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47 Cal.2d 265

In re ESTATE of Anna M. JOHNSTON, Deceased.

Alfred R. Johnston, as Executor and as Heir, Appellant.

L. A. 24046.

Supreme Court of California.
In Bank.
Nov. 2, 1956.

Proceeding in the matter of the judicial settlement of the first account current of executor of decedent's estate. The Superior Court, Los Angeles County, Burdette J. Daniels, J., entered an order settling the account, decreeing preliminary distribution, fixing fees of executor and attorney and interpreting decedent's will, and the executor appealed. The Supreme Court, McComb, J., held that under provision in will stating that other assets of estate shall be held and administered by the executor until they liquidate themselves, absolute power of alienation of such assets could possibly be suspended for period longer than 21 years plus a period of gestation after some life in being at the time of the creation of the interest and consequently no valid trust was created, and that statutory fees of executor should be predicated upon statute in effect at time of final settlement of the account and that executor should not include in his account estate property, of which he never had possession.

Order affirmed in part; order reversed in part and cause remanded with directions.

Opinion, 299 P.2d 892, vacated.

1. Wills 🔑439

A will is to be construed according to the intention of the testator, and where his intention cannot have effect to its full extent, it will be given effect so far as it is possible to do so. West's Ann.Prob.Code, § 101.

2. Wills 🔑450, 470

A will must be read as a whole, and all parts thereof must be construed together in relation to each other to form, so far as possible, a consistent whole.

3. Perpetuities 🔑4(15), 6(10)

It is not the probability of a violation of rules against remoteness or restraints on alienation that brings such rules into operation, but only the bare possibility as such possibility exists at the date of the inception of the trust. West's Ann.Civ.Code, § 715.1.

4. Perpetuities 🔑6(10)

Under will providing that all other assets of testatrix' estate shall be held and administered by executor of her estate until they liquidate themselves, it was possible that absolute power of alienation in regard to the other assets would be suspended for period longer than 21 years plus period of gestation after some life in being at time of creation of the interest, and consequently a valid trust of such other assets was not created. West's Ann.Civ.Code, § 715.1.

5. Trusts 🔑1

To constitute a valid express trust, it is essential that there should be a trustee, an estate conveyed to him, a beneficiary, a legal purpose and a legal term.

6. Perpetuities 🔑6(2)

Where a trust is void as an illegal restraint upon alienation, no title or right is acquired by either the trustee or any of the beneficiaries, and thus the trust is void as to property attempted to be devised in trust. West's Ann.Civ.Code, § 715.1.

7. Executors and Administrators 🔑489

Commissions of the executor and his attorney should be the amount of the statutory commissions in effect at time of the settlement of the account and making of the order allowing compensation rather than those in effect at time of death. West's Ann.Prob.Code, §§ 901, 910.

8. Executors and Administrators 🔑488, 501

Right of an executor, administrator, or attorney for either, to ordinary compensation is absolute, but does not accrue until an order for its payment is made. West's Ann.Prob.Code, §§ 901, 910.

9. Constitutional Law 🔑112

Executors and Administrators 🔑489

Imposition of probate fees on estates of decedents who died before enactment on September 7, 1955 of amendment increasing fees, was the result of mere procedural change in which heirs and devisees had no vested rights and did not involve imposition of new or additional burden on such estates. West's Ann.Prob.Code, § 901.

10. Executors and Administrators 🔑488

Fees of administrators, executors and their attorneys for administering an estate do not arise from contract but are founded upon statutory enactment. West's Ann.Prob.Code, §§ 901, 910.

11. Executors and Administrators 🔑495(1)

An administrator cannot be said to have accounted for an estate in the sense of the statute unless he shall first have taken it into possession, and in affording a basis for the allowance of administrator's commissions, value of the estate which has been taken into possession and has been accounted for is alone regarded. West's Ann.Prob.Code, §§ 910, 920.

12. Executors and Administrators 🔑216(2), 495(3)

Executor of domiciliary estate not having possession of property located in Texas was not chargeable in his account with its value, and therefore neither he nor his attorney was entitled to fees predicated upon value thereof. West's Ann.Prob. Code, §§ 901, 920.

Leland J. Allen, Los Angeles, for appellant.

No appearance for respondent.

McCOMB, Justice.

This is an appeal from an order settling the first account current, decreeing preliminary distribution, fixing statutory and extraordinary fees of the executor and the attorney, and interpreting the will of Anna M. Johnston.

Chronology

i. Testatrix died July 14, 1953, leaving a will.

ii. The provisions of her will, insofar as they are pertinent to this appeal, are as follows:

> "Seventh: I direct that my farm at Hopkinton, Iowa be sold, if this has not been done before my decease, and the proceeds added to the value of my estate. All other assets to be held and administered by the Executor of my estate, until they liquidate themselves.
>
> "Eighth: After the payment of the above set out cash bequests, I hereby direct that the Reformed Presbyterian Church Board of Foreign Missions of North America whose address is 209 Ninth Street, Pittsburgh, Pa., is to receive an undivided one-fourth interest of my entire estate, personal and real wherever situated, including the cash balance on hand after the payment of just debts, cash bequests and taxes. In case this Board ceases to exist, then in that event the remainder of such interest is to pass to the Presbyterian Church Board of Foreign Missions of

U.S.A., whose address is 156 Fifth Avenue, New York City, N. Y.

"Ninth: The remainder of my estate shall be distributed as follows:

"(a) One-third to my sister Mary Ensign's three children, namely—Evelyn Leininger, Russell Ensign and Elizabeth Groot, share and share alike. In case any one of the above named children of my sister Mary Ensign shall predecease me or before the final distribution of my estate, then in that event their respective share or shares shall be paid to their lawful issue, share and share alike.

"(b) One-third to my brother James Johnston's nine children, namely—William Johnston, Elmer Johnston, Gracia Wimmer, Dorothy Moulton, Alfred Johnston, Harlan Johnston, Forrest Johnston, Bruce Johnston and Lorraine Shedeck, share and share alike. In case any one of the above named children of my brother James Johnston shall predecease me or before the final distribution of my estate, then in that event their respective share or shares shall be paid to their lawful issue, share and share alike.

"(c) One-third to my brother William Johnston's four children, namely—Alice Fehlman, Clemna McIlrath, Ruth Johnston and Walter Johnston, share and share alike. In case any one of the above named children of my brother William Johnston shall predecease me or before the final distribution of my estate, then in that event their respective share or shares shall be paid to their lawful issue, share and share alike.

"Tenth: I do specifically and intentionally omit to provide for any other person or relative, as it is my specific intention to leave my property to be distributed as previously set forth * * *."

iii. At the time of decedent's death section 901 of the Probate Code read in part as follows:

> "The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; and for all above fifty thousand dollars, at the rate of one per cent."[1]

iv. By an amendment to section 901 of the Probate Code effective September 7, 1955, the fee schedule was increased as follows:

Size of Estate	Former Rates	New Rates[2]
First $ 1,000	7%	7%
Next 9,000	4	4
Next 10,000	3	3
Next 30,000	2	3
Next 100,000	1	2
Next 350,000	1	1½
Over 500,000	1	1

---

[1] Hereinafter the rates in effect pursuant to section 901 of the Probate Code at the time of decedent's death on July 14, 1953, will be referred to as the "old rates."

[2] The rates in effect pursuant to section 901 of the Probate Code effective on and after September 7, 1955, will be referred to as the "new rates."

v. Section 910 of the Probate Code reads as follows:

> "Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services."

vi. On October 28, 1955, the executor filed his first account current and a petition for statutory fees of the executor and the attorney for the executor.

vii. On December 9, 1955, the probate court settled the first account current and ordered the payment of statutory fees of the executor and the attorney for the executor, calculated in accordance with the provisions of section 901 of the Probate Code in effect at the time of decedent's death (see iii., supra).

Questions

First: Did the will create a trust in the remaining assets of the estate?

This question must be answered in the negative and is governed by these pertinent rules:

[1] (1) A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it will be given effect so far as it is possible to do so. (Prob. Code, § 101; In re Estate of Akeley, 35 Cal.2d 26, 28, 215 P.2d 921, 17 A.L.R.2d 647.)

[2] (2) A will must be read as a whole, and all parts thereof must be construed together in relation to each other to form, so far as possible, a consistent whole. (In re Estate of Northcutt, 16 Cal.2d 683, 689 [4], 107 P.2d 607.)

If the foregoing rules are applied to this case and appellant's contention that the will should be construed as creating a trust is accepted, the intention of a testatrix would be defeated in toto, since the trust would be void as violating the rules against restraint on alienation. Section 715.1 of the Civil Code provides: "The absolute power of alienation cannot be suspended, by any limitation or condition whatever, for a period longer than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain."

[3] It is likewise settled that it is not the probability of a violation of rules against remoteness or restraints on alienation that brings such rules into operation, but only the bare possibility as such possibility exists at the date of the inception of the trust. (In re Estate of Gump, 16 Cal.2d 535, 547 [3], 107 P.2d 17; Sheean v. Michel, 6 Cal.2d 324, 328, 57 P.2d 127; In re Estate of Sahlender, 89 Cal.App.2d 329, 348 [12], 201 P.2d 69.)

[4] The language used by the testatrix in her will directing that all other assets be held and administered by the executor of her estate "until they liquidate themselves" clearly indicated a desire on the part of the testatrix that final distribution of her estate be delayed by her executor until such time. Therefore, it is possible that the absolute power of alienation would be suspended for a period longer than 21 years plus a period of gestation after some life in being at the time of the creation of the interest.

[5, 6] To constitute a valid express trust, it is essential that there should be (1) a trustee, (2) an estate conveyed to him, (3) a beneficiary, (4) a legal purpose, and (5) a legal term. Where a trust is void as an illegal restraint upon alienation, no title or right is acquired by either the trustee or any of the beneficiaries, and thus the trust is void as to the property attempted to be devised in

trust. (In re Estate of Walkerly, 108 Cal. 627, 650, 660, 41 P. 772.)

Second: In fixing the statutory fees of the executor and the attorney for the executor, should they be predicated upon the statute in effect at the time of the settlement of the account and making of the order allowing compensation, or on the basis of the statute in effect at the date of death?

[7] We are of the opinion that the commissions of the executor and his attorney should be the amount of the statutory commissions in effect at the time of the settlement of the account and making of the order allowing compensation, to wit, in the instant case in accordance with the provisions of section 901 of the Probate Code as amended and effective September 7, 1955.

In Re Estate of Spires, 126 Cal.App. 174, 14 P.2d 340, decedent died January 3, 1924, and her will was admitted to probate on the 23rd day of that month. The petition of the executors claiming a fee for extraordinary services was filed March 17, 1930, wherein a fee in excess of the amount allowable under the law in effect at the time of death was requested. A legatee under the will objected. As of the date of decedent's death the law provided that the court could allow extra compensation provided the total amount of such extra compensation did not exceed one-half the amount of the commissions regularly allowed by the section. In 1925 the section was amended by omitting the limitation and thereby left the amount of extra compensation entirely within the discretion of the court.

The probate court found that the services were worth in excess of the amount allowable under the law in effect at the date of death. However, for the reason that it believed its powers to be restricted to the law as it existed at the date of death, and not as it existed at the time of the allowance of the fees, it did not make an allowance in excess of the limited amount. The executors appealed and the appellate court reversed the order, the court stating in 126 Cal.App., at page 177, 14 P.2d at page 341: "But we think that there is no such vested right in the benefit of the limitation. 'The right of inheritance and testamentary disposition is entirely the creation of the statute and the heirs, devisees and legatees take the property subject to such burdens as the legislature has seen fit to impose upon it. * * * While it is true that the descent is cast and the property of the decedent vested in the devisees and legatees, or in the heirs, at the moment of the death of the deceased, it is also true that they take the property, subject to the payment of the expenses of administration. * * *' [Citation.] *On the other hand, the right of the executor to a defined rate or standard of compensation is not vested as of the date of the decedent's death, nor even as of the date when he qualifies as executor, but such right first accrues at the time when by appropriate order the amount of compensation payable to him is determined and allowed.* And since the right of an executor to compensation for extraordinary services is not established or vested until allowed by the court in the exercise of its discretion, it follows as a direct consequence that the law in force at the time when the order is made constitutes the only law by which the power of the court is to be governed." (Italics added.)

The weight of authority in the United States is to the effect that the law in force at the time of the settlement of the account, and not at the date of death, governs the amount of compensation allowed executors, administrators and their attorneys. (See 91 A.L.R. 1421–1422; In re Donovan's Estate, 266 Mich. 362, 253 N.W. 552, at page 553; In re Dewar's Estate, 10 Mont. 426, 25 P. 1026, at page 1029; In re Hildebrand's Estate, 57 N.M. 778, 264 P.2d 674, at page 677[2]; In re King's Will, 121 Misc. 530, 201 N.Y.S. 239, at page 240; In re Daly's Estate, 99 Misc. 203, 165 N.Y.S. 792, at page 796[3]; In re Barker, 230 N.Y. 364, 130 N.E. 579, 581[4]; In re Leigh's Estate, 196 Iowa 1102, 195 N.W.

1005, at page 1007[2]; Brown's Estate v. Hoge, 198 Iowa 373, 199 N.W. 320[1]; In re Barrett's Estate, 124 Misc. 699, 209 N.Y. S. 678, at page 679[1]; cf. In re Estate of Carver, 123 Cal. 102, 55 P. 770.)

[8] It is likewise settled that the right of an executor, administrator, or attorney for either, to ordinary compensation is absolute but does not accrue until an order for its payment is made. (Cf. Estate of Roberts, 27 Cal.2d 70, at page 76[7], 162 P.2d 461; In re Estate of Carver, supra, 123 Cal. at page 103, 55 P. 770.)

[9] The imposition of probate fees on the estates of decedents who died before September 7, 1955, does not involve the imposition of a new or additional burden on such estates. In Schwan v. Superior Court, 204 Cal. 51, 266 P. 532, it was held that the Legislature was not prohibited from making changes in procedural matters applicable to estates of decedents who died prior to the effective date of such changes. The present change in the law was a mere procedural change in which the heirs and devisees have no vested rights.

Section 901 of the Probate Code recognizes this rule. The section reads in part thus: "The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate *accounted for by him* * * *." (Italics added.)

[10] It is likewise settled that the fees of administrators, executors, and their attorneys for administering an estate do not arise from contract but are founded upon statutory enactment. (Gaines v. Reutch, 64 Md. 517, 2 A. 913, at page 914.)

Third: Should the executor include in his account property belonging to the estate and situated in Texas, and should the executor and his attorney be allowed fees on the amount thereof?

No. Section 901 of the Probate Code provides that the executor "shall receive commissions upon the amount of the estate accounted for by him * * *," while section 920 of the Probate Code provides that "Every executor and administrator is chargeable in his accounts with all of the estate of the decedent which comes into his possession, and with all the income, issues and profits of the estate * * *."

[11] The rule is accurately set forth in Re Estate of Simmons, 43 Cal. 543, 550, as follows: "We are of the opinion that an administrator cannot be said to have 'accounted for' an estate, in the sense of the statute, unless he shall first have taken it into possession. He is charged by the statute, as we have already seen, with the value of 'the whole of the estate of the deceased which may come into his possession,' etc. (Sec. 216); and it is made his duty to 'take into his possession all the estate of the deceased, real and personal.' (Sec. 194.) When he shall have taken the property into possession and accounted for it, he is entitled to compensation by way of commissions upon its value. Unless he take it into possession, he is not charged in his account with its value. He may, and doubtless would, incur a responsibility, should he fail to take it into possession when he lawfully might, if by such failure it should become ultimately lost to those entitled to its benefits; but as affording a basis for the allowance of commissions, the value of the estate which has been taken into possession, and having been in possession has been accounted for, is alone regarded." (See also In re Estate of Lampman, 15 Cal.2d 212, 215, 100 P.2d 488; In re Ricaud, 70 Cal. 69, 71, 11 P. 471; In re Estate of Boggs, 33 Cal.App.2d 30, 32, 33, 90 P.2d 814.)

[12] The executor of the domiciliary estate not having possession of the property in Texas was not chargeable in his account with its value, and was therefore not entitled to fees predicated upon the value thereof.

The order is reversed insofar as it fixes the compensation of the executor and attorney for the executor upon the basis provided by law prior to September 7, 1955, and the cause is remanded with directions to the probate court to enter an order in accordance with the views expressed herein. In all other respects the order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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145 Cal.App.2d 561

Henry DETHLEFSEN, Andrew H. Dethlefsen and A. Hudson Turner, Petitioners and Respondents,

v.

The STATE BOARD OF EQUALIZATION, Respondent and Appellant.

Civ. 8894.

District Court of Appeal, Third District, California.

Nov. 1, 1956.

Hearing Denied Dec. 24, 1956.

Liquor license suspension proceedings before Board of Equalization, wherein off-sale liquor license was suspended for thirty days for sale of liquor to minor. Upon application for mandate, the Superior Court, San Joaquin County, Thomas B. Quinn, J., set aside findings and order and remanded cause for further proceedings. The board appealed. The District Court of Appeal, Van Dyke, P. J., held that where selective service card, which minor presented to employee of liquor store as identification and proof of majority had been altered by minor to show his age as over 21, was bona fide, and alteration was not apparent from reasonable inspection, owner of liquor store had defense to liquor license suspension proceedings, in absence of finding by board of bad faith or want of diligence or that employee had in fact discovered alteration.

Judgment affirmed.

1. Intoxicating Liquors ⇨108(10)

Upon appeal to district court of appeal from judgment of superior court reviewing decision of board of equalization in liquor license suspension proceedings, district court of appeal must test sufficiency of evidence to support board's decision by substantial evidence rule.

2. Intoxicating Liquors ⇨108(10)

Sufficiency of evidence to support decision of board of equalization in liquor license suspension proceedings would be tested by same rule applied in superior court in review of such decision; neither superior court nor district court of appeal has power to reweigh evidence presented to board of equalization, or to exercise independent judgment thereon.

3. Intoxicating Liquors ⇨108(10)

In proceeding upon review of decision of board of equalization suspending liquor license of proprietor whose employee had sold liquor to minor who had presented selective service card altered to show his age as over 21, examination of card revealed that conclusion of board that alteration should have been apparent from reasonably careful inspection of card was unjustified. West's Ann.Bus. & Prof.Code, §§ 25658, 25660.

4. Intoxicating Liquors ⇨108(1)

Purpose of statute providing that fact that purchaser had presented driver's license or selective service card at time of purchase of intoxicating liquor would be defense in liquor license suspension proceedings brought before board of equalization against liquor store proprietor for offense of sale to minor, is to relieve vendor from having in all events to determine at his peril age of purchaser, and is intended to furnish readily applicable standard usable under generally obtaining conditions which, when complied with, would constitute defense if in fact purchaser was under 21. West's Ann.Bus. & Prof.Code, §§ 25658, 25660.

5. Intoxicating Liquors ⇨159(2)

Where evidence of majority and identity was presented by person whose appearance was such as to make it doubtful on which side of line dividing minority from majority purchaser was, vendor of intoxicating liquor could rely upon documentary evidence of majority and identity, such as driver's license or selective service card, though bona fides of such documents must be ascertained if lack of it would be disclosed by reasonable inspection, circumstances considered; and such circumstances include right of vendor to rely on usual presumptions. West's Ann.Bus. & Prof. Code, §§ 25658, 25660; West's Ann.Code Civ.Proc., § 1963.

6. Intoxicating Liquors ⟹108(1)

Where purchaser at liquor store presented draft card which accurately described him, and his appearance physically was that of one who might either be a minor or have attained his majority, vendor of liquors was entitled to rely upon presumption that he had not committed crime of altering certificate to show his age as over 21, within statute providing that presentation of such evidence to vendor constitutes a defense for vendor in liquor license suspension proceedings before board of equalization. West's Ann.Bus. & Prof. Code, §§ 25658, 25660; West's Ann.Code Civ.Proc., § 1963.

7. Intoxicating Liquors ⟹108(1)

Where selective service card, which minor presented to employee of liquor store as identification and proof of majority had been altered by minor to show his age as over 21, was bona fide, and alteration was not apparent from reasonable inspection, owner of liquor store had defense to liquor license suspension proceedings before board of equalization, in absence of finding by board of bad faith or want of diligence or that employee had in fact discovered alteration. West's Ann. Bus. & Prof.Code, §§ 25658, 25660; West's Ann.Code Civ.Proc., § 1963.

◆

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent and appellant.

Smallpage & Willis, Stockton, for petitioners and respondents.

VAN DYKE, Presiding Justice.

In a proceeding before the State Board of Equalization, respondents were found guilty of selling liquor to a minor in violation of Section 25658 of the Business and Professions Code. The board ordered that respondents' off-sale license be suspended for thirty days. They applied for mandate to the superior court, which after a hearing set aside the findings and order of the board on the ground of insufficient evidence and remanded the cause for further proceedings. The board appeals.

The board found that on June 5, 1954, an employee of respondents sold an alcoholic beverage to one Anthony Sanchez Gamino, who was then under twenty-one years of age; that he was born June 13, 1934; that on a previous occasion Gamino had exhibited to the employee documentary evidence of age and identity consisting of a selective service registration certificate which had been issued to and was in fact the property of Gamino; that the date of birth on said identification card had been altered by Gamino to show his age as over twenty-one; that the alteration should have been apparent from a reasonably careful inspection of the card by said employee; and that she was, therefore, not justified on the basis of said selective service card in assuming the said Gamino was over twenty-one years of age. The board concluded that respondents had failed to establish a defense to the accusation under the provisions of Section 25660 of said code. Section 25660 then read as follows:

> "In any criminal prosecution or proceeding for the suspension or revocation of any license based upon violation of Section 25658, proof that the defendant licensee, or his agent or employee, demanded and was shown, before furnishing any alcoholic beverage to a minor, a motor vehicle operator's license or a registration certificate issued under the Federal Selective Service Act or other bona fide documentary

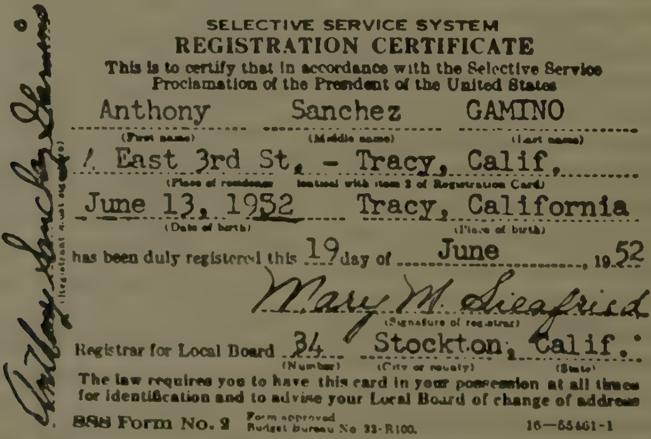
evidence of majority and identity of the person, is a defense to the prosecution or proceeding for the suspension or revocation of any license."

The trial court found that the evidence offered and received in the board proceedings was insufficient to support the board's finding that no defense had been established to the accusation in that, "the Selective Service Card referred to in said finding was offered in evidence and was physically present at said proceeding, from which card it affirmatively appears that the alteration of said Selective Service Card was and is not apparent and should not have been apparent from a reasonably careful inspection of said card."

[1, 2] The appellant board being a state-wide agency exercising fact-finding powers, the situation presented on appeal from the superior court's judgment is that this court, on the record presented, which is the same record presented to the superior court, must test the sufficiency of the evidence to support the appellant board's decision by the substantial evidence rule, the same rule as was applied in the superior court. Neither the superior court nor this court has power to reweigh the evidence presented to the appellant board or to exercise independent judgment thereon. Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545.

The accusation was made by two state liquor officers, both of whom testified at the hearing before the board. They said they had been watching the licensed premises, saw Gamino enter, walk up to the counter and buy a half pint of Vodka; that as he left he appeared to them to be under age, so they stopped him. In response to questions he said he was twenty-one years of age, but on further questioning admitted that he was a minor. He told the officers he had not shown respondents' employee any identification before purchasing the Vodka because he had made a purchase of liquor at the same place on the previous Saturday, at which time the employee had demanded, and he had shown her, his registration certificate. The registration certificate was introduced in evidence and is part of the record before us. Admittedly, it is a genuine certificate that had been issued to Gamino, but Gamino had altered the date of his birth appearing on the card so as to show that he was born in 1932 instead of in 1934. The officers said the premises were well lighted. Gamino testified as a witness when called by the attorney for the board at the board hearing. He said the date of his birth was June 13, 1934 (this would make him within a few days of being twenty years of age when he made the purchase); that when the officers stopped him he showed them his driver's license, which was the first thing they asked for. Then he showed them his service card and told them that he had made the changes on the card by erasing the "34" and typing in "32" on his own typewriter. The description of Gamino on the card was as follows: "Color of eyes, brown; Color of hair, brown; Complexion, olive; Height (Approx.), 5 ft. 10 in.; Weight (Approx.), 170; Race, WH". Gamino gave his own description as of the time of testifying, saying he was then 5 feet, 10 inches tall and weighed about 180 pounds. As to the occurrence when he first showed his card to respondents' employee, he testified as follows: The card he showed her was a genuine card issued to him by the Government; that she asked him for proof of majority and identification before she sold him liquor; that he showed her his service card; that she turned it over and looked at the description on the back which she checked very thoroughly with his appearance to see that he was the person to whom the card had been issued; that she then sold him the liquor, not apparently detecting the alteration of the two figures on the card which he said represented the best job he could do to make the altered card look authentic; that his purpose was to represent that he was older than he really was. He said that on the second occasion the employee did not ask him for further identification, but that she recognized him from the previous time and simply said "Hello". The employee testified as follows: That she recalled Gamino coming into the store prior to the time when the officers stopped him as he left; that he wanted to buy liquor and she asked him for an "I. D." because she wasn't sure he was twenty-one; that he showed her a draft card, being the one in evidence; that she had never seen him before; that she sold him liquor when he presented the card; that she looked at the description; that she looked to see how old he was, and the card showed that he was over twenty-one; that she turned it over and compared his height and the color of his eyes and it all fit, so she sold him liquor; that she was satisfied that the description fit him; that she looked from him to the card and back from the card to him; that when he came in the second time she saw no need of asking him for identification as she recognized him.

The card in evidence shows the discoloration and scuffing which might be expected on a card the owner is required to have in his possession at all times, and which, therefore, presumably had been carried by Gamino for about two years. It is difficult indeed to detect the alteration of the "3" and "2" without a close and critical examination. For better illustration we append hereto a photostat of the face of the card:



SELECTIVE SERVICE SYSTEM

REGISTRATION CERTIFICATE

This is to certify that in accordance with the Selective Service Proclamation of the President of the United States

Anthony (First name) Sanchez (Middle name) GAMINO (Last name)

/ East 3rd St. - Tracy, Calif. (Place of residence located with item 3 of Registration Card)

June 13, 1952 (Date of birth) Tracy, California (Place of birth)

has been duly registered this 19 day of June, 1952

Mary M. Siegfried (Signature of registrar)

Registrar for Local Board 34 (Number) Stockton, (City or county) Calif. (State)

The law requires you to have this card in your possession at all times for identification and to advise your Local Board of change of address

SSS Form No. 2 Form approved Budget Bureau No 33-R100. 16—65461-1

Anthony Sanchez Gamino (Registrant must sign here)

There are three appellate court decisions which bear upon the issues presented on this appeal. They are: Young v. State Board of Equalization, 90 Cal.App.2d 256, 202 P.2d 587; Conti v. State Board of Equalization, 113 Cal.App.2d 465, 248 P.2d 31; and Keane v. Reilly, 130 Cal.App.2d 407, 279 P.2d 152. Keane v. Reilly reviews the other two.

In Young v. State Board of Equalization a seventeen-year old, to prove majority and identity, had presented to a bartender a draft registration card issued to another and had been required to write his name, which the bartender testified resembled the one on the identification card to his satisfaction. The court said that the presentation to the bartender of the card was prima facie evidence under Section 25660 of the majority and identity of the person presenting it and observed, 90 Cal.App.2d at page 258, 202 P.2d at page 588:

> "* * * The clerk, if he acted in good faith and without actual knowledge, gained from the appearance of the purchaser, or otherwise, that the card did not or could not belong to the minor, and if the alteration was with reasonable diligence not discernible or ascertainable, had a right to assume that anyone presenting such a card would not unlawfully possess or use it."

In the Conti case a nineteen-year old presented an out-of-state driver's license not his own which on its face showed that it was issued to a person over twenty-one. The appellate court said, 113 Cal.App.2d at page 466, 248 P.2d at page 32:

> "* * * [T]he statute does not impose upon the licensee the duty of determining at his peril whether the driver's license is a bona fide license of the party presenting it. Possession of the license is presumptive evidence that the license belonged to the holder. * * * To hold otherwise would require the attendant to determine at his peril whether the driver's license had been legally issued, whether it had not been revoked or suspended, and whether the party presenting it was in truth and fact the legitimate holder of the paper.
>
> "* * * Unless the personal appearance of the holder of the driver's license demonstrates above mere suspicion that he is not the legal owner of the license the bartender is justified in assuming the validity of the driver's license and in accepting the holder as the legal owner."

In Keane v. Reilly the foregoing holdings interpreting the statute were applied to a case where sales had been made to minors who presented fake identification documents. One had been carefully prepared to resemble a bona fide official identification card, another was a driver's license belonging to someone else, but on which the physical description fitted the minor with fair accuracy, and the other was a driver's license belonging to another from whom the minor had obtained it for the purpose of "fooling bartenders" and which showed a physical description that roughly fitted the minor. We quote the following headnote:

> "Where evidence shows that before purchasing an intoxicant purchaser submitted to the bartender a document, purporting to indicate majority, apparently complying with former Alcoholic Beverage Control Act, § 61.2(b), and bartender testifies that he believed document to be official, Board of Equalization and courts may not suspend license for selling to a minor, in absence of a supported finding that bartender acted in bad faith and without diligence."

[3] In this case there is no finding of bad faith and no finding that the employee in fact discovered the alteration of the card. There is no express finding of want of diligence on the part of respondents' employee. What the board did find was that "The alteration should have been apparent from reasonably careful inspection of the card by" the employee, therefore the employee "was not justified on the basis of said Selective Service Card in assuming the said Gamino was over 21 years of age". Gamino was practically twenty years of age, was five feet, ten inches in height, weighed about 180 pounds, and the description on the card fitted him. The whole decision then rests upon the finding that the employee should have detected the alteration, and in turn that depends entirely on the appearance of the card itself which is a part of the record. It is our view that to say, as the board did, that "the alteration should have been apparent from reasonably careful inspection of the card" is a wholly false conclusion. We agree with the superior court that this record contains no substantial support for the vital finding of the board.

[4–7] Appellant contends that the superior court weighed the evidence when it held the alteration not in fact apparent on a reasonably diligent inspection. If that be so, then this court has fallen into the same error. But we think that is not so when the purpose of Section 25660 of the Act, as interpreted by the decisions cited herein, is considered. The purpose of the legislation when enacted was to relieve vendors of alcoholic beverages from having in all events to determine at their peril the age of the purchaser. It was intended to furnish a readily applicable standard usable under the conditions generally obtaining which, when complied with, would constitute a defense if in fact the purchaser was under twenty-one. A plan was hit upon whereby the vendor could demand that he be shown bona fide documentary evidence of majority and identity, vehicle operators' licenses and draft board certificates being specifically mentioned. Obviously, to protect a vendor such evidence of majority and identity would have to be presented by a person whose appearance was such as to make it doubtful on which side of the line dividing minority from majority the purchaser was. When a doubt as to that would arise in good faith, it was intended that the vendor could rely upon documentary evidence of majority and identity such as motor vehicle operators' licenses and draft board certificates, but the bona fides of such documents must be ascertained if the lack of it would be disclosed by reasonable inspection, the circumstances considered. The circumstances include the right of the vendor to rely upon the usual presumptions, which Section 1963 of the Code of Civil Procedure provides all may rely upon. In this case a card issued by a draft board to the purchaser was presented. It accurately described him. His appearance physically was that of one who might either be a minor or have attained his majority. The vendor was entitled to rely upon the presumption that he had not committed the crime of altering the certificate. When these matters are considered we do not hesitate to say as a matter of law that respondents established the statutory defense to the charge of selling liquor to a minor.

The judgment is affirmed.

PEEK, J., and McMURRAY, J. pro tem., concur.

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145 Cal.App.2d 755

Antonio VALENZUELA, Plaintiff and Respondent,
v.
Maria C. VALENZUELA, as Special Administratrix with General Powers of the Estate of Gilberto Valenzuela, deceased (substituted as a party defendant in the place of Gilberto Valenzuela, deceased), et al., Defendants,

Maria C. Valenzuela, as Special Administratrix with General Powers of the Estate of Gilberto Valenzuela, deceased, Appellant.

Civ. 21355.

District Court of Appeal, Second District, Division 1, California.

Nov. 13, 1956.

Son's action against special administratrix of father's estate for a judgment declaring that administratrix held certain real estate in trust for son. The Superior Court, Los Angeles County, William P. Haughton, J., entered judgment for son and administratrix appealed. The District Court of Appeal, Fourt, J., held that evidence was sufficient to support finding that real estate for which father advanced down payment and took title in own name as security, was held by father in trust for son who had expended large sums in repairing property and paid balance on purchase price himself as well as partially repaying father for advance.

Affirmed.

1. Trial ⚷29(4), 110

In action by son to have it declared that administratrix of his father's estate was holding certain real estate in trust for him, record failed to show that adverse witness was threatened by counsel in a foreign language known to both witness and counsel, that court had prejudged case by any statements made to witness, or that error was committed in allowing witness to answer in a foreign language without translation.

2. Trusts ⚷110

In son's action against administratrix of father's estate for declaration that such administratrix held certain real property in trust, evidence was sufficient to support finding that real estate for which father advanced down payment and took title in his own name as security was held by father in trust for son who had expended large sums in repairing property and paid balance due on purchase price as well as partially repaying father's advance.

3. Appeal and Error ⚷931(1)

All substantial conflicts in evidence on appeal must be resolved in favor of the respondent and all legitimate and reasonable inferences indulged in to uphold the findings if possible.

Rosalind Goodrich Bates, Roland S. Bates, Los Angeles, for appellant.

David C. Marcus, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal by defendant from a judgment to the effect that the defendant held certain real property in trust for the plaintiff.

A substantial résumé of the facts in the case is as follows. About April 1, 1949, the plaintiff was, and had been for some time prior thereto, living at the Del Rio Hotel on Union Avenue in Los Angeles. On the date mentioned the plaintiff saw that the property in question, which was across the street from the hotel where he lived, was for sale. The buildings upon the premises were unfit for habitation and the property was generally dilapidated. Plaintiff wanted to purchase the property and fix it up and he contacted Michael H. Berry, the owner of the same and inquired how much he wanted for it. The plaintiff, at that time, had $2,200, which was enough to make some necessary repairs, but not enough for the down payment. Plaintiff discussed the purchase of the property with his father, the original defendant, Gilberto Valenzuela, Sr., and the father offered to assist the plaintiff by providing the down payment.

About April 10, 1949, plaintiff went to the home of Mr. Berry, the owner who lived at Springville, California, and negotiated with him for the purchase of the property for a total consideration of $7,250, with a down payment of $2,500. On the next day, April 11, 1949, Mr. Berry came to Los Angeles and accompanied the plaintiff and his father to the bank to place the transaction for the purchase in escrow. The father advanced the money for the down payment and was to be repaid "as much as you can monthly, every month".

While on the way to the bank plaintiff proposed that the title to the property be placed in the name of the father to secure him for the $2,500 he was advancing as the down payment. At the bank there was further discussion regarding the placing of the title in the name of the father and about the terms of repayment of the money to be loaned. Some of the conversations between Mr. Berry, the father and the plaintiff were in English and some were a mixture of English and Spanish.

The plaintiff testified that he had the utmost confidence and trust in his father and that there was never any misunderstanding or trouble between them about the property.

Immediately after the purchase of the property the plaintiff started repairing it and making it habitable. He expended about $4,000 in all in fixing up and maintaining the property; this money came in part from his own funds initially, and later from the rents received. During the first few weeks after the purchase the plaintiff was short of cash and sometimes referred casual workmen to his father for payment until he could get to the bank. These latter mentioned payments were small in comparison to the expenditures which the plaintiff had made.

After the plaintiff took possession of the property he made all of the payments to Mr. Berry, paid the taxes and utilities and collected the rents and paid for the major repairs and maintenance. The father collected one payment of rent from one "hold-over" tenant before the tenant was aware of to whom he should pay the rent.

The plaintiff repaid his father sums varying from $40 to $60 per month until he had repaid about $1,600 of the $2,500 advanced by the father as the down payment.

The father did not, so far as the record discloses, ever demand an accounting from the plaintiff "although the brothers and sisters of the plaintiff did make such a demand". About one month after the purchase the father became ill and on May 26, 1949, was admitted to the hospital. He continued in bad health to the date of his death.

On November 28, 1951, the plaintiff filed suit to establish and enforce a trust against the father in reference to the property. An answer was filed on December 11, 1951, which in effect denied that plaintiff had any interest in the property. There was testimony to the effect that the brother Gilberto Valenzuela verified the answer and that the verification was untrue.

On February 9, 1952, the father died, and his daughter, Maria C. Valenzuela, petitioned for appointment as special administratrix of the estate with general powers and was on July 8, 1952, appointed and the court did, on the same day, sign an order substituting Maria C. Valenzuela as the party defendant in the place of the deceased Gilberto Valenzuela, Sr.

On June 25, 1949, plaintiff's brother, Gilberto Valenzuela, secured from his father, Gilberto Valenzuela, Sr., a power of attorney while the father was in a hospital. The father signed by making his cross. Using this power of attorney, the brother sold his father's grocery store for $2,000. On September 24, 1949, the brother secured from his father a grant deed to certain property, transferring that property from the father to Gilberto. This property was that which the father had helped his son Gilberto to purchase with title being taken in the name of the father.

On or about July 14, 1950, using the power of attorney, the brother Gilberto mortgaged the property in question to the County of Los Angeles for medical care of the father at the General Hospital.

Mr. Berry stated that he had no dealings with the father relative to the transaction; that he looked to the plaintiff for the payments and that the plaintiff had made all of the payments to the date of the trial.

[1] Under the title "Statement of Questions Involved", appellant has set forth various contentions, the first of which is "Can the Court properly allow counsel to instruct, converse and/or threaten an adverse witness on the stand in a foreign language common to both witness and said counsel?" Most of the case was conducted with an interpreter interpreting from Spanish to English and English to Spanish.

Counsel for the appellant has signally failed to call our attention to any page or line in the transcript where any such statement was made or conduct pursued, and a complete reading of the record on our part fails to show a single instance or situation where counsel for the respondent threatened or instructed any adverse witness on the stand or otherwise.

It is true that out of almost six hundred pages of transcript there are four or five instances where the interpreter failed to translate the answer given, or a similar violation took place. Different counsel represented the defendant at the trial of the case and that attorney apparently was fairly familiar with the language in question for he said, during the proceedings, "I think I understand Spanish pretty well myself." Furthermore, the record discloses that no objections were made at the time of trial, and it is difficult to see how appellant was in any wise prejudiced thereby.

Appellant's next contention is "Had the Court indicated he had prejudged the case by his language to a witness?"

Our reading of the transcript convinces us that the trial judge said nothing and did nothing which would demonstrate that he had in any wise prejudged the case.

Appellant's next contention is "Did the Court commit error in allowing witnesses to answer in a foreign language without translation?"

In this connection the appellant has cited two instances where the transcript contains words in the Spanish language which were not translated. The first contained the Spanish word "claro". Immediately thereafter the court rephrased the question and an answer was given which was translated. The second is taken out of context. Counsel for the plaintiff had made an objection to a question as calling for hearsay, and while the objection was pending before the court, the question was reasked and the witness replied "Nada mas". Before the interpreter could translate the court interrupted and indicated that he wanted a matter cleared before acting upon the objection. Shortly thereafter, the witness replied "Yes".

Appellant's last contention is "Was there substantial evidence to justify the decision on the uncorroborated testimony of plaintiff only?"

[2] It is our opinion that there was substantial evidence to justify the decision in this particular case.

[3] In Richter v. Walker, 36 Cal.2d 634, at page 640, 226 P.2d 593, at page 596, the court said, among other things:

> "* * * as to the sufficiency of evidence to support findings, it is the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to, uphold the findings if possible. [Citing cases.]"

In Murphy v. Ablow, 123 Cal.App.2d 853, at pages 858–859, 268 P.2d 80, at page 83, the court said:

> "It is quite apparent, we think, that the findings are adequately supported. We can only consider the evidence most favorable to the findings, together with every inference to be reasonably drawn therefrom. As Mr. Justice McComb stated in Marson v. Rand, 107 Cal.App.2d 466, 468, 237 P.2d 18, 20: '"It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled."'
>
> "Questions as to the credibility of plaintiff and the weight of the evidence were for the trial court. A reviewing court will not hold unsupported the trial court's findings merely because it might reasonably draw different inferences from those the trial court reasonably drew. A reviewing court cannot reject testimony of a witness that has been believed by the trier of the fact unless it is a physical impossibility that it be true, or its falsity is apparent without resorting to inferences or deductions. In order to say that testimony is inherently improbable, it must appear that what was related or described could not have occurred. Testimony which merely discloses unusual circumstances is not inherently improbable. Testimony which is subject to justifiable suspicion does not justify reversal of a judgment. The trier of fact may believe and accept a part of the testimony of a witness, and disbelieve the remainder or have a reasonable doubt as to its effect. On appeal that part which supports the judgment must be accepted, not that part which would defeat, or tend to defeat, the judgment. Unless it clearly appears that upon no hypothesis whatever is there substantial evidence to support a finding of the trier of fact, it cannot be set aside on appeal. [Citing cases.]"

In Trancoso v. Trancoso, 96 Cal.App.2d 797, at pages 798–799, 216 P.2d 172, at page 173, the court said:

> "Maria Trancoso is the mother of all the other parties * * * The

complaint alleged, and the court found and decreed, that the conveyance was in fact in trust and that Maria and Ysidro Trancoso held title for the use and benefit of all the plaintiffs and defendants * * *.

* * * * * *

"The rule that to establish a particular fact the evidence must be clear and convincing is directed to the trial courts. Whether the evidence is clear and convincing must be determined by the trial court and a reviewing court must accept that determination as conclusive if there is substantial evidence to support it. [Citing case.]

"We have examined the record and find nothing in the testimony of Maria Trancoso that could not have occurred. There is substantial evidence to support the determination of the trial court."

In our opinion there was no prejudicial error and there was clear and convincing evidence to support the judgment.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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145 Cal.App.2d 672

Leilamae HARLOW, Plaintiff and Appellant,

v.

UNITED TITLE GUARANTY COMPANY, a corporation, Citizens National Trust and Savings Bank, Riverside, California, et al., Defendants and Respondents.

Civ. 5211.

District Court of Appeal, Fourth District, California.

Nov. 7, 1956.

Action to cancel a deed of trust and note on ground that note had been paid by certain credits due the plaintiff. From a judgment of the Superior Court, Riverside County, Russell S. Waite, J., the plaintiff appealed. The District Court of Appeal, Griffin, J., held, inter alia, that the evidence sustained finding that the assignee of the deed of trust and note who had been mortgagor's employer had not executed a written agreement allowing mortgagor one-half of profits resulting from sale of lots or that assignee had agreed that balance due on note and trust deed had been paid.

Judgment affirmed.

1. Evidence 🔑60

In determining whether mortgagor was entitled to cancellation of deed and note on ground that note had been paid by certain credits due to mortgagor from mortgagor's employer to whom deed of trust and note had been assigned prior to his death, where employer's income tax returns which were made on cash basis showed payments of amounts indicated to mortgagor, court would assume that employer obeyed the law and actually made payments to mortgagor at time indicated in returns. West's Ann.Code Civ.Proc., § 1963, subd. 33.

2. Evidence 🔑265(4)

In action to cancel deed of trust and note on ground that note had been paid by certain credits due mortgagor from mortgagor's employer to whom deed of trust and note had been assigned, wherein only evidence of payment was an alleged oral admission of employer to that effect, made two weeks before his death, court was justified in viewing it with caution. West's Ann.Code Civ.Proc., § 2061, subd. 4.

3. Mortgages 🔑319(1)

Fact that note and deed of trust were in possession of assignee at time of his death raised inference that note had not been paid since retention of note and trust deed by lender raises presumption that debt is not paid.

4. Mortgages 🔑319(1)

In action to cancel deed of trust and note on ground that note had been paid by certain credits due to mortgagor from her employer to whom deed of trust and note had been assigned, burden of proof rested upon plaintiff to prove payment.

5. Appeal and Error ⚷994(3)

Trial court is the sole judge of weight and effect of testimony and of credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for so doing.

6. Mortgages ⚷319(3)

In action to cancel deed of trust and note on ground that note had been paid by certain credits due to mortgagor from assignee of deed of trust and note, evidence sustained finding of nonexistence of written agreement allowing mortgagor one-half of profits from sale of lots by assignee or that assignee had agreed that balance due on note and trust deed had been paid.

◆

Herbert C. Schulze, Riverside, for appellant.

Clayson, Stark & Rothrock, Corona, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant brought this action to cancel a deed of trust and promissory note executed by her on December 5, 1945, on the ground it was paid by certain credits due her. Defendant and respondent Citizens National Trust and Savings Bank, Riverside, is the executor of the will of Richard C. Hattan, deceased. The note and trust deed were assigned to said deceased during his lifetime. Defendant and respondent United Title Guaranty Company is the trustee under the deed of trust.

Plaintiff was an employee of deceased. Hattan owned some real estate, was in the process of subdividing it, and had sold some of the lots at the time of his death. Plaintiff claims deceased agreed to give her one-half of the net profits of the sale of lots, and on July 8th, 1952, she presented her creditor's claim against the estate totaling $29,404.19, for participation rights in sold and unsold lots, and for 59 months unpaid salary at $100 per month. The claim was rejected on July 15, 1952, and no action was commenced thereon by the plaintiff. On December 5, 1952, she commenced this action to declare a balance of $4,213.58 due on said note and trust deed, paid by virtue of this unpaid claim.

Her testimony, received over defendants' objections, was to the effect that she assisted Hattan in the preparation and sale of the subdivision lots and that he signed a written agreement that she was to have a one-half interest in the net profits; that she let Hattan have the agreement about two weeks before he died and she never saw it after that time. She claimed it "was something to the effect" that he would pay her one-half of the proceeds and $100 per month for "bookkeeping, etc.", but she "couldn't say positively"; that she discussed this agreement with Hattan on various occasions and went to his accountant with him for the purpose of preparing his income tax returns for the years 1947, 1948 and 1949; that Hattan told the accountant to set forth therein that one-half of the profits of the sale of the subdivision property was hers and that he did so; and that later, about two weeks before his death, Hattan gave her a memorandum of items "that I had paid to him through my work"; and he said "I had paid the loan". No such memorandum was produced in evidence. The income tax return does disclose that a sale of lots took place in 1947; that the accountant showed plaintiff's participation to be $3,564.67; and a deduction in this amount was taken. Also, the return for 1948 showed a similar participation for $2,600. All of these returns were prepared on a cash basis and the accountant testified this was done in accordance with the instructions of Hattan. The trust deed and note were found in the effects of the deceased with no indication that they were paid. The only notation thereon was a balance due of $4,213.58, on January 5, 1948.

Apparently the trial court disbelieved the testimony of plaintiff in reference to the execution of a written agreement allowing her one-half of the profits, and her claim that decedent agreed that the balance due on that note and trust deed had been paid. It found against her on all issues and in addition found her claim for credits was barred for failure to comply with sections 707 and 714 of the Probate Code, in not bringing an action thereon within the time required.

[1–6] The only question is the sufficiency of the evidence to support this finding. Since the income tax returns were made on a cash basis showing payments of the amounts indicated to the plaintiff, we must assume the deceased obeyed the law and actually made the payments to plaintiff at the time indicated in the tax return. Sec. 1963, subd. 33, Code Civ.Proc. In this connection it should be noted that the trust deed and note were not assigned to deceased until February 19, 1948, after plaintiff's claimed participation in the 1947 profits were presumably paid to her. Plaintiff testified her mother was present at the time of the claimed conversation in reference to Hattan stating that the trust deed and note were considered paid, but she was not called as a witness. Since the only evidence of payment of the note is an alleged oral admission of the deceased to that effect, made two weeks before his death, the court was justified in viewing it with caution. Sec. 2061, subd. 4, Code Civ.Proc.; Estate of Emerson, 175 Cal. 724, 727, 167 P. 149. Furthermore, the note and deed of trust were in the possession of the deceased at the time of his death. It can thus be reasonably inferred that the note had not been paid, else plaintiff would have obtained possession of it. Retention of a note and trust deed by the lender raises a presumption that the debt is not paid. Loucks v. Luckel, 107 Cal.App.2d 217, 219, 236 P.2d 905. The burden of proof rested upon plaintiff to prove payment. The trial court is the sole judge of the weight and effect of testimony and of the credibility of witnesses, and is free to disbelieve them, even though they are uncontradicted, if there is any rational ground for so doing. Norgard v. Estate of Norgard, 54 Cal.App. 2d 82, 89, 128 P.2d 566.

Since this finding fully supports the judgment in favor of defendants it is not necessary to discuss the merits of the other finding, i. e., that plaintiff is barred from maintaining the action under section 714 of the Probate Code or in reviewing the court's ruling in permitting plaintiff to testify under section 1880, subd. 3 of the Code of Civil Procedure over defendants' objections, of allowing her to testify as to the contents of the alleged lost written agreement, when it was claimed by defendants there was no adequate showing of its loss or destruction or of any attempt to locate it.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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145 Cal.App.2d 583

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Rudy HEN CHIN, Defendant and Appellant.

Cr. 3219.

District Court of Appeal, First District, Division 1, California.

Nov. 2, 1956.

Defendant was convicted of a narcotics violation. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., entered judgment and defendant appealed therefrom and from order denying new trial. The District Court of Appeal, Fred B. Wood, J., held that evidence relating to what the officers saw when they looked into window of hotel room in which defendant was reclining on the bed, disclosed that officers had such reasonable cause to believe that defendant had committed a felony as to justify defendant's arrest without a warrant and the search and seizure of bindles of heroin and narcotics "outfit" found in room.

Judgment and order affirmed.

1. Arrest ⚷63(4), 71

In narcotics prosecution, evidence relating to what the officers saw when they looked into window of hotel room in which defendant was reclining on the bed disclosed that officers had such reasonable cause to believe that defendant had committed a felony as to justify defendant's arrest without a warrant and the search and seizure of bindles of heroin and narcotics "outfit" found in room. West's Ann.Pen. Code, § 836, subd. 3.

2. Arrest ⚷63(1)

That defendant was a state parole violator did not furnish officers with sufficient cause to enter defendant's hotel room, to arrest defendant and to seize contraband found therein, where the officers were not state parole officers.

3. Arrest ⚷63(4)

"Reasonable cause" for belief that person arrested without warrant has committed a felony is not necessarily limited to evidence which would be admissible on a trial of the issue of guilt and it may include information received from others. West's Ann.Pen.Code, § 836, subd. 3.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

4. Searches and Seizures ⚷7(1)

Looking through a window does not constitute an unreasonable search.

Edward T. Mancuso, Public Defender, City and County of San Francisco, Joseph McNamara, Deputy Public Defender, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., William M. Bennett, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

An officer experienced in the enforcement of the narcotics laws[1] knew defendant Rudy Chin and knew Chin to be a user of narcotics.[2] He had an agent working under him who was buying narcotics from one McNamara and reported that McNamara twice took the agent to the vicinity of a certain hotel and told the agent that McNamara's connection was a Chinese by the name of Rudy. About two hours before going to that hotel, the officer interviewed a Chinese informant (one who had given reliable information on previous occasions and who was known to the officer as an associate of Rudy Chin) and asked the informant if he knew where Rudy Chin lived. The informant said that Rudy Chin lived at room 34 of the hotel mentioned, adding that Chin was a source of supply to McNamara.

Acting upon this information, the officer, with two policemen,[3] proceeded to room 34. One of the policemen took a position in the corridor opposite the door to room 34. The officer who knew Chin, accompanied by the other policeman, went to a lightwell outside of and adjoining room 34. Looking from the lightwell through a window into room 34, the officer observed[4] Chin in the room, reclining on a bed, awake. On a dresser table near the bed, the officer saw two small white packets wrapped in bindle shape; also, an object which was covered with tissue paper. The officer thereupon formed the opinion that the two white packets were probably bindles of heroin.[5]

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[1] He had served with the Federal Narcotics Bureau for four years and had made between 300 and 400 arrests for possession of heroin.

[2] About five months prior to the arrest herein the officer visited the defendant in a downtown hotel room and observed defendant taking a "fix," by looking over the skylight in the room.

On that occasion the defendant told the officer he was on probation or parole from the state penitentiary on a narcotics charge and admitted he was addicted.

On the following day the officer learned that defendant had moved from that hotel, and later learned that within the following five months defendant did not report to his probation or parole officer and was wanted on that charge.

[3] Each of the two was a member of the San Francisco Police Department. One of them was attached to the Special Services of that department, his duties being the enforcement of the California laws relating to narcotics.

The policemen who accompanied the officer then raised the window and the shade further and the officer told Chin he was under arrest and instructed him to open the door and not touch anything on the dresser. Chin immediately complied. The three officers entered the room. One of them immediately handcuffed the defendant and another seized the two white packets (which later upon chemical analysis proved to contain heroin) and the paper covered object (which consisted of a hypodermic needle, a syringe and a spoon, known as a narcotics "outfit").

[1,2] Under these circumstances it is manifest that the finding of the trial court (the case was tried without a jury, a jury having been waived) that the arrest, the search and the seizure were legal (despite the lack of a search warrant) is amply supported by substantial evidence that "a felony * * * [had] in fact been committed, and * * * [that the arresting officers had] reasonable cause for believing the person arrested [defendant Rudy Chin] to have committed it", Pen.Code, § 836, subd. 3, and that the bindles of heroin and the narcotics "outfit" were admissible in evidence, having been legally seized.[6]

[3,4] "There is a substantial agreement in the decisions of the courts as to what constitutes probable cause or reasonable cause such as will justify one in arresting

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[4] It was about 12:30 a. m. but the room was lighted by an overhead light.

The window and shade were raised about six inches from the bottom.

[5] They were of the same shape and appearance as heroin in small quantities had been packaged in 99% of the cases in which the officer had seized heroin packaged in small quantities.

[6] The state urges as an additional basis for the conclusion that this seizure was legal, the fact that the defendant was a state parole violator, which, assertedly, furnished sufficient cause to justify the entry into appellant's room, his arrest, and the seizure of contraband found therein, invoking People v. Denne, 141 Cal.App.2d 499, 297 P.2d 451, 454.

The doctrine of the Denne case is not applicable here. There is no evidence, and no claim by the state, that any officer who participated in making the arrest and seizure herein was a state parole officer, much less a state parole officer who had jurisdiction over defendant as a parolee. This is in marked contrast to the situation which obtained in the Denne case. There "parole officer Haydis took over the supervision of defendant's activities as a parolee" (on behalf of the Adult Authority) and "had about 15 personal visits with defendant"; later received disquieting information concerning the defendant; went to the latter's apartment and inspected it, gaining entrance by aid of the building manager; found marijuana and then went to the defendant's place of employment and took him into custody.

That was justified by the following factors (absent from the instant case):

"It is unnecessary for a parole officer to apply for a warrant to 'arrest' a parolee who is already his prisoner and who is at all times *in custodia legis*. * * * A parole officer's physical apprehension of his prisoner for suspected violation of parole is not an 'arrest' in the sense that a peace officer arrests a private individual suspected of a crime but a mere transfer of the subject from constructive custody into actual or physical custody. Having constructive custody of his prisoner at all times, there is nothing unreasonable in a parole officer's search of the prisoner's premises where, as here, he has reasonable cause to believe the parcle has been breached * * It is our conclusion, therefore, that the search being a reasonable one because of the information possessed by the parole officers that defendant was associating with Leonard, who was both a felon and currently engaged as a narcotic peddler, and had thereby broken his faith with the prison authorities, there is no foundation for the contention that defendant's constitutional rights were violated." At page 510 of 141 Cal.App.2d, at page 458 of 297 P.2d.

or prosecuting another upon a criminal charge; and perhaps as clear and comprehensive a statement of the rule as can be found is that of Shaw, C. J., in Bacon v. Towne, 4 Cush. [Mass.] 217. *'There must be such a state of facts,'* said he, *'as would lead a man of ordinary care and prudence to believe, or entertain an honest and strong suspicion, that the person is guilty.'*" People v. Kilvington, 104 Cal. 86, 92, 37 P. 799, 801. (Emphasis added.) See also People v. Martin, 45 Cal.2d 755, 761–762, 290 P.2d 855; Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36; People v. Maddox, 46 Cal.2d 301, 294 P.2d 6; People v. Rodriguez, 140 Cal.App.2d 865, 869, 296 P.2d 38; People v. Moore, 140 Cal.App.2d 870, 871–874, 295 P.2d 969; People v. Soto, 144 Cal.App.2d 294, 301 P.2d 45. Reasonable cause to justify an arrest is not necessarily limited to evidence that would be admissible on a trial of the issue of guilt. It may include information received from others. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535; Willson v. Superior Court, supra, 46 Cal.2d 291, 294 P.2d 36; Trowbridge v. Superior Court, 144 Cal.App.2d 13, 300 P.2d 222. Looking through a window does not constitute an unreasonable search. People v. Martin, supra, 45 Cal.2d 755, 762, 290 P.2d 855; People v. Moore, supra, 140 Cal.App.2d 870, 871, 295 P.2d 969.

These cases exemplify and apply long-established principles of logic and of law, illustrated illuminatively by the inimitable opinion which flowed from the facile pen of Georgia's Chief Justice Bleckley some eight and sixty years ago: "A social, genial gentleman, fond of company and a glass, by occupation a cigar-maker, who keeps his sleeping apartment with the doors 'blanketed,' in a fit condition for privately gaming therein, and who invites his friends at night to refresh themselves with beer, but has in the room, besides barrel and bottles, a table suitable for gaming, together with 11 packs of cards and 2 boxes of 'chips,' one containing 80 chips and the other 300, and a memorandum book with names and numbers entered in it, and whose guests, or some of them, retire hurriedly under the bed on being surprised by a visit from the police at 1 o'clock in the morning, may or may not be guilty of the offense of keeping a gaming-house. A verdict of guilty, based on these and other inculpatory facts, such as the rattle of chips and money, and some expressions about $7 and $12, heard by the police on approaching the premises, is warranted by the evidence, and is not contrary to law." Pacetti v. State of Georgia, Nov. 1888, 82 Ga. 297–298, 7 S.E. 867, 868.

The judgment and the order denying a new trial are affirmed.

PETERS, P. J., and BRAY, J., concur.

145 Cal.App.2d 730

Marjorie A. SUTTON, Plaintiff and Appellant,

v.

Doren G. SUTTON, Defendant and Respondent.

Civ. 5245.

District Court of Appeal, Fourth District, California.

Nov. 9, 1956.

Action for divorce wherein defendant denied that a valid marriage existed between the parties and plaintiff claimed a putative marriage. From an adverse judgment of the Superior Court of Riverside County, O. K. Morton, J., the plaintiff appealed. The District Court of Appeal, Barnard, P. J., held that plaintiff was not entitled to a division of jointly accumulated property on ground that a putative marriage existed between parties that the court properly decreed specific performance of an alleged oral contract of plaintiff to convey property to defendant and that the failure to find that plaintiff had not believed in good faith that a valid marriage existed as basis for a putative marriage was not error.

Judgment affirmed.

1. Marriage 🔑54

The real basis for the holding that woman to a putative marriage is entitled to share in the property jointly accumulated is that the woman honestly believes that a valid marriage existed, that it later proved to be invalid because of some essential fact of which she was unaware, that in good faith she helped accumulate the property and is entitled to share in the proceeds of the joint efforts of the parties.

2. Marriage 🔑54

Evidence did not require a finding on the putative marriage theory that the plaintiff, who went through an invalid marriage ceremony with the defendant, was entitled to a division of jointly accumulated property in view that she was amply compensated for any services that she allegedly performed.

3. Divorce 🔑184(12)

In action for divorce, where defendant denied a marriage existed and plaintiff claimed a putative marriage, alleged error in refusing to admit a marriage certificate was not shown to be prejudicial where court asked counsel shortly before conclusion of trial if he desired to offer any other evidence to show the legality of the marriage and counsel replied that the only thing they had was the certificate which was previously presented and court replied that in view of the evidence the offer would be denied.

4. Specific Performance 🔑121(5)

In action for divorce, where defendant alleged that plaintiff had sold property involved to him by oral contract, evidence justified decree of specific performance on the ground that the contract was fully performed by the defendant and that defendant did not learn that the deed was a joint tenancy deed to both parties until after the action was filed.

5. Specific Performance 🔑121(5)

In action for divorce, wherein defendant sought specific performance of oral contract for conveyance of property to him, evidence supported finding that defendant paid consideration for the lot involved and that plaintiff delivered possession thereof to him.

6. Divorce 🔑150(2)

In action for divorce, where defendant denied the existence of a marriage and plaintiff claimed a putative marriage and the court found that no marriage ever existed, in that plaintiff was not the putative wife of the defendant, the latter finding would include the implied finding that plaintiff had not believed in good faith that a valid marriage existed and no specific finding thereon was necessary.

Rex Estudillo, Riverside, for appellant.

L. Donald St. Clair, Riverside, for respondent.

BARNARD, Presiding Justice.

The plaintiff brought this action for divorce on August 6, 1954. The complaint alleged that the parties were married in Tijuana, Mexico, on August 9, 1952, and separated on July 3, 1954; that there is community property consisting of a house and lot in Mira Loma (Riverside County) the title being held by them in joint tenancy; and that there are no children of the marriage. The defendant filed an answer denying the allegations of the complaint and alleging that the parties never went through a marriage ceremony at any time or place, and that they are not and never have been husband and wife. He also filed a cross-complaint alleging that on or about August 8 or 9, 1952, the parties went through an alleged marriage ceremony at Tijuana, and that the application for such a marriage was not submitted to the proper officials, or signed or certified by such officials, as required by Mexican law. In one cause of action he alleged that on May 5, 1952, the plaintiff sold this lot in Mira Loma to him for $575 by an oral contract; that he paid $205 on May 20 and $370 on June 14, 1952, as provided in the oral contract; that she told him she had conveyed the property to him, which he believed; that when served with divorce proceedings on August 6, 1954, he checked at the recorder's office and learned that instead of deeding the property to him she had deeded it to herself and to him as joint tenants; and that while in possession of the lot, under said contract, he erected a building thereon of the value of $4,500. In another cause of action he alleged that on July 3, 1954, the plaintiff told him that she had been living with another man for several months. He prayed that the marriage be declared null and void, for a divorce, and that the defendant be required to convey the real property to him. No evidence was received on either request for a divorce, since the court first held that a legal marriage had not been established.

The court found that these parties never went through any marriage ceremony at any time or place, that they are not and never have been husband and wife, and that the plaintiff is not and never has been the putative wife of the defendant. The court also found that on or about May 5, 1952, the plaintiff sold this real property to the defendant for $575 by an oral contract and agreed to convey the property to him by grant deed upon his payment of the purchase price; that this was the fair value of the property; that the defendant paid this consideration to the plaintiff and she delivered possession of the property to him; that she told him she had conveyed the property to him, and he believed her; that he first learned on August 6, 1954, that she had not done so but instead had deeded it to them both as joint tenants; that while in possession under said contract the defendant, with the knowledge of plaintiff, erected a building worth $4,500 on said premises; that defendant has fully performed said contract, and plaintiff has refused to give him a grant deed in accordance therewith; and that plaintiff was now in possession of the property, under permission given by the defendant. Judgment was entered denying a divorce "as no marriage exists"; decreeing that the defendant is the sole and legal owner of this real property; ordering the plaintiff to surrender possession and to convey the premises to the defendant; and ordering that the parties bear their respective costs. A motion for a new trial was made and denied, and the plaintiff has appealed from the judgment.

[1] It is first contended that the court erred in finding that these parties never went through any marriage ceremony and that plaintiff is not the putative wife of the defendant. While it is not and could not well be contended that a valid marriage was shown by the evidence, it is argued that the evidence was sufficient to establish a putative marriage, and that the plaintiff is therefore entitled to share in the property in question, under the principles established by such cases as Estate of Foy, 109 Cal.App.2d 329, 240 P.2d 685; Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761; Sancha v. Arnold, 114 Cal.App.2d 772, 251 P.2d 67, 252 P.2d 55; Santos v. Santos, 32 Cal.App.2d 62, 89 P.2d 164; Bacon v. Bacon, 21 Cal.App.2d 540, 69 P.2d 884; and Partrick v. Partrick, 112 Cal.App.2d 107, 245 P.2d 704. The real basis for the holding in such cases is that the woman honestly believed that a valid marriage existed; that the marriage later proved to be invalid because of some essential fact of which she was unaware; that in good faith she had helped to accumulate the property in question, usually over many years; and that she was entitled, in equity and justice, to share in the proceeds of the joint efforts of the parties.

This defendant was employed by a corporation doing heavy construction work in the Middle East. He and the plaintiff lived together at times during 1951, and prior thereto, when he was in this country. A deed was recorded on July 14, 1952, conveying the Mira Loma property from the plaintiff to herself and to him, as joint tenants. He started to build a house on the property in June, 1952, and the house was completed in September. The defendant went overseas on November 13, 1952, and returned in June, 1954. During that absence he addressed letters to the plaintiff as his wife in which he talked about additions to the house he planned to make for her comfort when he returned. He had also addressed letters to her as his wife in 1951. He also made an allotment through which his bank sent the plaintiff $100 a month which was later increased to $200 a month. She thus received $2,500 during that period, the last payment being made on June 1, 1954. The defendant left the plaintiff very shortly after he returned in June, 1954.

As the appellant admits, the remaining facts in this case "are highly controverted." The appellant testified that they went to the house in Mira Loma a day or two after August 9, 1952, living in one room and eating elsewhere; that they remained there until he left for overseas in November; and that she assisted in the construction of the house by picking out the paint and doing some work. There was evidence that the defendant lived elsewhere during most of that period, and that the plaintiff was not there except for an occasional day or two until sometime in October. About the middle of October they had a "Thanksgiving dinner" in the house, the occasion being celebrated in advance because the defendant and his nephew expected to leave soon to go "overseas".

The plaintiff introduced three documents in evidence which were admitted as exhibits. One of these is a power of attorney signed by her and having on it what is said to be her fingerprint. It purports to appoint a lawyer, other than the one she claims they saw in Tijuana, to represent her in the courts of the state of Morelos, in Mexico, and to file a marriage contract with this defendant. A similar document is signed by the defendant, with his purported finger mark. These documents are not dated nor witnessed, and are not acknowledged or certified to before or by any notary public or other official. The other document is an application for a marriage certificate dated August 9, 1952, and signed by both parties. The plaintiff testified that they received no papers when they went to Tijuana except a receipt from the attorney for his fees; that this man told her that they were married; and that she received these three documents by mail a week or two later. She did not claim to have shown these documents or any other document to the defendant. The defendant testified that he and the plaintiff went to Tijuana during the last part of July or the first part of August, but did not go to the office of any attorney or notary public, or any place called "Legal Affairs"; that he signed a power of attorney at one time but did not sign it in Tijuana; that he did not pay any money to anybody in Tijuana for any proxy marriage with plaintiff, and had not seen the receipt she offered in evidence; and that he had no knowledge of any marriage certificate being issued to him from Mexico.

The evidence is not sufficient to compel a finding or holding in plaintiff's favor on the putative marriage theory. While she testified, in response to a leading question from her counsel, that she believed all the time that a valid marriage existed, this appears doubtful in view of all the evidence. The documents she received shortly after August 8 did not purport to show that any marriage had taken place, by proxy or otherwise, and were incomplete on their face. She did not change her position in reliance on a purported marriage, and continued to live with the defendant only at intervals, as she had done for several years prior to August, 1952. While she testified that after that date they lived together for some three months, there is other evidence indicating that after that date they did not live together except for possibly two or three weeks. There is no evidence that she helped to accumulate any property, or that any of defendant's earnings after August 8 went into the Mira Loma property which she claims was actually community property. That property was acquired before August 8, 1952. Checks in evidence show that the defendant put about $4,100 into it, including the lot, before that date, and there is no evidence that anything he earned thereafter was used in building the house.

[2] From an equitable standpoint, it would seem that the plaintiff was amply compensated for any service she claims to have performed by the $2,500 she admittedly received, and the use of the house for several years. On deciding the case the court remarked that the evidence was conflicting and he did not believe all of the evidence offered by either of the parties; that their conduct after the claimed marriage remained the same as it was before; that the plaintiff had benefited materially from defendant's generosity over a long period of time; and that he had given her much of the money which she claimed to have expended. The question was one of fact for the trial court, and in view of all of the evidence it cannot be held that the court was compelled to find, on the putative marriage theory, that the plaintiff was entitled to a division of this property.

[3] It is next contended that the court erred "in refusing to admit the marriage certificate." On the first day of the trial there was some talk about a purported marriage certificate, but there is nothing in the record as to what it contained. Apparently, counsel for plaintiff agreed with the court's view that some document there was not sufficiently authenticated to be admitted or to show any connection with the defendant. The court asked counsel if he had received a certain document, and counsel said he had not, that he had "sent for the actual certificate of marriage", that he had requested that it be air mailed back as fast as possible, and that he had wired for a copy "of the original marriage certificate on file." The court pointed out that he had continued the matter for more than two months to enable the papers to be obtained, stated that the document could be later presented, on a motion for a new trial if necessary, and then adjourned the hearing for five days. The only other thing that appears in the record is that shortly before the conclusion of the trial, fifteen days later, the court asked counsel for the plaintiff if he desired to offer any other evidence to show the legality of the marriage. Counsel replied that he only thing they had was the certificate which was previously presented, and the court replied that in view of the evidence the offer would be denied. No prejudicial error appears in this connection.

[4] It is next contended that the court erred in "decreeing specific performance" of the alleged oral contract to sell and convey the Mira Loma property. It is argued that the court found that this contract was made on or about May 5, 1952, whereas the evidence shows that the defendant did not get back to California until May 20; that the evidence does not show that any particular type of deed was discussed by the parties; that there was evidence that the parties had discussed building a home together long before May 5, 1952, and the only logical inference is that they intended a deed which would contain both of their names as joint tenants; and that the evidence does not show a sufficient part performance to take the contract out of the statute of frauds. There is no merit to these contentions. The evidence supports the findings as to the making of this contract, that it was fully performed by the defendant, that the plaintiff told the defendant that she had deeded the property to him, and that he did not learn that the deed was a joint tenancy deed to both parties until after this action was filed. Even the plaintiff admitted on the stand that the defendant had paid the $575.

[5, 6] The further contentions that there is no evidence to support the finding that the defendant paid the consideration for this lot and that the plaintiff delivered possession to him, and that the court failed to find on certain material issues raised in the defendant's cross-complaint are likewise without merit. There was ample evi-

dence to sustain the finding complained of, and no finding was necessary on the other matters in view of the court's other findings to the effect that no marriage ever existed and that the plaintiff was not the putative wife of the defendant. The latter finding would include the implied finding that the plaintiff had not believed in good faith that a valid marriage existed.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

DOUGLAS AIRCRAFT, Inc., a corporation, and Industrial Indemnity Company, a corporation, Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, John A. MacDowell, State of California, Department of Employment, and Elizabeth M. MacDowell, Respondents.*

Civ. 21902.

District Court of Appeal, Second District, Division 1, California.

Nov. 2, 1956.

Hearing Granted Dec. 19, 1956.

For Opinion of Supreme Court see 306 P.2d 425.

Proceeding to review an award of compensation by the Industrial Accident Commission to an employee of petitioning corporation against its petitioning insurance carrier. The District Court of Appeal, Nourse, J. pro tem., held that Commission's finding that evidence failed to establish that injury to employee was caused by his intoxication was erroneous, in view of Commission's finding that employee was inebriated and hence unable to use his faculties to avoid hazards of his occupation of tool control dispatcher when injured as result of motor scooter, on which he was returning to booth where he worked from employer's blueprint room after picking up blueprints, striking a bump and throwing him off, and fact that he had often followed same course on scooter without accident when sober.

Award annulled.

1. Workmen's Compensation 🔑1581

Evidence supported Industrial Accident Commission's finding that injuries to tool control dispatcher as result of motor scooter, on which he was taking blueprints from his employer's blueprint room to booth where he worked, striking a bump and throwing him off, arose out of and in course of his employment.

2. Workmen's Compensation 🔑1604

Industrial Accident Commission's finding that evidence failed to establish that injury to tool control dispatcher as result of motor scooter, on which he was taking blueprints from his employer's blueprint room to booth where he worked, striking bump and throwing him off, was caused by his intoxication, was erroneous, in view of Commission's finding that he was inebriated at time of accident and fact that he had often followed same course on scooter without accident when sober.

3. Workmen's Compensation 🔑798

The verb "inebriate" means to make drunk, to intoxicate, and hence to disorder senses or deprive of sense and judgment, and word "inebriated" is synonymous with intoxicated or drunk and imports loss of normal control of one's bodily and mental faculties.

See publication Words and Phrases, for other judicial constructions and definitions of "Inebriate".

4. Workmen's Compensation 🔑6, 798

Liability imposed by workmen's compensation laws on employer for injury to employee is liability without fault, to which employee's negligence is no defense, unless it consists in employee's voluntary intoxication proximately contributing to injury.

5. Negligence 🔑1

One rendering himself incapable of acting normally to avoid danger to himself or others by becoming intoxicated or inebriated is negligent.

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* Opinion vacated 306 P.2d 425.

6. Workmen's Compensation ⚷798

An employee's intoxication when injured does not defeat his rights under Workmen's Compensation Act, unless it contributes as proximate cause to his injury.

7. Workmen's Compensation ⚷1335

In workman's compensation proceeding, claimant's intoxication when injured is affirmative defense to be asserted and proved by employer.

8. Workmen's Compensation ⚷1604

An employer, asserting defense in workman's compensation proceeding that claimant was intoxicated when injured, is not required to offer independent evidence that intoxication was proximate cause of injury, where accident arose out of special hazard to which claimant was exposed and use of his normal physical abilities and mental faculties was necessary to avoid injury from such hazard.

9. Evidence ⚷14

It is matter of common knowledge, and hence of judicial notice, that an inebriated person is not able to control his bodily movements in normal manner and is dangerous to himself and that one driving motor vehicle while inebriated drives erratically.

10. Workmen's Compensation ⚷798

When a person voluntarily becomes intoxicated and loses normal control of his physical abilities and mental faculties, thus disabling himself to exercise ordinary care, and in that condition exposes himself to hazards of his employment, his intoxication must be deemed a proximate cause of ensuing injury to him, unless facts proven are such as to exclude his intoxication as a proximate, contributing cause of injury.

11. Workmen's Compensation ⚷1604

An employer, proving that employee was inebriated when injured and, while in such condition, engaged in hazardous activity, hazards of which might be avoided by person in command of his faculties, establishes defense under Workmen's Compensation Act that employee's voluntary intoxication proximately contributed to his injury, and award of compensation to such employee cannot be sustained, in absence of evidence sustaining a finding that his intoxication was not a contributing cause of injury.

12. Workmen's Compensation ⚷1604

The fact that injury to employee while intoxicated was one which might have occurred without any negligence on his part or because of negligence other than intoxication is insufficient to warrant finding by Industrial Accident Commission that employee's intoxication was not a contributing cause of injury.

13. Workmen's Compensation ⚷798

Where employee is proved to have exposed himself to hazards of his work while inebriated, Industrial Accident Commission will not hold that his inebriation was not a contributing proximate cause of his ensuing injury, in absence of evidence supporting a finding of some other cause.

14. Workmen's Compensation ⚷1604

Where employee had often driven his employer's motor scooter over paved area while in possession of his faculties without accident or injury, proof of his inebriation when injured as result of scooter hitting bump in such area and throwing him off constituted proof that his inebriation was a contributing cause of accident and injury.

15. Workmen's Compensation ⚷1604

Where Industrial Accident Commission found that employee was inebriated when injured on basis of evidence showing very high degree of intoxication, and hence had judicial notice that he was without normal use of his faculties, Commission erred in finding that there was no evidence that employee's inebriation was a proximate cause of injury, but that only evidence as to cause of his injury was that motor scooter driven by him struck a bump and threw him off, as evidence of his inebriation was sufficient to require finding that his intoxication was a proximate cause of scooter striking bump.

16. Workmen's Compensation ⚷1604

The Industrial Accident Commission erred in finding that employee's intoxication when injured as result of motor scooter driven by him striking bump and throwing him off was not proximate cause of injury on theory that his inebriety did not cause him to be thrown from scooter after striking bump, as question was whether his inebriety contributed to striking bump, danger of which was a hazard to which his employment exposed him, so as to require him not to expose himself thereto voluntarily when he could not make full use of his faculties to avoid danger.

17. Workmen's Compensation ⚷6, 798

An employee injured as result of hazard to which his employment exposes him is entitled to compensation under Workmen's Compensation Act, regardless of whether he was negligent, unless he contributed to injury intentionally or by depriving himself of ability to avoid risk of such hazard through voluntary intoxication.

18. Workmen's Compensation ⚷798

The Industrial Accident Commission erred in finding that employee's inebriation when injured as result of motor scooter, driven by him, hitting a bump or uneven place in pavement, thereby throwing him off, was not a contributing cause of injury because a sober employee might have been thrown from scooter and injured, if he failed to avoid such hazard, as employee's failure to avoid danger of hazard, rather than results of such failure, was test of whether his inebriation was a proximate cause of injury.

19. Workmen's Compensation ⚷798

An employee's inebriation when he mounted motor scooter, from which he was subsequently thrown when it hit a bump, became a cause of ensuing injuries to him, as he could not exercise care, judgment and caution in operating scooter that he would have been able to exercise had he been sober.

20. Workmen's Compensation ⚷1604

An employer need not produce independent evidence that employee's proven inebriation when injured was proximate cause of accident resulting in injury, in absence of other witnesses of accident than employee, who has burden of offering some explanation excluding his inebriation as proximate cause of accident.

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Kearney, Scott & Clopton, Mort L. Clopton, Los Angeles, for petitioners.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Los Angeles, for respondent Industrial Accident Commission.

NOURSE, Justice pro tem.

This is a proceeding to review an award of compensation made by the respondent Commission in favor of the respondent MacDowell and against petitioner Industrial Indemnity Company as the insurance carrier of petitioner Douglas Aircraft Company, Inc.

On December 11, 1954, MacDowell was in the employ of Douglas as a tool control dispatcher. He was employed upon the night shift and testified that it had been customary for him to, on two or three occasions each night, take a three-wheeled motor scooter and return blueprints to the blueprint room and pick up other blueprints and take them back to the tool room. His lead man, who was his immediate superior, testified that it was not a part of applicant's duties to ride the motor scooter or to deliver or pick up blueprints, but that that was the work of another employee, called the follow-up man; and that he had on several occasions instructed MacDowell not to leave the tool room and not to perform any service in connection with picking up blueprints from the blueprint room or in delivering blueprints to that room. Such instructions were denied by MacDowell.

MacDowell testified that on the night of December 11, 1954, about 10:40 p. m., he took the motor scooter, went to the blueprint room, picked up blueprints, and while returning from the blueprint room to the booth where he worked that he "struck a bump and it threw me off the motor scooter." MacDowell's memory was very hazy as to all facts both before and after the alleged accident. He had no definite recollection of leaving his place of employment or of getting on the motor scooter or delivering blueprints to the blueprint room or picking up other blueprints. His testimony was that he assumed he did said things because that was what he usually did. He could not say whether he or the motor scooter collided with any object or whether the place of the accident was in a lighted portion of the paved surface over which he was riding or in a dark portion. He could not say how far from his booth the accident occurred, but he did walk from the place of the accident to that booth and mounted the stairs to the booth, although in the accident he had received a compression fracture of the fourth lumbar vertebra and four broken ribs.

Several witnesses, including one physician and a trained nurse, testified that MacDowell was intoxicated when found in the control booth after the accident; and one of the attending physicians testified that without some anaesthesia or sedative MacDowell would have been unable, with the injuries he sustained, to have endured the pain of walking to his booth and climbing the stairs, but that alcohol acted as a sedative or anaesthesia and because of his intoxicated condition he was able to accomplish this feat. The medical evidence also showed without contradiction that MacDowell did not suffer any injuries which would account for his major loss of memory, but that intoxication would account for such a loss of memory.

By its findings and award the Commission found that the injuries sustained by MacDowell arose out of and occurred in the course of his employment, and that "The evidence fails to establish that said injury was caused by the intoxication of applicant."[1] It is these findings that are attacked by petitioner here, as being without evidentiary support.

[1] Petitioner first contends that the finding that the injuries arose out of and in the course of MacDowell's employment is entirely unsupported by and contrary to the evidence. It is petitioner's contention that in riding the motor scooter and delivering and picking up blueprints applicant was acting outside the scope of his employment and contrary to the express instructions of his superior. There was ample evidence to have sustained a finding by the Commission that applicant was acting outside of the course of his employment and in violation of the express instructions of his employer. On the other hand, however, MacDowell's testimony that he had not received instructions and that his superior had at no time objected to his performing these services supports the Commission's finding that he was acting in the course of his employment.

[2] Petitioner's contention, that the evidence fails to support the finding of the Commission that the defense of intoxication had not been proved, must be sustained. The formal finding of the Commission is in reality not a finding at all but a pure conclusion, for it cannot be determined from the formal finding whether the Commission found that MacDowell was not intoxicated or whether it found that he was intoxicated but that his intoxication was not *a* proximate cause of the accident and injuries. The intent of the Commission by this finding is, however, made clear by its report, for in its report it expressly finds that MacDowell was "inebriated" at the time of the accident, but that the evidence failed to show that his inebriation was a cause of his injury.[2]

[1] The affirmative defense of intoxication was placed in issue by petitioner.

[2] The following are the findings of the Commission upon this issue as set forth in their report:

"The Panel has again reviewed the record including the additional testimony produced at the hearing of April 24, 1956. The Panel is aware that applicant stated in his testimony on June 23, 1955, 'I struck a bump and it threw me off the motor scooter.' However, the Panel also has noted the applicant's apparent complete loss of recollection with

All parties contend that the findings contained in the report of the Commission are to be treated here as its findings of fact, and respondent concedes that the Commission did find as a fact that applicant was inebriated at the time of the accident.

[3] We assume that the Commission used the word *inebriated* in its common sense. The verb *inebriate* is defined in Webster's International Dictionary (2d ed.) as "To make drunk; to intoxicate. 2. Hence, to disorder the senses * * * to deprive of sense and judgment * * *" *Inebriated* is synonymous with *intoxicated* or *drunk,* and imports the loss of normal control of one's bodily and mental faculties. Standard Life & Accident Insurance Co. v. Jones, 94 Ala. 434, 10 So. 530; Freeburg v. State, 93 Neb. 346, 138 N.W. 143; O'Connell v. State, 5 Ga.App. 234, 62 S.E. 1007.

[4–8] The liability imposed by the workmen's compensation laws upon the employer is a liability without fault, and to which liability the negligence of the employee is not a defense except where that negligence[3] consists in the voluntary intoxication of the employee, which intoxication proximately contributes to his injury. Intoxication, however, like the negligence of a plaintiff in an ordinary tort action, does not defeat the rights of the employee unless it contributes as a proximate cause to his injury, and the defense of intoxication is an affirmative defense to be asserted and proved by the employer. It does not follow, however, that the employer must offer independent evidence that intoxication was a proximate cause of the injury suffered by an inebriated employee, where the accident is one arising out of a special hazard to which the employee is exposed, and where the use of the employee's normal physical abilities and mental faculties are requisite to his avoiding injury from that hazard.

[9] It is a matter of common knowledge, and therefore of judicial notice, that one who is inebriated is not able to control his bodily movements in a normal manner and is dangerous to himself, and that one who drives while inebriated drives erratically. Johnston v. Brewer, 40 Cal.App.2d 583, 587, 105 P.2d 365; Dobson v. Industrial

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respect to many of the incidents which occurred at the time of his accident and prior thereto and after. He did not know whether or not the accident had caused any damage to the motor scooter and he did not know whether he himself had collided with anything other than the ground or the street surface but he did state that the scooter did not collide with anything while he was on it. The area on which he traveled on the motor scooter was approximately 600 yards in length and was paved with asphalt or something of that nature and there were lights along the street. He was unable to say whether the spot at which he fell was within the area of an adjacent light or whether it was just outside the lighted area. There was a regular headlight on the motor scooter which was burning at the time but he was unable to recall whether the light illuminated the area where the accident occurred sufficiently to enable him to see any object that was in the way of the motor scooter and to either stop or swerve the scooter to one side. Applicant's objection to the Panel's Notice of Intention pin-pointed the alleged specific cause of the accident as being a bump in the street and the matter was thus again open for rebuttal or clarification as the case may be. Defendants have produced no evidence to show that there was no bump in the street as testified to by applicant and he testified further that striking this bump threw him from the motor scooter. The Panel remains of the opinion that applicant *was inebriated at the time of his accident* but, mindful of the fact that the defense of intoxication proximately causing injury must be proved by the party asserting such as a defense and after further review of the record, the Panel has come to the conclusion that such defense has not been proved. To bar the injured employee from compensation benefits, intoxication must have proximately caused his injury and *even a sober driver may well be thrown from a motor scooter if the scooter strikes a bump or other inequality in the street over which it is traveling.*" [Italics ours.]

[3] Where one renders himself incapable of acting normally to avoid danger to himself or others by becoming intoxicated or inebriated, he is negligent. Frisvold v. Leahy, 15 Cal.App.2d 752, 755, 60 P.2d 151.

Acc. Comm., 114 Cal.App.2d 782, 786, 251 P.2d 349; People v. Salladay, 22 Cal.App. 552, 555, 135 P. 508.

[10–13] When one voluntarily becomes intoxicated and loses normal control of his physical abilities and mental faculties and thus disables himself to exercise ordinary care, and in that condition exposes himself to the hazards of his employment, it necessarily follows that his intoxication must be deemed a proximate cause of an ensuing injury, unless the facts proven are such as to exclude his intoxication as a proximate, contributing cause. Therefore, when an employer proves that the employee was inebriated and that while inebriated he engaged in a hazardous activity, the hazards of which might be avoided by one in command of his faculties, he has established the defense which the statute gives him and an award to the inebriated employee cannot be sustained in the absence of evidence which would sustain a finding that the intoxication or inebriation was not a contributing cause. In order to make such a finding it is not enough that the injury is one which might occur without any negligence or by reason of negligence other than intoxication, for that is true in every accident. Sober employees are injured by the vehicles which they are driving leaving the road and overturning, by falls from scaffolds, in lighting ovens or furnaces, by being thrown from horses, or while grooming horses. Yet if it be proved that he exposed himself to the hazards of such work while inebriated, it will not be held that his inebriation was not a contributing proximate cause of his injury in the absence of evidence that would support a finding of some other cause. Pacific Freight Lines v. Industrial Acc. Comm., 26 Cal.2d 234, 157 P.2d 634; Dannenfelser v. Perry, 2 Ind. Acc.Com. 979; Suhr & Co. v. State Compensation Ins. Fund, 2 Ind.Acc.Com. 717; Atkins v. Peoples' Express Co., 2 Ind.Acc. Com. 631; Arnold v. Benjamin, 1 Ind.Acc. Com. 411, 412–413; Amell v. Byurdor Confection Co., 19 Ind.Acc.Com. 36; Ruemping v. Ind. Acc. Comm., 1 Cal.Comp.Cases 71; Calles v. Bressano, 5 Cal.Comp.Cases 177; McLean v. Vogel, 12 Cal.Comp.Cases 82.

[14] In the case at bar MacDowell had, night after night, driven over the same paved area while in possession of his faculties, without accident or injury; but on the night in question when he exposed himself to the same hazards but without the ability to exercise his faculties to protect himself from them, the accident in question occurred. We think it must be held that the proof of inebriation was, under these circumstances, proof that that inebriation was a contributing cause of the accident and the injury.

[15] In effect the Commission here found that there was no evidence before it that MacDowell's inebriation was a proximate cause of the accident, but that the only evidence as to the cause of his injuries was his striking a bump. This reasoning is unsound. In the first place, the Commission had before it evidence showing a very high degree of intoxication, and on the basis of this evidence found MacDowell to be inebriated. From this evidence it had judicial notice that he was without the normal use of his faculties, and that in itself was sufficient evidence to find his intoxication to be a proximate cause of his striking the bump which resulted in his being thrown from the motor vehicle.

[16] In the second place, the Commission treats the case as if the question of proximate cause turned upon the question as to whether or not MacDowell's inebriety caused him to be thrown from the scooter after striking the bump; but that is not the question upon which proximate cause turns —on the contrary, the question is, did his inebriety contribute to his striking the bump. The danger of striking an uneven place in the pavement or a bump was a hazard to which MacDowell's employment exposed him, and it was the presence of this hazard as well as any other hazards of his occupation that required him not to voluntarily expose himself to them when he could not make full use of his faculties to avoid their dangers.

[17] Hazard of injury is present in a greater or lesser degree in all employments, and it is this fact that caused the Legislature to place the normal risk of loss from these hazards upon industry rather than upon the employee; and the hazard, whatever it may be, to which the employee is exposed, is always one of the causes of an industrial injury. The injury may result from the hazard with or without negligence on the part of the employee, and yet the law compensates the injured employee unless he intentionally contributes thereto or contributes thereto by depriving himself, through voluntary intoxication, of his ability to avoid the risk of the hazard.

[18, 19] Here the danger of hitting a bump or uneven place in the pavement while riding the motor scooter and thereby being thrown and injured was one of the hazards of MacDowell's employment which he was obligated not to increase by exposing himself to it while inebriated. Yet the Commission here places its finding that inebriation was not a contributing cause of his injuries upon the proposition that a sober employee might have been thrown and injured if he failed to avoid the hazard.

The Commission thus entirely loses sight of the fact that it is the failure to avoid the danger of the hazard rather than the results of failing to avoid it which is the test of whether or not MacDowell's inebriation was a proximate cause of those results. Inebriation became a causative force to the resulting injuries the moment that MacDowell mounted the motor scooter while inebriated. It was a causative force from that moment on because he could not, while operating the motor scooter, exercise the care, judgment, and caution that he would have been able to exercise had he been sober. (See 1 Larson, Workmen's Compensation Law, sec. 34.34, pp. 493–495.)

The finding that MacDowell was inebriated at the time of the accident and was thus unable to use his faculties to avoid the hazards of his occupation, together with the fact that he had many times when sober followed the same course without accident or injury, compels, as we have heretofore said, a finding that his inebriation was a proximate cause of the accident, there being no other explanation of it.

[20] To hold that the employer must produce independent evidence that the proven inebriation of an employee was a proximate cause of an accident resulting in injury to the employee would wholly deprive the employer of this defense in any accident which occurred and to which there were no witnesses other than the employee. In the case at bar the instrumentality, the motor scooter, was entirely under the control of MacDowell. He and he alone had the knowledge of any facts which would explain the accident and show that his inebriation did not contribute to it. The same practical reasons that cast upon a defendant driver of an automobile in a tort action whose passenger has been injured by his car leaving the highway or colliding with an inanimate object, or upon a hospital or a doctor where an unconscious person receives injury, or upon a claimant for compensation against whose award a lien is claimed, the burden of explanation or of going forward with the evidence, place upon an inebriated employee the burden of offering some explanation which would exclude his inebriation as a proximate cause of the accident. Garcia v. Industrial Accident Comm., 41 Cal.2d 689, 694, 263 P.2d 8.

The award is annulled.

WHITE, P. J., and FOURT, J., concur.

R. A. KLASSEN, Plaintiff and Appellant,
v.
The CITY OF SAN CARLOS, a municipal corporation, Harry L. Grant, as Treasurer of said City of San Carlos, and L. C. Smith Co., a corporation, Defendants and Respondents.

Civ. 16863.

District Court of Appeal, First District, Division 1, California.
Nov. 9, 1956.

Taxpayer's action to prevent alleged illegal expenditure from city's general fund and to require restoration to that fund of moneys which had been illegally spent on theory that city council's resolution of intention made no mention of contribution for street improvement from general fund of city as required by statute. The Superior Court, County of San Mateo, Murray Draper, J., entered judgment against taxpayer upon failure to amend after sustaining of demurrer and taxpayer appealed. The District Court of Appeal, Fred B. Wood, J., held that complaint clearly stated a cause of action not vulnerable to general demurrer.

Reversed.

1. Municipal Corporations 🔑1000(5)

Taxpayer's complaint to prevent alleged illegal expenditure from city's general fund and to require restoration to that fund of moneys which had been illegally spent on theory that city council's resolution of intention made no mention of contribution from general fund for street improvement as required by statute, was sufficient to state a cause of action. West's Ann.Streets & High.Code, §§ 5000–6794, 5125, 5582, 10201, 10205; West's Ann.Code Civ.Proc. § 526a.

2. Municipal Corporations 🔑886

Where city is desirous of contributing from its general fund for street improvement, failure of resolution of intention to mention proposal to contribute from general fund is fatal. West's Ann.Streets & High.Code, §§ 5582, 10201.

3. Municipal Corporations 🔑1000(5)

Where taxpayer alleged that certain action was taken by city in violation of a certain statute, and such action would be illegal no matter which of two statutes was applicable, allegation that it was in violation of such specific statute would be of no consequence for, if erroneous, the law would supply the applicable statute when the complaint adequately describes the challenged transaction.

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William O. Ellis, Redwood City, for appellant.

Melvin E. Cohn, City Atty. of the City of San Carlos, San Carlos, Kirkbride, Wilson, Harzfeld & Wallace, San Mateo, for respondents.

FRED B. WOOD, Justice.

In this action, brought,[1] as the complaint alleges, by a "citizen resident and taxpayer of the City of San Carlos and a contributor to the general fund of said City," the owner of "real property within said city which has been and is assessed for such general taxes," who "is bound and liable to pay the same, and within one year before commencement of this action has paid a tax in said City," seeking to prevent an alleged illegal expenditure from the general fund of the city and to require restoration to that fund of moneys that had been illegally expended, judgment was rendered against plaintiff upon his failure to amend after the sustaining of a demurrer to his third amended complaint, with ten days' leave to amend.

The challenged transaction was incident to a street improvement proceeding conducted under the sanction of the Municipal Improvement Act of 1913, Sts. & Hy. Code, §§ 10000–10609. The complaint alleges that this proceeding was commenced by a resolution of intention adopted on the 13th of September, 1950; that on November 8, 1950, the city council, out of the city's general fund, contributed $4,000 for the improvement, and on June 15, 1951, appropriated an additional $2,000 for the same purpose; that general fund moneys have been used for payment of the contractor; that such payment does not constitute an advance or loan to the special improvement fund by the city, to be repaid to the city; that no provision has been made to repay the general fund out of the proceeds of the special assessment; and that the resolution of intention "made no mention of a contribution from any general fund in the City Treasury."

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[1] Against the City of San Carlos, the City Treasurer, and the contractor who had been engaged to do certain improvement work for the city.

[1] We think that these and other allegations, which need not be detailed here, clearly state a cause of action, not vulnerable to the general demurrer. The Municipal Improvement Act expressly declares that *in the resolution of intention* "the legislative body may order that a specified portion or percentage of the cost and expenses of the improvement shall be paid out of the treasury of the municipality from such fund as the legislative body may designate." Sts. & Hy.Code, § 10201. The allegations of the complaint also show that plaintiff possesses the qualifications prescribed by section 526a of the Code of Civil Procedure for the bringing of such an action as this.

We observe that neither the plaintiff nor the defendants brought the provisions of section 10201 to the attention of the trial court. Plaintiff alleged that the challenged transfer of funds was in violation of section 5582 of the code. Defendants contended that section 5125, based upon a later enactment than section 5582, prevailed.[2] Both make the same contentions upon this appeal. Defendants add the suggestion that section 5125 in effect supplements section 5582 by authorizing the city council to determine the desirability of contributing from the general fund after a proceeding has commenced. Plaintiff in his closing brief furnishes a more elaborate analysis of section 5125 than heretofore. Counsel on neither side has directed our particular attention to the provisions of section 10201 of the code.

We perceive no real inconsistency between sections 5125 and 5582. Section 5582 deals with contributions "out of the treasury of the city", provision therefor to be "stated in the resolution of intention". Section 5125 deals with moneys received from *other* sources ("from any funds made available for the purpose by any *local* [such as the county or a joint highway district], *state or national agency or authority"),* funds which the city council "may accept" and provide for "contribution toward the cost and expenses" of the work. In such a case, it is not "necessary to set forth or give notice of such contribution in the resolution of intention". The complaint herein does not present a section 5125 situation.[3] It speaks solely of a proposed contribution from the general fund of the city; makes no mention of funds received from an outside source, whether federal, state, county or district.

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[2] Both sections 5125 and 5582 (portions of the Improvement Act of 1911, §§ 5000–6794 of the code) are *potentially* applicable.

The Municipal Improvement Act by a general reference (in § 10205 of the code) potentially incorporates them: "The provisions of the Improvement Act of 1911 relating to contributions is incorporated in this division [Division 12 of the code] as if fully set out herein."

That, however, with three other references to the 1911 Act, §§ 10206–10208 of the code, appears at the end of a chapter, §§ 10200–10208, of the 1913 Act which deals with the "resolution of intention" under that Act and prescribes certain requirements (including those expressed in § 10201) in respect thereto.

It is a fair inference that the Legislature, when making those incorporations by reference, intended to make applicable to a 1913 act proceeding only the pertinent provisions of the 1911 act which were not inconsistent with the specifically expressed requirements of the 1913 act.

[3] We are not undertaking a detailed, definitive analysis of the provisions of section 5125, such as the question whether a section 5125 determination must be made before any work is done or may be made at a later stage of the improvement proceeding.

[2] Thus, it is clear that the alleged failure to mention in the resolution of intention the proposal to contribute from the city's general fund, is fatal, whether section 10201 or 5582 applies. In this connection, we wish to state that we recognize that section 5582 may not be wholly repugnant to section 10201. The latter speaks of a contribution in terms of "a specified portion or percentage" of the cost and expenses. The former says the legislative body may determine that "the whole or any part" of the costs and expenses may be contributed. It is better to leave the resolution of this seeming inconsistency, under the circumstances of this case, to the determination of the trial court as the facts develop upon the trial, if the case goes to trial. We have before us only the allegations of the complaint and have not had the benefit of a discussion of this point by counsel. (Upon stipulation of counsel, this appeal was submitted upon the briefs on file, without oral argument.)

[3] If plaintiff predicated his pleading upon the wrong section, 5582 instead of 10201, it is of no consequence. His allegation that the failure to mention the proposed contribution in the resolution of intention was "in violation of Section 5582, Streets and Highways Code" is a legal conclusion. If that is an erroneous conclusion, the law supplies the applicable statute where as here the complaint adequately describes the challenged transaction. In re Murphy, 190 Cal. 286, 291–293, 212 P. 30; In re Mingo, 190 Cal. 769, 771, 214 P. 850; and People v. Papayanis, 101 Cal.App.2d Supp. 918, at pages 922–925, 226 P.2d 91, at pages 95–97, in which, Judge Bishop of the Appellate Department of the Superior Court, Los Angeles, furnishes a comprehensive review of the case law on this subject from 1890 to 1950.

It happens that defendant demurred specially as well as generally, but it appears to us that the special demurrer dealt with matters which if vulnerable, should be challenged by means of a motion to strike. See 21 Cal.Jur. 248, Pleading, § 173, and supplements thereto. The special demurrer seems to have been predicated upon the erroneous theory that plaintiff was additionally attempting to present questions which only a special assessment payer in the improvement district could present, and the trial court decision appears to have been based upon the seeming failure of the complaint to state any cause of action. Under the circumstances, particularly in a case which involves the legality of public expenditures, a matter of grave concern to the city itself and to all of its citizens and general taxpayers, the cause should be remanded for such further proceedings as may not be inconsistent with the views herein expressed.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

* * *

146 Cal.App.2d 1

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Grover Howard COOK, Defendant and Appellant.

Cr. 1090.

District Court of Appeal, Fourth District, California.

Nov. 13, 1956.

Defendant was charged with grand theft, and from a judgment of the Superior Court, San Diego County, John A. Hewicker, J., which found him guilty the defendant appealed. The District Court of Appeal, Barnard, P. J., held, inter alia, that in grand theft prosecution the circumstantial evidence with reasonable inferences therefrom was sufficient to justify jury in finding that circumstances were not equally compatible within innocence and in bringing in a verdict of guilty.

Judgment affirmed.

1. Arrest 🔑63(4), 71

Criminal Law 🔑395

Where evidence disclosed that information in hands of officers at time of arrest was amply sufficient to show that a felony had been committed, and to show reasonable and probable grounds for believing that defendant was the one who had committed it, such evidence was sufficient to justify his arrest and search of truck in connection therewith, so that evidence of stolen property found in his truck was properly admitted in grand theft prosecution.

2. Criminal Law 🔑706, 1171(1)

In grand theft prosecution, there was no error or prejudice in permitting district attorney to tell a witness, when tape recording of conversation between defendant and police officer was played, to pay particular attention to voice answering questions, which was for purpose of comparing such voice with voice of person making telephone calls which resulted in taking of the property.

3. Witnesses 🔑266

Defendant was not deprived of right of cross-examination because testimony was such that any cross-examination would have been unfavorable to defendant.

4. Criminal Law 🔑387

In grand theft prosecution, evidence that officers were unable to find persons or firms at addresses given by defendant was not inadmissible on ground that it was negative evidence and insufficient to prove that they were not at those addresses on date mentioned since weight of such evidence was for jury.

5. False Pretenses 🔑49(1)

In grand theft prosecution, circumstantial evidence with reasonable inferences therefrom was sufficient to justify jury in finding that circumstances were not equally compatible with innocence and in bringing in a verdict of guilty.

6. Criminal Law 🔑566

In grand theft prosecution wherein main issue was identity of party ordering goods which were the subject of the prosecution, evidence with reasonable inferences therefrom sufficiently supported jury finding of guilt.

Howard A. Muhleman, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Victor Griffith, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged with grand theft in that on December 22, 1955, he feloniously took personal property of the Western Metals Supply Company, valued at $416. A jury found him guilty and he appeals from the judgment.

On December 20, 1955, the defendant purchased some fluorescent light bulbs from Western Metals Supply Company, which will be referred to as Western Metals. He paid the bill amounting to $49.48, and the billing indicated that the items were sold to the Western Floodlight Service at a certain address in Las Vegas. He asked for and obtained a special discount by saying that he was doing work for the Tidewater Associated Oil Company, and that Tidewater had a contract with the Sylvania Company and was entitled to a larger discount. On the same day the defendant told the vice president of Western Metals that he had contracts with Tidewater and Richfield under which he was installing lights in their service stations.

On the morning of December 22, 1955, a salesman in the order department of Western Metals received a telephone call from a person saying he was Luke Waters, who said he was with Tidewater Associated Oil Company and wanted to place an order. He ordered a list of fluorescent bulbs in the name of Tidewater Associated Oil Company at a Los Angeles address, and said that he was in a hurry for delivery and would like to pick up the order himself.

He was informed that the order would be turned over to one Caffey in another department and that he should contact Caffey about the delivery. The man giving the order then stated that he could be contacted at the "San Diego Hotel."

Around noon of that day this person called Caffey on the telephone telling Caffey to ship the goods to Oceanside in care of Tidewater Associated Oil Company, and that he would pick it up there. The goods were placed in factory-packed boxes with identifying labels thereon. About 3 o'clock that afternoon, this person phoned Caffey that he would send his truck to pick up the merchandise. About 3:30 that day a dispatcher at a messenger service received a telephone call from a man giving the name of Luke Waters, stating that he was with Tidewater Associated Oil Company, asking the dispatcher to send one of their trucks to pick up this merchandise at Western Metals, and telling him to hold it at the office of the messenger service. A driver for the messenger service picked up the goods at Western Metals and brought them back to the messenger office. Later that day this person again called the messenger service and instructed them to deliver the goods to the Railway Express Company saying: "One of my men will be at the Railway Express Company. If you pull your truck in around the back, in other words where the freights cars are, a man there will meet you and take care of the merchandise." The truck driver for the messenger service drove to the Railway Express Company and inquired about a representative from Tidewater who was to receive the goods, but no one knew anything about it. Five minutes later an unidentified man approached the truck driver and asked if he had a load for the Tidewater Associated Oil. He informed the truck driver he was the man who was to take delivery, took the goods and paid the delivery charge.

It was established that the defendant was registered in the San Diego Hotel on December 22, 1955, having given his address as "Western Floodlight" at a certain address in Las Vegas, and that no such person as Luke Waters had been registered at the San Diego Hotel during December of 1955. There was also evidence that no person by the name of Luke Waters was employed by or known to Tidewater Associated Oil Company.

On December 28, 1955, this transaction was called to the attention of the San Diego police department. An investigation was made and it was discovered that several of the larger oil companies had been having trouble in that some person was installing lights in their stations, under the claim that this was authorized by the particular company. On January 19, 1956, in response to a telephone call, the officers went to a Mobilgas station in San Diego where they found the defendant with a truck containing a number of boxes with a quantity of fluorescent bulbs therein. The defendant said he was leasing the truck, that he was operating a business under the name of Howard's Western Floodlight Company, and that he was contacting service stations and selling them a service in replacing their lighting equipment. The defendant was arrested and the truck impounded. One of the boxes of fluorescent light bulbs, which was found in his truck, had the identifying tag and number which was on one of the packages secured from Western Metals on December 22. The defendant claimed to have purchased all of the merchandise in the truck. When the officer informed him that part of the lighting equipment in his truck was from a stolen shipment that occurred in San Diego on December 22 the defendant replied, "If there is any stolen property in the truck you planted it there." The defendant then said: "Maybe I bought that stuff from the McKinsey's—they're the ones probably—who got the stuff and sold it to me." Later the defendant told the officers that he had purchased the goods from Hunt and Van Slyke, and that Western Metals would get their money whenever they sent their bills through the proper channels. At another time he told the officers he had bought the bulbs with the Tidewater Associated Oil Company shipping label from an outfit in Las Vegas named "Todd Waters Associated Ores", that he picked up these lamps from that company in Las Vegas, and that Western Metals had not sent a bill to Todd Waters Associated Ores Company. On the same day, the defendant told another officer that he was not in San Diego on December 22, 1955; that he was suspicious that he had been taken in by some fellows in Las Vegas who ran the Todd Waters Associated Ores Company; that this company was located on Main Street in Las Vegas but he did not know the address; and that "Well, Waters told me that it was the Todd Waters Associated Ores Company." The officers went to Las Vegas and found there was no Todd Waters Associated Ores Company in Las Vegas, found that two of the addresses given by the defendant were fictitious, and they were unable to locate a Luke Waters anywhere. The defendant testified that he made a purchase from Western Metals on December 20 and that he did not make any telephone calls to Western Metals on December 22. With respect to the box of fluorescent bulbs identified as coming from Western Metals he testified that he never wanted to believe that it was in his truck, but that it possibly could have been. Two witnesses testified that the defendant's voice and manner of talking closely resembled that of the person who had made the telephone calls on December 22. A tape recording of a conversation between the defendant and one of the officers was introduced in evidence and played to the jury.

[1] The appellant first contends that the evidence of property found in his truck was erroneously admitted, because it was obtained by an illegal search and seizure. It is argued that the officers had no reasonable or probable cause for his arrest since they had no reason to believe that there was any connection between him and Luke Waters. The evidence discloses that the information in the hands of the officers at the time of the arrest was amply sufficient to show that a felony had been committed, and to show reasonable and probable grounds for believing that the defendant was the one who had committed it. The evidence was sufficient to justify his arrest, and a search of the car in connection therewith. No illegal search and seizure appears. People v. Baker, 135 Cal.App.2d 1, 286 P.2d 510.

[2–4] It is next contended that certain evidence was improperly admitted over appellant's objection. Some twenty instances are cited in this connection, most of which are trivial and all of them are without merit. Some are claimed to be hearsay, and it is argued that certain witnesses testified with respect to appellant's transaction on December 20, when the matter in issue occurred on December 22. The matters involved had a material bearing on the main issue in the case. There was no error or prejudice in permitting the district attorney to tell a witness, when the tape recording was played, to pay particular attention to the voice answering the questions. This was for the purpose of comparing this voice with the voice of the person making the phone calls on December 22. Objection is made that one witness was allowed to testify as an expert without qualifying as such. This witness did not testify as an expert, but only as to what he did in filling the order on December 22. The other matters complained of were admissible as a part of the surrounding circumstances, and the argument here made goes to the weight of the evidence and not to its admissibility. In one connection it is argued that the appellant was deprived of the right of cross-examination because the testimony was such that any cross-examination would have been unfavorable to the appellant. It is argued that the evidence that the officers were unable to find persons or firms at the addresses given by the appellant was negative evidence, and not sufficient to prove that they were not at those addresses on December 22, 1955. The weight of this evidence was for the jury. We find no prejudicial error in connection with the admission of evidence.

[5] Finally, it is contended that the evidence was insufficient to sustain the verdict.

The only argument made in this connection is that while the court correctly instructed the jury with respect to what is necessary to establish the crime of theft based on false or fraudulent representation or pretenses and what is necessary for a conviction based on circumstantial evidence, these conditions were not met and if the jury followed these instructions it could not have found as it did. It is argued that there was nothing to show any connection between the appellant and Luke Waters; that there was nothing to show any intent on the part of the appellant to defraud Western Metals; and that the evidence was insufficient since, in a circumstantial evidence case, the evidence must not only be consistent with the hypothesis of guilt but inconsistent with any other rational hypothesis. Under the rule last referred to the evidence, with the reasonable inferences therefrom, was sufficient to justify the jury in finding that the circumstances were not equally compatible with innocence and in bringing in a verdict of guilty. It cannot be said, as a matter of law, that upon no hypothesis whatever was the evidence sufficient to support the conclusion reached by the jury. People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[6] The main issue in the case was as to the identity of the party ordering these goods from Western Metals on December 22. In other words, as to whether or not the appellant was the person who carried through that transaction under the name of Luke Waters. The evidence, with the reasonable inferences therefrom, sufficiently supports the jury's finding in that regard. Any reasonable doubt in this connection, which might or might not otherwise have existed, was apparently removed by the conflicting statements and admissions made by the appellant, and by his own testimony on the stand which rather clearly disclosed that he was not telling the truth. The question was one of fact for the jury and the evidence supports the verdict.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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145 Cal.App.2d 660

Ruth W. LYON, Plaintiff and Respondent,

v.

Ralph M. LYON and American Trust Company, Defendants,

Ralph M. Lyon, Appellant.

Civ. 8898.

District Court of Appeal, Third District, California.

Nov. 7, 1956.

Actions for divorce, to quiet title to personal property and an action involving title to real property, which actions were consolidated for trial. From so much of judgment of the Superior Court, Napa County, Harlow V. Greenwood, J., as determined the rights in the real property the individual defendant appealed. The District Court of Appeal, Van Dyke, P. J., held, inter alia, that the evidence sustained court's findings that the joint tenancy deed which had been executed by wife to husband had been fraudulently procured and was therefore to be voided.

Judgment affirmed.

1. Fraud ⚿49

Where there was no pleading of fraud in original complaint, defendant's objection as to introduction of evidence of fraud ought to have been sustained, and plaintiff's counsel should have been compelled to amend his pleadings to allege fraud or be confined to issues presented by pleading under which case had been brought to trial.

2. Appeal and Error ⚿1039(13)

Where court from beginning took the position, and so advised counsel for defendant, that court would consider granting a right to amend at close of plaintiff's evidence regarding fraud, and when that point was in fact reached plaintiff's counsel announced that plaintiff was resting her case subject to "reserved right" to amend to conform to proof and at close of evidence leave to so amend was granted, and no continuance was requested, and it did not appear that case was not as fully tried upon that issue as parties deemed necessary, the error in admitting evidence of fraud before pleading had been amended did not justify reversal. West's Ann.Code Civ.Proc. § 469.

3. Pleading ⟹26

Form is subordinated to substance in pleading and practice in civil cases.

4. Deeds ⟹196(3)

Presumption of undue influence arises in transaction between wife and husband gaining advantage therefrom, which is rebuttable by proof of full disclosure to wife.

5. Deeds ⟹196(3)

Execution of joint tenancy deed by wife to husband without valuable consideration raised presumption that deed was the result of undue influence and burden was cast upon husband to prove otherwise.

6. Deeds ⟹211(3)

Evidence sustained findings that joint tenancy deed from wife to husband had been fraudulently procured and hence was to be voided.

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Francis H. Frisch, Napa, for appellant.

John E. Anderton, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

At the end of five years of marriage, Ruth W. Lyon, plaintiff and respondent in this appeal, brought three actions against her husband, Ralph M. Lyon, appellant herein. The three actions were consolidated for trial. One was an action for divorce which terminated in Ruth's favor, and Ralph has taken no appeal. Another was to quiet title to personal property, and this action also terminated in Ruth's favor; again Ralph has not appealed. The third action involved the title to certain real property on which defendant American Trust Company held a lien. The judgment in this action determined that Ruth was the owner of the property and that Ralph had no interest therein; Ralph has appealed. The judgment preserved the lien rights of American Trust Company. Herein, therefore, we are concerned only with the attacks made by Ralph upon the judgment as to the ownership of the real property.

The original complaint was entitled as a complaint to partition real property. The status of Ruth and Ralph as husband and wife was alleged, and it was alleged further that the two were the record owners in joint tenancy of the subject property; that the property had been purchased by Ruth prior to the marriage and that she had paid the entire purchase price therefor from her separate funds; that about two years after the marriage she caused the property to be conveyed to herself and Ralph in joint tenancy; and that the conveyance was made as a matter of convenience and to facilitate passage of title to said real property in case of the death of either plaintiff or said defendant Ralph M. Lyon. It was further alleged that after she bought the property Ruth, with the knowledge and consent of Ralph, had paid from her separate estate various sums of money in the improvement and betterment of the property and in the discharge of taxes levied against it; that no community funds of the two had been expended either for the purchase of the property or the improvement or betterment of it and that Ralph had never contributed anything to cost, maintenance, or improvement from his separate funds. Ruth prayed that the respective interests of the parties in the property be ascertained and determined, that partition be had according to such interests or that the property be sold and the proceeds so divided. Ralph answered, admitting that Ruth had paid the original purchase price from her separate funds, but raised issues as to the source and nature of the funds that had been expended upon the property, alleging affirmatively that community funds of the parties had been so expended. He, too, prayed that the respective interests of the parties in the property be ascertained, and that it be partitioned or sold.

Appellant first contends that the trial court erred in admitting evidence of fraud on the part of Ralph in procuring the joint tenancy deed. The following occurred: At the beginning of the trial Ruth's counsel made a statement to the court concerning the issues and the evidence he proposed to adduce. He said he expected to prove that when the parties were married Ralph had nothing and that he had earned nothing during the marriage; that he had been guilty of continuous fraudulent conduct for the purpose of obtaining money from Ruth; that he obtained over $30,000 in cash; that all the money which purchased, improved and maintained the property came from Ruth's separate estate; that Ralph took fraudulent advantage of her in violation of his fiduciary duties and thereby obtained conveyance of the property in joint tenancy. Ruth's counsel stated that he further expected to show that, even assuming the validity of the joint tenancy transaction, Ruth would be entitled to have set off against Ralph's interest the amounts she had expended in the maintenance and improvement of the property; that Ralph had contributed nothing and had placed the entire burden for maintenance and improvement upon Ruth. Ralph's counsel asserted that the parties were bound by the existing pleadings and could not go outside of them; that there was no allegation of fraud or misconduct on the part of Ralph, and he was not prepared at that time to meet any such issue. He stated that as the pleadings then stood the only attack made upon the conveyance rested in the allegation that the conveyance had been made as a matter of convenience and to facilitate passage of title to the property in the case of the death of one of the parties. The trial court suggested that Ruth's pleadings could be amended to conform to proof, and thereafter, over the objection of counsel for Ralph, permitted testimony addressed to the claimed fraudulent conduct of Ralph in obtaining the execution of the joint tenancy deed. At the conclusion of the evidence the court granted permission to Ruth's counsel to amend the complaint to conform to the proof that had been made, and the complaint was so amended. By its decree the court adjudged that the interest of Ralph under the deed had been fraudulently procured, that the deed was invalid because of such fraud and that Ruth was the sole owner of the property. The trial court further found that at the time the joint tenancy was created, Ruth had not been aware of the legal effect of the documents through which it was created, did not know that Ralph could thereby claim a present vested interest in the property and at no time had intended to convey to him such present vested interest.

There is, of course, a wide difference between proving a deed invalid for fraud in its procurement and invalidating a deed for want of delivery, or for want of intent to convey any estate, or the estate which it purports to convey. The distinction is pointed out in Cox v. Schnerr, 172 Cal. 371, 156 P. 509.

[1,2] There was no pleading of fraud in the original complaint. The objection of Ralph's counsel to the introduction of evidence of fraud ought to have been sustained, and counsel for Ruth should have been compelled to amend his pleadings to allege fraud or be confined to the issues presented by the pleading under which he brought the case to trial. To proceed as the court did was error. But is appears that the court from the beginning took the position, and so advised counsel for appellant, that he would consider granting a right to amend at the close of respondent's evidence. When that point was in fact reached respondent's counsel announced that plaintiff was resting her case subject to his "reserved right" to amend to conform to the proof that had been introduced. At the close of evidence leave to so amend was asked and granted. This was all irregular, but it does not appear that appellant suffered harm from this mode of proceeding. No continuance was requested in order to prepare to meet the

attack on the ground of fraud, or to set up special defenses thereto, and it does not appear that the case was not as fully tried upon that issue as the parties deemed necessary. We hold that such error as inhered in the mode of procedure would not justify reversal and further trial. Section 469 of the Code of Civil Procedure provides:

> "No variance between the allegation in the pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits." See Lyles v. Perrin, 134 Cal. 417, 66 P. 472; Consolidated Pipe Co. v. Wolski, 211 Cal. 563, 296 P. 277.

[3] Appellant contends further that the trial court erred in permitting the plaintiff to file an amended complaint alleging fraud. What has been said disposes of this contention also. And as said in Vallera v. Vallera, 64 Cal.App.2d 266, 272, 148 P.2d 694, 697:

> "In the final analysis, the aims and objects of a trial are and should be to get at the truth. While formal requirements of pleading and practice cannot be dispensed with by the court, it can usually make such orders or grant such amendments as the case progresses as will tend to justly dispose of the issues presented upon their merits. Form is subordinated to substance in pleading and practice in civil cases. In passing upon the construction, or permitting the filing of amended pleadings, the court is justified in adopting a liberal attitude to the end that substantial justice may be attained upon the merits of the controversy."

[4] Finally, appellant contends that the proof was insufficient to sustain the finding of fraud. The situation presented by the record is covered by the rule well stated in Smith v. Lombard, 201 Cal. 518, 524, 258 P. 55, 58, as follows:

> " 'It is the rule that in transactions between husband and wife whereby the former gains an advantage a presumption of undue influence arises (Civ. Code, § 2235), but the presumption is disputable and may be overcome by proof of a full and fair disclosure of all that the wife should know for her benefit and protection concerning the nature and effect of the transaction. (In re Estate of Cover, 188 Cal. 133, 204 P. 583).
>
> " 'The ultimate fact to be determined in this class of cases is whether the act was induced by such influence, the fact being taken for granted prima facie where it appears that the husband gained an advantage by means of the transaction.' " (See, also, Combs v. Combs, 75 Cal.App.2d 903, 171 P.2d 949.)

[5] It appears clearly from the record that the joint tenancy deed was executed without valuable consideration, and therefore the presumption arose that the deed was the result of undue influence and the burden was cast upon appellant to prove otherwise. Combs v. Combs, supra. That husband and wife in fact stood in confidential relationship to each other appears from the testimony of both. Admittedly, and beginning shortly before the marriage, Ruth transferred from time to time substantial sums to Ralph, who said that he expended the sums for their living expenses. But the sums are so large that the trial court could conclude his expenditure thereof could not be accounted for on that theory. It appears that she was deeply enamored of him and for years sold securities owned by her and turned the proceeds over to him with unquestioning confidence that he would protect her interests. It appears also that he stimulated the flow of largess by telling her that she must advance money to him. It appeared he had failed in business before the marriage, and efforts were being made to collect by out-of-state creditors. When she remonstrated as to the amount of money she was giving him he replied to her, "We are in this thing up to our necks". He told

her that in order to save anything he had to have help to get out of trouble; that he owed a great deal of money, and that if she did not help him she would lose everything; that everything she owned would be taken away from her and she would have to go bankrupt; that he had nothing to lose, but that she would lose everything; that all her property would have to go to satisfy creditors. It appears that she was untrained in business. Finally, when the break came and the parties separated, Ralph sold many articles of furniture that were in the common residence of the parties and took and sold business fixtures such as a walk-in icebox and various mechanical devices which had been purchased and paid for by her funds for use in the chicken raising business in which he had been engaged. The proceeds he kept. He said he did these things because he had to have something to live on. Concerning the joint tenancy deed itself, the record shows that her understanding of the transaction as testified to by her was that they had gone to an attorney's office to have something drawn up so that if she should die he would have the place, and that his name would be on the deed so that he could feel that she was not the only one who had anything while he had nothing; that she had never previously executed a deed, and no one explained to her the effect of the deed she executed. She said she had never heard of a joint tenancy deed and learned of it and of its nature for the first time in the summer of 1954 when her attorney explained it to her. When asked what she believed had been accomplished when she signed the document, she said: "What I mean to try to say is that I know in Louisiana my grandmother was given two houses, one in the city and one in the country, by her sons and very much like the same sort of arrangement, I think,—in which the house was not hers actually, neither of the houses were hers but for her lifetime she could live in them." She said she did not know that by executing the deed she was giving Ralph an equal interest with herself in the property, but understood that his name would appear as joint owner with her and thought that if she died he would have a place to live. Of course, we are not here concerned with conflicts in the evidence. The attorney who drew the deed and attended to its execution testified that he explained the effect of the transaction to her. He was unable to repeat with exactness just what he had said to her due to the lapse of time and to the fact that it was a rather routine transaction in his office. The following questions and answers appear in the record:

> "Q. What explanation, if any, that you can recall did you make to Mrs. Lyon as to the effect of the execution of these deeds? A. That the execution of these deeds would *creat* a joint tenancy between her and Mr. Lyon.
>
> "Q. You explained that to her, is that correct? A. And that the joint tenancy carried the right of survivorship.
>
> "Q. Did you also explain to her that it conveyed to Mr. Lyon a present one-half interest? A. I can't recall the entire explanation. My notes indicate that it was separately discussed * * *.
>
> "Q. Did you discuss this matter with Mrs. Lyon at a time when Mr. Lyon was not present? A. I don't believe so."

[6] Without going further, it is sufficient to say that from this record it was a question for the court to determine as to whether or not there had been the full and fair disclosure to the wife, understood by her, of things that she ought to have known for her benefit and protection concerning the nature and effect of the transaction. It was also a question of fact for the trial court as to whether or not Ralph had borne the burden of overcoming the presumption of fraud. We hold that the court's findings that the deed had been fraudulently procured and was therefore to be voided is sustained by the record. This being so, it is unnecessary to discuss appellant's con-

tention that there was no evidence of an understanding between these parties that the deed in the form of a joint tenancy deed did not carry out their intentions.

The judgment appealed from is affirmed.

PEEK, J., and McMURRAY, J. pro tem., concur.

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145 Cal.App.2d 628

Richard MACINTOSH, Beatrice Macintosh, Richard R. Macintosh, Plaintiffs and Respondents,

v.

DIRECTOR OF EMPLOYMENT, Defendant and Appellant.

Civ. 8897.

District Court of Appeal, Third District, California.

Nov. 2, 1956.

Action to recover unemployment insurance taxes paid by partnership. The Superior Court of Sacramento County, J. O. Moncur, J., rendered judgment for plaintiffs and defendant appealed. The District Court of Appeal, McMurray, J. pro tem., held that change resulting from death of one partner and substitution of his widow as member was not a change in employing unit with respect to computation of maximum upon which unemployment insurance taxes were due.

Affirmed.

Taxation ⚷347.1

Mere change in membership of partnership, resulting from death of one partner and substitution of his widow, was not a change in employing unit and hence did not require exclusion of amounts of unemployment insurance taxes paid by original partnership in determining maximum upon which wages paid after partner's death would be considered taxable. West's Ann.Unempl.Ins.Code, §§ 100 et seq., 926, 930.

◆

Edmund G. Brown, Atty. Gen., by Vincent P. Lafferty, Deputy Atty. Gen., for defendant and appellant.

Martin S. Stolzoff, Beverly Hills, for plaintiffs and respondents.

McMURRAY, Justice pro tem.

This is an appeal from a judgment of the superior court of Sacramento which awarded respondents Macintosh the sum of $3,011.14 plus interest which represented unemployment insurance taxes paid by the respondents after an assessment by the Director of Employment.

This case involves the meaning of certain sections of the Unemployment Insurance Act, Unemployment Insurance Code, § 100 et seq., as it was in effect during the calendar year 1950 and resolves itself into a question as to whether or not the amounts paid by a predecessor employing unit in reaching the $3,000 limit upon which wages are considered taxable under the Unemployment Insurance Act, might be tacked on by the successor employing unit. Specifically, in this case a 1936 partnership consisting of four general partners was formed. The business was conducted under the name of "Macintosh Studio Clothes." In June of 1950, Walter Macintosh, one of the partners, died intestate, his wife succeeded to his interest, and his brother Richard acted as administrator of the estate which passed to Walter's wife. No change in the conduct of the business resulted from Walter's death nor did the partnership formally dissolve. The business was continued exactly as it had been before except that Walter was no longer a partner. The business had employed about 80 persons prior to his decease and the same number afterwards. Many of these employees earned over $3,000 during the year 1950. The partnership only paid unemployment insurance taxes on the first

$3,000 paid to each employee during that year.

The Director of Employment made an assessment against the plaintiffs for the sum of $2,522.82, plus penalties, which sum was the tax alleged due from the successor partnership on the first $3,000 in wages paid by the successor to each employee during the year 1950. It was the Director of Employment's contention that after the death of Walter Macintosh, "Macintosh Studio Clothes" constituted a new employing unit and was liable for the tax on the first $3,000 of wages paid by it to each employee. The main question here is whether the death of this general partner resulted in such a new employer or employing unit as is contemplated by the tax statute. There can be little doubt that the death of Walter resulted in a new entity being created, but whether or not that entity is such as to constitute a new employing unit is the matter here for determination.

Section 11, subdivision (a) of the California Unemployment Insurance Act, 3 Deering's General Laws, Act 8780d, sections 11(a), 37, here under consideration, provided that contributions be made by employers to the defendant based on wages paid by the employer. The statute excluded from the definition of the term wages remuneration in excess of $3,000 paid to every individual by an employer in any calendar year. The cited section read in part:

> "Except as hereinafter in the section provided the term 'wages' means:
>
> "(1) All remuneration payable for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the cash value of all remuneration payable to any medium other than cash.
>
> * * * * * *
>
> "(c) If, when, and during such time as the definition of the term 'wages,' as contained in the Federal Unemployment Tax Act excludes from 'wages' any one or more of the following types of payments, then such type or types of payments as are so excluded shall likewise be excluded from the definition of wages as contained in subsection (a) of this section:
>
> "(1) That part of the remuneration which, after remuneration equal to three thousand dollars ($3,000) has been paid to an individual by an employer with respect to employment during any calendar year is paid after December 31, 1939, and prior to January 1, 1947, to such individual by such employer with respect to employment during such calendar year; * * *."

Appellant urges that the mere change in entity is sufficient to require this court to hold that there was a change in the employing unit and in support of its position cites section 15031 of the Corporations Code which deals with the dissolution of a general partnership where the death of a partner results in the dissolution, and further relies upon the case of State of California, Department of Employment v. Fred S. Renauld & Co., 9 Cir., 1950, 179 F.2d 605, where the federal court held that a successor corporation to a partnership, where the stock interest was the same as in the partnership, was a new employing unit for the purpose of the unemployment insurance tax. In this case the federal court did not consider as binding upon it two California cases decided by the superior court of San Francisco; Barrett et al. v. California Emp. Com., C.C.H. Unemployment Insurance Reporter, California, Par. 1205.116 (1945), and California Emp. Com. v. Ransohoff, Inc., et al., C.C.H. Unemployment Insurance Reporter, California, Par. 1205.115 (1944), both of which cases held that successor entities were not new employing units but constituted a single employer. In the Renauld case the court held that a partnership and the corporation which succeeded it were separate units and, as a reason for this construction, stated that it would facilitate administration of the Act. Thereafter, however, the case of Mc-

Henry's, Inc., v. California Emp., etc., Comm., 112 Cal.App.2d 245, 246 P.2d 76, was decided. In that case a husband and wife, each of whom had invested separate and community funds in a business subsequently incorporated the business, and stock was issued to each of them individually. The business continued exactly as it had been before the incorporation except that the legal form had been changed. The court said that the terms "employing unit" or "employer" as used in the unemployment insurance statute refer to the unity of enterprise and are not concerned with the shifting of management or the legal form of the same enterprise. The court held that for the purpose of the unemployment insurance tax only one employer existed in the year the business was incorporated. At page 249 of 112 Cal.App.2d, at page 79 of 246 P.2d the court, in outlining certain aspects to be considered in determining whether or not a new entity arose, says:

> "There was likewise no change in the type or location of the business. Also the actual management was conducted by plaintiff in the same manner as it had been during the operation of plaintiff's predecessors. The identity of the business was carried on under the same name and was not altered or otherwise affected by the transfer. Therefore, there was no change in the employing unit."

It is our opinion that in the instant case, as in the McHenry case, the only change made was one of form and not of substance. In both of these cases there was, it is true, a new legal entity, but this legal entity conducted the business in exactly the same manner as its predecessor. Only a change in the identity of one of the partners is here apparent, namely the widow of the deceased partner succeeding to his share. The change was one in form only and was not one of substance.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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145 Cal.App.2d 568

SACRAMENTO MUNICIPAL UTILITY DISTRICT, a municipal utility district, Petitioner,

v.

Joseph E. SPINK, as Secretary of Sacramento Municipal Utility District, Respondent.

Civ. 9050.

District Court of Appeal, Third District, California.

Nov. 1, 1956.

Original mandamus proceeding by Municipal Utility District to compel its secretary to sign and execute revenue bonds authorized by electors of district. The District Court of Appeal, Schottky, J., held, in part, that Municipal Utility District Act amendment, authorizing districts, which have owned and operated electric distribution system for eight years or more, and which have population over 250,000, to issue revenue bonds for construction of hydroelectric and transmission facilities, does not contravene constitutional prohibition upon local or special legislation, where classification was not palpably arbitrary and beyond rational doubt erroneous.

Writ to issue accordingly.

1. Mandamus 🔑103

Mandamus was appropriate remedy to compel secretary of municipal utility district to sign revenue bonds if proposed issue met requirements of law, since acts demanded were ministerial duties. West's Ann.Public Util.Code, §§ 11501 et seq., 12850–12852.

2. Courts 🔑207(4)

Original jurisdiction is frequently exercised by appellate courts of mandamus proceedings to compel, for example, secretary of municipal utility district to sign revenue bonds if proposed issue met requirements of law. West's Ann.Public Util. Code, §§ 12850–12852.

3. Statutes 🔑71

Within constitutional prohibition against special legislation, a law to be general in its scope need not include all classes. West's Ann.Public Util.Code, §§ 12850–12852; West's Ann.Const. art. 4, § 25, subd. 33.

4. Statutes ⚷77(1)

Within constitutional prohibition against special legislation, an act which applies uniformly to any single class in its entirety, when class is founded upon some natural intrinsic or constitutional classification, is not special legislation. West's Ann.Public Util.Code, §§ 12850–12852; West's Ann.Const. art. 4, § 25, subd. 33.

5. Statutes ⚷95(4)

Municipal Utility District Act amendment, authorizing districts which have owned and operated electric distribution system for eight years or more and which have population over 250,000 to issue revenue bonds for construction of hydroelectric and transmission facilities required to deliver power and energy to distribution system, does not contravene constitutional prohibition upon special legislation, where classification was not palpably arbitrary and beyond rational doubt erroneous. West's Ann.Public Util.Code, §§ 12850–12852; West's Ann.Const. art. 4, § 25, subd. 33.

6. Statutes ⚷109.2

Under constitutional requirement that every act shall embrace but one subject, which must be expressed in its title, generality of title is not an objection so long as provisions of act are germane to subject of act. West's Ann.Public Util.Code, §§ 12850–12852; West's Ann.Const. art. 4, § 24; West's Ann.Gov.Code, § 54300 et seq.

7. Statutes ⚷123(7)

Municipal Utility District Act amendment, which authorized certain districts to finance construction of hydroelectric facilities by issuance of revenue bonds under Revenue Bond Law, and whose title stated that amendment added new article to act relating to municipal utility districts, did not violate constitutional requirement that every act shall embrace but one subject, which must be expressed in its title, though title did not refer to fact that it related to only certain districts, and though no reference was made to fact that statute permitted districts to finance construction by bonds issued under such law. West's Ann. Public Util.Code, §§ 12850–12852; West's Ann.Gov.Code, § 54300 et seq.; West's Ann. Const. art. 4, § 24.

8. Municipal Corporations ⚷950(15)

Provision of Municipal Utility District Act, in effect at time 1938 bonds were issued, that only revenue producing utilities shall be acquired, owned or operated by district, and that as far as possible utilities shall be self-supporting, but that in order so to do, board shall not be required to fix rate which is unreasonably high, nor to cover large expenditures and interest required for future needs and development, did not compel directors to allocate any of revenue received to payment of these bonds. West's Ann.Public Util.Code, §§ 12850–12852.

9. Municipal Corporations ⚷953

A bond which contains a general obligation to pay does not contain an implied promise to pay out of a particular fund except in a clear case. West's Ann.Public Util.Code, §§ 12850–12852.

10. Constitutional Law ⚷143

If revenues of municipal utility district were not specifically pledged to payment of bonds issued by district in 1938, contract entered into between 1938 bondholders and district was not impaired if district subsequently diverted those revenues to secure revenue bond issue. West's Ann.Public Util.Code, §§ 12850–12852.

11. Municipal Corporations ⚷953

That bonds issued by municipal utility district in 1938 contained covenant pledging "full faith and credit" of district to their punctual payment did not pledge revenues of district to payment of such bonds. West's Ann.Public Util.Code, §§ 12850–12852.

See publication Words and Phrases, for other judicial constructions and definitions of "Full Faith and Credit".

12. Constitutional Law 🔑143

Where revenues of municipal utility district were not specifically pledged to payment of bonds issued by district in 1938, contract entered into between 1938 bondholders and district was not impaired by diversion of these revenues to secure subsequent revenue bond issue. West's Ann.Public Util.Code, §§ 12850–12852.

13. Municipal Corporations 🔑950(15)

Provision of Government Code forbidding local agency from issuing revenue bonds for generation, production, transmission, and distribution of electric energy would not preclude municipal utility district from financing construction of hydroelectric and transmission facilities by issuance of revenue bonds, where amendment of Municipal Utility District Act specifically granted such authority and negatived effect of Government Code provision. West's Ann.Public Util.Code, §§ 12850–12852; West's Ann.Gov.Code, §§ 54309, 54310.

14. Municipal Corporations 🔑950(15)

Under Municipal Utility District Act amendment, authorizing certain districts to issue revenue bonds to finance construction of hydroelectric and transmission facilities, and providing that such shall constitute "enterprise" within Government Code provision, district may pledge revenues from entire integrated distribution enterprise to the servicing of proposed bonds; district is not restricted to income from proposed project. West's Ann.Public Util.Code, §§ 12850–12852; West's Ann.Gov.Code, §§ 54309, 54310.

15. Municipal Corporations 🔑950(15)

Where resolution calling for issuance of revenue bonds by Municipal Utility District provided that bonds were to be secured by all revenues of district as it exists and as it will be improved and extended by facilities of river project, and statutes authorized pledging of revenue from distribution enterprise to servicing of proposed bonds, revenues from entire system could be used to satisfy revenue bond issue. West's Ann.Gov.Code, §§ 54300 et seq., 54384, 54420, 54422, 54478(b); West's Ann. Public Util.Code, §§ 12850–12852.

16. Mandamus 🔑172

Question whether water rights would be available for project would not be determined by court in mandamus proceeding to compel secretary of municipal utility district to issue revenue bonds authorized by electorate for construction of hydroelectric and transmission facilities, where it could not be said as matter of law that district would not be able to acquire necessary water rights for operation of project. West's Ann.Public Util.Code, §§ 12850–12852.

17. Municipal Corporations 🔑883

Sacramento Municipal Utility District has power to pay any taxes levied upon property acquired by it in El Dorado County. West's Ann.Public Util.Code, §§ 11884, 11891, 12721; West's Ann.Const. art. 11, § 18; art. 13, § 1.

18. Municipal Corporations 🔑858

By acquiring property in El Dorado County, Sacramento Municipal Utility District does not thereby incur indebtedness in any sense of the word. West's Ann. Public Util.Code, §§ 11884, 11891, 12721; West's Ann.Const. art. 11, § 18; art. 13, § 1.

19. Municipal Corporations 🔑864(1)

Future taxes that might later be levied against property owned by Sacramento Municipal Utility District in El Dorado County would not constitute indebtedness within meaning of debt limitation provision of Public Utilities Code, since such taxes would not be voluntary obligation, but obligation imposed by law. West's Ann.Public Util.Code, §§ 11884, 11891, 12721; West's Ann.Const. art. 11, § 18; art. 13, § 1.

20. Municipal Corporations 🔑57, 956(1)

The Sacramento Municipal Utility District has power to increase its revenues to meet any increase in costs by increase in its rates, or by levy of taxes. West's Ann. Public Util.Code, §§ 11884, 11891, 12721, 12809, 12841, 12892; West's Ann.Const. art. 11, § 18; art. 13, § 1.

21. Municipal Corporations ⟹864(1)

That county in which municipal utility district proposed to construct its revenue bond financed hydroelectric and transmission facilities may impose taxes which would exceed annual income of district, would not transgress debt limitation provision of Public Utilities Code, since such taxes would not constitute indebtedness within meaning of such debt limitation provision. West's Ann.Public Util.Code, §§ 11884, 11891, 12721, 12809, 12841, 12892; West's Ann.Const. art. 11, § 18; art. 13, § 1.

22. Mandamus ⟹172
Municipal Corporations ⟹950(15)

That municipal utility district had allegedly greatly underestimated cost of proposed construction of hydroelectric and transmission facilities, so that authorized revenue bonds would be insufficient to complete project, would not affect validity of bonds, and accordingly would not be subject to inquiry by court in mandamus proceedings involving validity of bond issue. West's Ann.Public Util.Code, §§ 12850–12852.

23. Municipal Corporations ⟹950(15)

Provision of Public Utilities Code that board of municipal utility district is not required to cover by rates large expenditures required for future needs and development does not preclude district from pledging all of its revenues to payment of revenue bonds issued to finance construction of hydroelectric and transmission facilities; provision, though not compelling district to pay for large expenditures for future needs from rates, does not so forbid. West's Ann.Public Util.Code, §§ 12809, 12850–12852; West's Ann.Gov.Code, § 54515.

24. Municipal Corporations ⟹950(15)

That municipal utility district could purchase electric power at lower cost from private company would not affect validity of revenue bonds issued by district to finance construction of its own hydroelectric and transmission facilities, since determination by board that public interest and necessity demanded acquisition and construction of facilities and that costs should be financed through issuance of revenue bonds was conclusive. West's Ann.Public Util.Code, §§ 11801, 12801, 12850–12852.

25. Municipal Corporations ⟹272

Determination of municipal utility district to exercise its statutory authority in matter by constructing hydroelectric project rather than constructing steam electric generating plant was not abuse of discretion. West's Ann.Public Util.Code, §§ 12850–12852.

◆

Frank L. Sprague, Sacramento, McDonough & Wahrhaftig, and Downey, Brand, Seymour & Rohwer, Sacramento, and Orrick, Dahlquist, Herrington & Sutcliffe, San Francisco, of counsel, for petitioner, Sacramento Municipal Utility Dist.

Brandenburger, White & Dillon, Sacramento, for respondent Spink.

SCHOTTKY, Justice.

This is an original proceeding instituted by the Sacramento Municipal Utility District to compel Joseph E. Spink, as Secretary of the Sacramento Municipal Utility District, to sign and execute some $85,000,000 worth of bonds which were authorized by the electors of the district.

The Sacramento Municipal Utility District was organized in July of 1923 under the provisions of the Municipal Utility District Act (now Public Utilities Code, Division 6, Section 11501 et seq.). The District serves a population in excess of 300,000 and comprises an area of approximately 650 square miles in Sacramento and Placer Counties. The District has owned and operated an electric distribution system for over eight years. The District has been purchasing power from the United States Bureau of Reclamation. It does not have any facilities for generating electric power. In 1955 the legislature added certain provisions to the Public Utilities

Code which permit a municipal utility district which has owned and operated an electric distribution system for at least eight years and which has a population in excess of 250,000 to issue revenue bonds for the purpose of financing the construction of hydroelectric facilities and associated transmission facilities required to deliver the power and energy generated to the distribution system. Stats.1955, ch. 1268, sec. 1, Public Utilities Code, secs. 12850–12852.

Acting under the authority granted by these statutes, the District called an election at which the electorate was asked to authorize the issuance of some $85,000,000 worth of revenue bonds to be issued under the provisions of the Revenue Bond Law of 1941, Government Code, § 54300 et seq., for the purpose of developing hydroelectric generating facilities on the American River in El Dorado County. The project known as the Upper American River Project will provide for the generating of electricity and the construction of transmission lines to carry the electricity generated to the present distribution system. The bond issue was approved by the voters of the district. Thereafter, the board of directors adopted a resolution authorizing the issuance of the revenue bonds.

The proposed bonds are to be secured by a lien upon the gross revenues of the district including the revenues of the existing distribution system after the maintenance and operating costs are paid. The proposed bonds will not be a general obligation debt of the district; the purchasers of the bonds cannot compel the exercise of the taxing power of the district or the forfeiture of any of its property.

At the present time the District has an indebtedness of $21,270,000, including some $10,317,000 worth of bonds issued in 1938. These bonds were issued under the provisions of the Municipal Utility District Act of 1921 as amended, Stats.1921, ch. 218, Stats.1929, ch. 31, Stats.1931, ch. 75, sec. 18, which at the time the bonds were authorized provided:

> "Only revenue producing utilities shall be acquired, owned or operated by a district formed under the provisions of this act. The rates and charges for commodities or service furnished shall be fixed by the board of directors. As far as possible utilities shall be self-supporting but in order so to do the board shall not be required to fix a rate which in its opinion is unreasonably high, nor to cover large expenditures and the interest thereon required for future needs and development.
>
> "The words 'revenue producing utilities' as used in this act, shall be deemed to mean such utilities as those from which revenue is customarily or may be derived by means of charges, rates, or rentals imposed upon or collected from users, consumers or customers thereof, together with such works, facilities and appliances used or useful in connection therewith or incidental thereto."

Section 20 read:

> "(1) If, in the opinion of the board of directors, the revenues will not be sufficient to pay the principal or interest on any bonded debt as it becomes due, or to carry out the objects and purposes of the district, then said board shall levy a tax for such purpose or purposes and fix the amount of money necessary to be raised therefor by taxation."

Included in the covenants of the 1938 bonds is the following: "The full faith and credit of said District are hereby pledged for the punctual payment of the principal and interest of this bond."

Respondent Joseph E. Spink as Secretary of the Sacramento Municipal Utility District has refused to execute the proposed bonds because as he alleges they do not meet the requirements of law.

[1, 2] Mandamus is, of course, an appropriate remedy to compel respondent to sign the bonds if the proposed issue meets the requirements of the law, since the acts demanded are ministerial duties, City of Oxnard v. Dale, 45 Cal.2d 729, 290 P.2d 859; City of Fairfield v. Hutcheon, 33 Cal.

2d 475, 202 P.2d 745; California Toll Bridge Authority v. Kelly, 218 Cal. 7, 21 P.2d 425; Fairfield-Suisun Sewer District v. Hutcheon, 139 Cal.App.2d 502, 294 P.2d 102, and original jurisdiction has frequently been exercised by the appellate courts in proper cases of this nature. City of Grass Valley v. Walkinshaw, 34 Cal.2d 595, 212 P.2d 894; Ventura County Harbor District v. Board of Supervisors, 211 Cal. 271, 295 P. 6; Fairfield-Suisun Sewer District v. Hutcheon, supra.

[3, 4] Respondent's first contention is that sections 12850–12852 of the Public Utilities Code are in contravention of the Constitution of the State of California because they constitute a violation of the mandate of Article IV, Section 25, subdivision 33, that the legislature shall not pass any local or special laws where a general law can be made applicable. Respondent claims that the law is special because it only applies to districts which have owned and operated an electric distribution system for over eight years and have a population of over 250,000. Public Utilities Code, sec. 12850. The law is not special in the sense that it refers to the Sacramento Municipal Utility District. A law to be general in its scope need not include all classes. An act which applies uniformly to any single class in its entirety when the class is founded upon some natural intrinsic or constitutional classification is not special legislation. In re Sutter-Butte By-Pass Assess. No. 6, 191 Cal. 650, 671, 218 P. 27.

As was said in Sacramento Municipal Utility District v. Pacific Gas and Electric Company, 20 Cal.2d 684, at page 693, 128 P.2d 529, at page 534:

> "* * * None of those constitutional principles is violated if the classification of persons or things affected by the legislation is not arbitrary and is based upon some difference in the classes having a substantial relation to the purpose for which the legislation was designed. County of San Bernardino v. Way, 18 Cal.2d 647, 117 P.2d 354; Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717. A law to be general in its scope need not include all classes of individuals in the state. Nor is a classification void because it does not embrace within it every other class which might be included. Heron v. Riley, 209 Cal. 507, 289 P. 160; Powers Farms v. Consolidated Irr. Dist., supra. Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. In re Weisberg, 215 Cal. 624, 12 P.2d 446; Rainey v. Michel, 6 Cal.2d 259, 57 P.2d 932, 105 A.L.R. 148; Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595; Natural Milk, etc., Ass'n v. City and County of S. F., 20 Cal.2d 101, 124 P.2d 25. A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it."

[5] In the instant case it cannot be held that the classification "is palpably arbitrary and beyond rational doubt erroneous." The statute permits only utility districts which have operated an electric distribution system for eight years and which have a population in excess of 250,000 to issue bonds in accordance with the provisions of the Revenue Bond Law of 1941 for the purpose of constructing hydroelectric generation facilities and associated transmission facilities required to deliver the power and energy generated by such facilities to "load center." It is common knowledge that such facilities are expensive. It is reasonable to assume that only populous districts could assure the necessary revenues to finance the cost of such projects. The fact that the legislature limited the application of the statute to districts which have owned and operated a distribution system for eight years may have been due to a determination that a district should

have experience in the distribution of electric power before it was allowed to integrate its system or it may have been due to a determination that the electorate should have a chance to judge the operation of the system before large expenditures for the development of hydroelectric facilities be incurred.

Respondent next attacks the validity of the legislation upon the ground that the subject of the act is not expressed in its title. The legislation was added by Statutes of 1955, Chapter 1268, under the following title: "An act to add Article 6a, comprising Sections 12850 to 12852, inclusive, to Chapter 6 of Division 6 of the Public Utilities Code, relating to municipal utility districts." Article IV, Section 24, of the Constitution of the State of California provides: "Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title." It cannot be doubted that the sections relate to municipal utility districts. Respondent's objection is that the title did not refer to the fact it related to only certain municipal districts and that no reference was made to the fact that the statutes permitted certain utility districts to finance construction by bonds issued under the provisions of the Revenue Bond Law of 1941. In County of Los Angeles v. Hurlbut, 44 Cal. App.2d 88, at pages 100–101, 111 P.2d 963, at page 969, the court stated:

> "It is not necessary that the title of an act should embrace an abstract or catalogue of its contents. Abeel v. Clark, 84 Cal. 226, 229, 24 P. 383. So long as the provisions of a statute are germane to the subject matter of the title, no violence is done to the constitution in omitting from the title an index of all of such provisions. Ex parte Hallawell, 155 Cal. 112, 114, 99 P. 490. Every provision of an act which is closely allied to the subject expressed in the title is germane to it. Utah State Fair Ass'n v. Green, 68 Utah 251, 249 P. 1016. The purpose of the constitutional provision is merely to prevent legislators or the public from being misled by titles to bills whereby legislation relating to one subject might be obtained under the title of another subject. Abeel v. Clark, supra."

In Ikuta v. Ikuta, 97 Cal.App.2d 787, at page 791, 218 P.2d 854, at page 857, the court said:

> "A title will not be held objectionable merely because it is general in terms, or is broader in scope than the provisions of the act, as long as those provisions are germane to the subject * * *."

[6, 7] The title to the act in question certainly deals with municipal utility districts. The act is a short one and states in the title that it adds a new article, 6a, to the act relating to municipal utility districts, and at the outset the act states that it applies only to districts which have owned and operated an electric distribution system for at least eight years and have a population of 250,000 or more. Neither the public nor the legislature could have been misled by the fact that no reference is made in the title to the fact that certain municipal utility districts are empowered to issue bonds under the provisions of the Revenue Bond Law of 1941. The title is general but generality is not an objection so long as the provisions of the act are germane to the subject of the act, and in this case we are satisfied that respondent's contention that the legislation is invalid because the subject of the act is not expressed in the title cannot be sustained.

Respondent next contends that the terms of the contemplated revenue bonds constitute an impairment of the contract with the holders of the bonds issued by the district in 1938, which bonds are still outstanding. Respondent argues that the revenues out of which it is proposed to service the revenue bonds will include all of the revenues derived by the district from the operation of its electrical system exclusive of moneys derived from the levy or collection of taxes; that these revenues will include those derived from the present distribution system; that at the present time the revenues from the distribution system are being used to service the outstanding bonds; that if the holders of the bonds issued in 1938 have a lien on these revenues, the diversion of the revenues would impair the obligation of the contract they made with the District.

When the 1938 bonds were issued the Municipal Utility District Act contained a provision that:

> "Only revenue producing utilities shall be acquired, owned or operated by a district formed under the provisions of this act. The rates and charges for commodities or service furnished shall be fixed by the board of directors. As far as possible utilities shall be self-supporting but in order so to do the board shall not be required to fix a rate which in its opinion is unreasonably high, nor to cover large expenditures and the interest thereon required for future needs and development.
>
> "The words 'revenue producing utilities' as used in this act, shall be deemed to mean such utilities as those from which revenue is customarily or may be derived by means of charges, rates, or rentals imposed upon or collected from users, consumers or customers thereof, together with such works, facilities and appliances used or useful in connection therewith or incidental thereto." Stats.1921, ch. 218, as amended Stats.1931, ch. 75, sec. 18.

[8, 9] The section as it read did not compel the district to allocate any of the revenue received to the payment of the bonds. It contains a guide for the directors to follow. The section specifically provides that large expenditures and the interest thereon which was required for future development could be paid by means other than revenues. Nothing affirmatively appears in the section which compels the conclusion that the directors pledged the revenue or were under an obligation to the bondholders of the 1938 bonds to use the revenues from the distribution system to pay its indebtedness to the bondholders. In our opinion a bond which contains a general obligation to pay does not contain an implied promise to pay out of a particular fund except in a clear case. See 15 McQuillin, Municipal Corporations (3rd Ed.), p. 692.

In City of Oxnard v. Dale, 45 Cal.2d 729, at page 737, 290 P.2d 859, at page 863, the court said:

> "It follows that, in the present case, the former practice of the city to use the revenues from the sewer system to make payments on the general obligation bonds has no bearing upon the question whether the incurring of a subsequent obligation to be paid solely from those revenues, in priority to the general bonds, will violate section 18 of article XI. It may be noted, in this connection, that in the absence of some specific statutory or contractual provision the city could properly reduce or discontinue the imposition of charges for use of its sewer system and arrange for the assessment of taxes to make the payments on its general bonds. Since the city may terminate use of sewer revenues as a means of servicing the general bonds, it is, of course, immaterial that the city, at the same time, pledges the revenues for the payments to be made on an issue of revenue bonds.
>
> "As we have seen, an obligation which is payable out of a special fund is not an 'indebtedness or liability' of a governmental body within the meaning of section 18 of article XI of the Constitution if the governmental body is not required to pay the obligation from its general funds, or by exercise of its powers of taxation, should the special fund prove insufficient."

[10] It is clear from the foregoing quotation that if the revenues were not specifically pledged the contract entered into between the 1938 bondholders and the District is not impaired if the District diverts those revenues to secure a revenue bond issue.

[11, 12] Included in the covenants of the 1938 bonds is the following: "The full faith and credit of said District are hereby pledged for the punctual payment of the principal and interest of this bond." Respondent contends that this clause should be interpreted to mean that the revenues of the District are pledged as security for the bonds. We cannot agree that the phrase "full faith and credit" pledged the revenues of the District to the payment of the bonds. Our research has disclosed only one jurisdiction where the meaning of such phrase has been determined. The Supreme Court of Florida, in State v. City of Lakeland, 154 Fla. 137, 16 So.2d 924, has held that it cannot agree that the phrase "full faith [and] credit" pledged the revenues of the district in payment of the bonds; that in its view the pledge contained in the original obligations no more constitutes an express pledge of the revenues in the legal sense of the term, than it does other income of the district; that it does no more than express an undertaking by the city to be irrevocably obligated in good faith to use its taxing powers as may be required for the full and prompt payment of the principal and interest as it becomes due. We agree with the interpretation of the Florida court and hold that such a covenant does not pledge the revenues.

[13–15] Respondent next contends that the petitioner District has no authority to use revenue from its existing facilities with which to discharge revenue bonds which are to be issued. Respondent first relies on Section 54310 of the Government Code which forbids a local agency from issuing revenue bonds for the generation, production, transmission, and distribution of electric energy. However, Section 12851 of the Public Utilities Code grants the authority and specifically states that said Section 54310 in so far as it is inconsistent with Section 12851 shall not apply. Respondent next argues that the existing system is one enterprise and the proposed project is another and that it is only from the latter that revenues may be derived with which to satisfy the revenue bond issue. Section 12851 of the Public Utilities Code states:

> "A district may * * * issue bonds in accordance with the Revenue Bond Law of 1941 * * * for the purpose of financing the construction of hydroelectric generation facilities and associated transmission facilities required to deliver the power and energy generated by such hydroelectric generation facilities to load center, which shall constitute an 'enterprise' within the meaning of Section 54309 of the Government Code."

The section defines an "enterprise" within the meaning of the Government Code Section 54309 so that revenue bonds can be issued. To construe it so as to limit the revenues of the District which can be pledged to those derived from the facilities constructed would in our opinion defeat the very purpose of the act under which the bonds here under attack were authorized. The statute only applies to existing districts which have owned and operated an electric distribution system for eight years and which have a population in excess of 250,000. It permits those districts to construct hydroelectric generating facilities and facilities for the transmission of the power generated to "load center" (or to the distribution system). If the power is to be used by the District and if the revenues are received from the ultimate consumers and the revenues received from the consumers are confined to the distribution enterprise there can be no revenues from the generating and transmission facilities unless the legislature were to provide some method of allocation. Even if the generation of its own power provided savings in the costs of operation to the District the increased "profits" would still be attributable to the distribution system because that in a practical sense is the only place from which revenues are derived. The more reasonable construction is that the legislature intended the revenues from the entire integrated system (and this is really what the new facilities provide) to be available for the servicing of the revenue bonds. The fact that the legislature defined an enterprise for the purpose of bringing it within the provisions of the Revenue Bond Law of 1941 which provide what facilities may be financed by revenue bonds does not necessarily mean that such enterprise must be construed as an enterprise for the purpose of determining what revenues are available to service such bonds. But even if the proposed facilities and the existing distribution system are two separate enterprises, the revenues of the distribution system may be pledged. Section 54420 of the Government Code provides that the bonds (revenue bonds) are special obligations and are secured by the gross revenues of the enterprise and such funds as are described in the resolution authorizing the issuance of the bonds. See also Sections 54384, 54421, 54222, and 54478(b). The resolution calling for the issuance of the bonds did provide that the bonds were to be secured by all the revenues of the District as it exists and as it will be improved and extended by the facilities of the American River Project. The statutes authorize the pledging of the revenue from the distribution enterprise to the servicing of the proposed bonds. This was done. Therefore, such revenues can be used.

Respondent's next contention is that the District has not acquired and cannot acquire the water rights necessary for the purpose of enabling it to generate hydroelectric power through the proposed works to be constructed as part of the Upper American River Project. Respondent asserts there are no surplus waters of the American River that will be available to the District, and that, therefore, when the voters of the District voted for the issuance of the revenue bonds for the purpose of acquiring all water rights necessary for the contemplated project the measure passed by them was invalid "because it provides for the performance of a legal impossibility."

[16] We deem it unnecessary to discuss the question of whether or not water rights will be available for the project as that is not a matter for this court to pass upon in this proceeding. We may safely assume that the District will not proceed with the construction of works for the generation of electric power until the necessary water rights are assured. We cannot say as a matter of law that the District will not be able to acquire the necessary water rights for the operation of the project.

Respondent contends also that the District does not have authority to submit itself to the taxing power of El Dorado County. It is, of course, true that El Dorado may tax lands and improvements which exist at the time that the District acquires the necessary property in El Dorado County. California Constitution, sec. 1, art. XIII. Respondent contends that El Dorado County might impose taxes which would exceed the annual income of the District and thus the debt limitation imposed upon the District by Section 12841 of the Public Utilities Code would be exceeded.

[17-21] There can be no doubt that the District has the power to pay any taxes levied upon property acquired by it in El Dorado County. Public Utilities Code, Secs. 11884, 11891, 12721. Furthermore, by acquiring property in El Dorado County petitioner District will not thereby incur an indebtedness in any sense of the word. For that matter, even future taxes that might later be levied against property in El Dorado County would not constitute an indebtedness within the meaning of Section 12841, as they would not be a voluntary obligation, but an obligation imposed by law. In construing the similar debt limitation of Article XI, Section 18, of the California Constitution, it has been held many times that an obligation imposed by law does not come within the limitations of that section. See City of Long Beach v. Lisenby, 180 Cal. 52, 179 P. 198; County of

Los Angeles v. Byram, 36 Cal.2d 694, 227 P.2d 4; and 18 Cal.Jur., Municipal Corporations, section 178, page 822. The District has the power to increase its revenues to meet any increase in costs by an increase in its rates, Public Utilities Code, sec. 12809, or by a levy of taxes, Public Utilities Code, sec. 12892.

[22] Respondent next contends that the cost of the project has been greatly underestimated and the authorized revenue bonds will be insufficient to complete it. It is at once apparent that this contention, like the preceding contentions as to water rights and fear of the taxing power of El Dorado County, is not one that goes to the validity of the bonds, but rather to the wisdom of the project. What this court said in Robbins v. Sonoma County Flood, etc., District, 138 Cal.App.2d 291, at page 302, 292 P.2d 52, at page 59, is applicable to these contentions.

> "* * * It is argued that there is and can be no assurance that the estimated cost of the work will bear any reasonable relation to actual costs and that already the costs, as estimated and alleged by plaintiffs, have increased most materially over the estimates made by the public agencies involved. That also may be assumed to be true. But such considerations are not material here nor do they, nor can they, affect the legality of the bonds proposed to be issued and sold. The possibility of such mischances may well have been valid arguments to the voters to persuade them not to authorize the district to incur the proposed indebtedness, and it may well be that they were urged upon all by those who opposed the debt. They are not, however, material here where the attack is upon the validity of what has been and what is proposed to be done and not upon the advisability thereof."

Respondent's final contention is that the District is not authorized to pledge all of the income received from the distribution and sale of electric power to the payment of the revenue bonds, and cites Section 12809 of the Public Utilities Code which provides: "The rates and charges for commodities or service furnished by a district shall be fixed by the board. As far as possible utilities shall be self-supporting but the board is not required to fix a rate which in its opinion is unreasonably high, nor to cover by rates large expenditures and the interest thereon required for future needs and developments." Respondent contends that the intent of the final sentence is that large expenditures for future needs and development should be covered by current revenues only where necessity requires and that where such necessity does not exist it is an abuse of discretion to so provide.

[23] Section 12809 constitutes a grant of authority to the Board of Directors to fix the rates and charges for commodities and services furnished by the District. While it does not compel the District to pay for large expenditures for future needs from rates, it does not so forbid. To say that one is not required to do something is not to say that he is required to do its opposite. For that matter, the general rule set forth in Section 12809 is that the utility should be self-supporting. Therefore, the fact that the revenue bonds are to be paid from rates does not in any way conflict with the section. Section 12809 makes no attempt to distinguish between revenue and general obligation bond financing and it cannot be construed impliedly to deprive the district from employing revenue bond financing. In fact, the subsequently enacted Article 6a of the Public Utilities Code provides, in section 12851, that bonds may be issued "in accordance with the Revenue Bond Law of 1941". This specifically authorizes the use of revenue bond financing, and, once the revenue bonds are issued the controlling section is 54515 of the Government Code which makes it mandatory upon the District to fix rates and charges fully sufficient to pay the interest on and principal of the revenue bonds as they become due and payable. We therefore conclude that there is no merit in respondent's

contention that the District is not authorized to pledge all of its revenue to the payment of the revenue bonds.

Likewise without merit is respondent's contention that the submission of the proposition relating to the Upper American River Project was an abuse of discretion by the Board of Directors because, according to respondent, additional electric power could be obtained at lower cost from the Pacific Gas and Electric Company.

The District's authority to construct works for supplying electric power and energy or to purchase such power and energy from other sources is contained by implication in Article 6a and directly in Section 12801 of the Public Utilities Code, which provides as follows:

> "A district may acquire, construct, own, operate, control, or use, within or without, or partly within or partly without, the district, works or parts of works for supplying the inhabitants of the district and public agencies therein, or some of them, with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the collection, treatment, or disposition of garbage, sewage, or refuse matter, and may do all things necessary or convenient to the full exercise of the powers herein granted. The district may also purchase any of such commodities or services from any other utility district, public agency, person, or private company, and distribute them."

[24] The legislative power of the District is vested in its board of directors. Public Utilities Code, sec. 11801. Here the board has found and determined that the public interest and necessity demand the acquisition and construction of the project and that the cost should be financed through the issuance of revenue bonds. That finding is conclusive under the rule of In re East Bay Municipal Utility District Water Bonds of 1925, 196 Cal. 725, 239 P. 38, 39, the headnote of which correctly states its holding:

> "In a proceeding to validate a bond issue of a Municipal Utility District * * *, where the court found that the board of directors of the district had by resolution determined that public interest and necessity demanded the same, in the absence of fraud and of attack upon said finding, the finding is conclusive that the district will be benefited by the proposed improvement."

[25] As was pointed out with respect to the question of whether the funds provided will be adequate to meet the costs of the project, questions of advisability of a project are for the board and the electors. Nor is there any abuse of discretion on the part of the District in constructing a hydroelectric project rather than constructing a steam electric generating plant. As stated in connection with the preceding point, the decision as to whether the District should purchase its power requirements or construct its own works and, if so, the type of works, is vested in its board of directors whose determination is conclusive.

In view of the foregoing we conclude that the petitioner, Sacramento Municipal Utility District, had the right to issue the bonds approved at the bond election, and that it is entitled to a writ of mandate directing respondent secretary, Joseph E. Spink, forthwith to sign and execute each and every bond and coupon of the issue hereinbefore referred to as provided by law and by said Resolution No. 2941 of the board of directors of petitioner District.

Let the writ issue as prayed for.

VAN DYKE, P. J., and PEEK, J., concur.

145 Cal.App.2d 667

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Sam Junior MULLINS et al., Defendants, Frank Bradham, Defendant and Appellant.

District Court of Appeal, Third District, California.

Nov. 7, 1956.

Defendant was convicted of robbery in the second degree. The Superior Court, Yolo County, C. C. McDonald, J., entered judgment, and denied motion for new trial and defendant appealed. The District Court of Appeal, Peek J., held that evidence as to identification of defendant was sufficient to present question for jury.

Judgment and order affirmed.

1. Criminal Law ⚷1160

The strength or weakness of the identification of defendant as one of the persons involved in a robbery, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were solely for the observation and consideration of the jurors in the first instance, and for consideration of the trial court on motion for a new trial.

2. Criminal Law ⚷741(2)

In prosecution for second degree robbery, evidence as to the identification of defendant was sufficient to present question for jury. West's Ann.Pen.Code, § 211.

3. Criminal Law ⚷339, 741(2)

Voice as well as physical appearance of a person is a means by which identification is made possible, and consequently testimony relating to identity of voice is competent and its probative value is a question of fact for the jury.

4. Criminal Law ⚷673(4)

In prosecution for second degree robbery, allowing police officer to testify to a conversation had with codefendant was not error as to defendant, where defendant and codefendant were jointly charged and jointly tried for the robbery and no request was made for separate trials and such evidence was relevant to codefendant in that it tended to implicate him in the robbery, and instruction limited the testimony to codefendant.

5. Robbery ⚷24(1)

In prosecution for robbery, wherein defendant alleged that verdict of second degree robbery arrived at by jury was not supported by evidence in that it should have been first degree or nothing and that therefore verdict was result of compromise, evidence was sufficient to show that verdict for second degree robbery was not result of a compromise in view of fact victim of robbery himself did not testify that he saw dangerous weapon used by the defendant. West's Ann.Pen.Code, § 211.

6. Criminal Law ⚷1144(14, 15)

In the absence of instruction in the record on appeal in criminal prosecution, it must be presumed the jury was correctly instructed as to degrees of the offense charged and followed such instructions.

7. Criminal Law ⚷935(1)

In proceeding for new trial in robbery prosecution, evidence as to whether codefendants were in the town where the robbery occurred on the night of its occurrence was sufficient to present question of fact. West's Ann.Pen.Code, § 211.

8. Criminal Law ⚷911, 1156(1)

In passing upon motion for new trial, trial judge has very broad discretion and is not bound by conflicts in the evidence, and reviewing courts are reluctant to interfere with a decision granting or denying such motion unless there is a clear showing of an abuse of discretion.

9. Criminal Law ⚷1037(1), 1064(6)

In prosecution for robbery, argument of district attorney to jury that crime had been investigated by three different law enforcement agencies, made to refute previous argument of defense counsel attacking overzealousness of the authorities and credibility of police officers who had testified, was not reversible error, especially in view of fact defendant raised no objection to statement when it was made and failed to question propriety thereof in support of his motion for new trial. West's Ann.Pen.Code, § 211.

James F. Roach, Woodland, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant Bradham, together with two co-defendants, Smith and Mullins, was charged with a violation of section 211 of the Penal Code. The defendants were tried jointly following pleas of not guilty. The defendant Smith was found not guilty, and the defendants Mullins and Bradham were found guilty of robbery in the second degree. The motion of the defendant Bradham for a new trial was denied. He alone appeals from that order and from the judgment of conviction, contending generally that the evidence was insufficient to support the conviction; that the trial court committed prejudicial error during the trial and on the motion for new trial; and that the district attorney was guilty of prejudicial misconduct.

Viewing the evidence, as we must, in the light most favorable to respondent, it appears that while one John Long was walking to his home in Broderick from Sacramento, he observed a brown or tan 1949 or 1950 Pontiac sedan following him. The car passed him slowly and continued on to a darkened service station where it waited until he passed. Long observed that the car held four occupants; that the right rear fender had been damaged and the red glass of the tail light on that side had been broken. As Long continued on past the service station, the car again followed him, and shortly thereafter stopped abruptly on the opposite side of the street. Three men got out of the car and accosted him. One of them got behind him, and holding a sharp object at his throat said, "This is a stick-up. * * * Hand over your goods." Long was forced to give over a leather jacket, a wrist watch, a cigarette case, a cigarette lighter and 15 cents in change. The three men then fled in the car which, in the meantime, had made a U-turn and was headed back toward Sacramento. Within a few minutes Long reported the robbery to the Yolo County authorities who radioed a description of the car and its occupants to the Sacramento police, and shortly thereafter the car was located in that city. When the occupants of the car were searched, a Ronson cigarette lighter was found in the possession of Mullins. Long was brought to the scene and identified the car as the one involved in the robbery and the cigarette lighter as the one which had been taken from him. His identification of the lighter was based upon the fact that it had a scratch on the cover and the cotton filler was red rather than the customary white. The occupants were interrogated by the police officers and gave conflicting stories as to their whereabouts that evening. At the trial Long identified Bradham as the person who had said, "This is a stick-up. * * * Hand over your goods." His identification of Bradham was based primarily upon his recognition of Bradham's voice which he had heard in the course of a conversation at the preliminary hearing.

[1–3] The appellant now contends that the evidence that he was in the automobile in company of the other defendants, one of whom had possession of the lighter, and the identification of himself by Long solely upon the claimed recognition of his voice, was insufficient to sustain the conviction. In support of this contention he refers to Long's doubtful identification of the car; the fact that Long failed to report the lighter as missing when he reported the robbery; and that he did not mention the lighter at the preliminary hearing as being insufficient to sustain a conviction, and that Long's testimony that he recognized the voice of appellant is so incredible as to be unworthy of belief. The fact that Long may have been doubtful in his identification of the car, or that he failed to mention the loss of the lighter and that it was not mentioned at the preliminary hearing, does not make such evidence unworthy of belief.

> " 'The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, and the uncertainties of witnesses in giving their testimony were matters solely for the observation and consideration of the jurors in the first instance, and for the consideration of the trial court on motion for a new trial * * *, and on appeal this court may not disturb such finding and the action of the trial court unless we can say, as a matter of law, that there was no evidence to support the conviction.' " People v. Hood, 140 Cal.App. 2d 585, 588, 295 P.2d 525, 528.

Viewing the evidence before us in light of the rule above enunciated, we cannot say as a matter of law that the evidence was insufficient to support the conviction of the defendant. Furthermore, as regards the question of the identification of the appellant by Long,

> "It is universally recognized that the voice as well as the physical appearance of a person, is a means by which identification is made possible, there being no more similarity in the voices of different people than there is in their physical appearance. * * * Therefore testimony relating to the identity of the voice is competent, its probative value being a question of fact for the jury." Connell v. Clark, 88 Cal.App. 2d 941, 947, 200 P.2d 26, 29.

[4] It is appellant's next contention that the court erred in allowing a police officer to testify to a conversation had with the co-defendant Mullins. We find no merit in this contention. The defendants were jointly charged and jointly tried for the robbery. No request was made for separate trials. As is quite often the case, under like circumstances, evidence may be properly admitted which may reflect participation by another, but that is inherent in such a situation. There can be no question but that the evidence introduced was relevant as to Mullins in that it tended to implicate him in the robbery. The court quite properly allowed the testimony and properly instructed the jury that "* * * it will be limited to [Mullins] the party talking." The situation was subsequently summarized thus by the court: "I have done all I can do. The fact it might make it look black for another defendant doesn't shut it out; but when you are trying defendants together, I can do all I can when I restrict to to the man who is doing the talking. That is as far as the court can go." See People v. Trawick, 78 Cal.App.2d 604, 608, 178 P.2d 45.

[5, 6] Appellant further contends that the verdict of second degree robbery is not supported by the evidence in that it should have been first degree or nothing, and therefore the verdict was the result of a compromise. Again we must disagree. Long did not testify that he saw a weapon, nor was any weapon introduced in evidence. He merely testified that a sharp object which he believed to be a knife or a straight razor was held at his throat. Under such circumstances the fact that the jury did not find that a dangerous weapon was used does not support a conclusion that the verdict was the result of a compromise. In the absence of instructions in the record on appeal, it must be presumed the jury was correctly instructed as to the degrees of the offense charged and followed such instructions. People v. Corenevsky, 124 Cal.App. 2d 19, 267 P.2d 1048.

[7, 8] Appellant also contends that the trial court erred when, in considering his motion for a new trial, it erroneously assumed that appellant's co-defendants, when on the stand, admitted being in Broderick on the night in question. The evidence concerning their whereabouts that evening was in conflict; however, there was sufficient evidence from which the court might infer that the defendants had been in that

city. And as the court noted, the record must be taken "as a whole and that there is enough there to sustain a verdict." It is well established that, "In passing upon a motion for new trial the judge has very broad discretion and is not bound by conflicts in the evidence, and reviewing courts are reluctant to interfere with a decision granting or denying such a motion unless there is a clear showing of an abuse of discretion." People v. Robarge, 41 Cal.2d 628, 633, 262 P.2d 14, 17. In the absence of a showing of such an abuse of discretion, this court is not warranted in interfering with the order of the trial court now attacked.

[9] Finally appellant contends that the district attorney was guilty of prejudicial misconduct in his final argument to the jury when he stated that the crime had been investigated by three different law enforcement agencies. In support of such contention, appellant states that the argument was irrelevant and made solely for the purpose of convincing the jury that if the case received such a thorough investigation, the defendants were more likely to be guilty than innocent. A reading of the transcript discloses that the district attorney was merely refuting the previous argument of defense counsel attacking the overzealousness of the Yolo County authorities and the credibility of the various police officers who had testified. In no way did the attacked statement reflect the personal view of the district attorney or imply any personal knowledge of facts outside of the case. It should be noted that counsel for defendant raised no objection to the statement when it was made, nor did he question the propriety thereof at the time of his argument in support of his motion for a new trial, which from the record appears to have been made solely upon the alleged insufficiency of the evidence.

The judgment and order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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146 Cal.App.2d 15

COUNTY OF LOS ANGELES, Plaintiff and Respondent,

v.

PAN AMERICAN DEVELOPMENT CORPORATION, substituted in place of Frederick S. Beverley, et al., Defendants.

Pacific Coast Cheese, Inc. and Pan American Development Corporation, Appellants.

Civ. 21601.

District Court of Appeal, Second District, Division 3, California.

Nov. 14, 1956.

Hearing Denied Jan. 8, 1957.

Condemnation proceeding. The Superior Court of Los Angeles County, William E. Fox, J., entered judgment disallowing severance damages in accordance with verdict of jury and defendants appealed from judgment and verdict. The District Court of Appeal, Parker Wood, J., held that instruction which told jury that mere inconvenience is not a compensable item of damage, although confusing to jury, was not prejudicial, in view of another instruction which told jury they could consider all facts and elements which would be reasonably and necessarily taken into consideration by prospective purchaser of said property in arriving at fair and reasonable market value of the property taken, and also held that an appeal does not lie from a verdict.

Judgment affirmed, and purported appeal from verdict dismissed.

1. Eminent Domain ⚷137

Severance damages in eminent domain proceeding are determined by ascertaining the market value of the property not taken as it was on the date fixed for determining such damages, and by deducting therefrom market value of such remaining property after severance of the part taken and the construction of the improvement in the manner proposed by the plaintiff.

2. Eminent Domain ⚷137

In determining severance damages in eminent domain proceeding, "market value" of property is the largest amount of money which land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable.

See publication Words and Phrases, for other judicial constructions and definitions of "Market Value".

3. Eminent Domain ⚷222(5)
Trial ⚷296(11)

In eminent domain proceeding, instruction which told jury that mere inconvenience was not a compensable item of damage was confusing and should not have been given, but was not prejudicial error in view of another instruction which told jury that in arriving at reasonable market value of the property taken, they could take into consideration all facts and elements which would reasonably and necessarily be taken into consideration by prospective purchaser of the property.

4. Eminent Domain ⚷220

Question as to whether jury in eminent domain proceeding should be permitted to view premises taken is a matter within discretion of trial judge. West's Ann.Code Civ.Proc., § 610.

5. Eminent Domain ⚷220

In eminent domain proceeding wherein plaintiffs sought to recover severance damages disallowed at prior trial, trial judge did not err in permitting jury to view premises on ground property was not in same condition it was at time of first trial, where alleged alterations were favorable to owners objecting to such procedure.

6. Eminent Domain ⚷219

Refusal of trial court in condemnation proceeding to admit in evidence testimony which was merely repetitious, was not error.

7. Appeal and Error ⚷123

An appeal does not lie from a verdict.

Jesse A. Hamilton, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Arthur Loveland, Deputy County Counsel, Los Angeles, for respondent.

PARKER WOOD, Justice.

Proceeding in eminent domain. In a former appeal in this case by defendants, judgment was reversed for the reason the court erred in instructing the jury to disregard the evidence as to severance damages. Los Angeles County v. Beverley, 126 Cal.App.2d 89, 271 P.2d 965. After the first trial defendant Beverley assigned his interest in the action to Pan American Development Corporation which was substituted as a defendant in place of Beverley. In the second trial (involved here) it was stipulated that the only issue to be submitted to the jury was the amount of severance damage, if any. (The parties also stipulated, with reference to the issue as to the value of the land taken, that judgment should be for $13,500 which was the amount awarded for the land by the jury at the first trial.) The verdict in the present trial was that there was no severance damage. Judgment of condemnation was entered, allowing as compensation for the land taken the amount agreed upon by the parties, and disallowing severance damage in accordance with the verdict of the jury. Defendants appeal from the judgment and the verdict.

Appellants contend that the court erred in instructing the jury that inconvenience was not an element of damage; in permitting the jury to view the premises; and in sustaining plaintiff's objection to defendants' offer of testimony.

In lieu of a reporter's transcript, the oral proceedings of the trial are presented on appeal by a settled statement.

The land sought to be taken by condemnation consisted of two lots at the northeast corner of the intersection of Eastern Avenue and East First Street in Los Angeles County. Those lots were fenced. At the time of the commencement of the action, Mr. Beverley, who was formerly a defendant herein, owned those two lots, and he also owned four lots (not sought to be condemned) which were at the north*west* corner of that intersection. (Apparently, he transferred his interest in the six lots to defendant Pan American Development Corporation.) Prior to and at the time of the commencement of the action, the six lots were leased to defendant Pacific Coast Cheese, Inc.

Eastern Avenue, which is between the parcel of two lots and the parcel of four lots, is sixty feet wide.

On the northerly two lots of the four lots (on the west side of Eastern Avenue) there were two buildings—a cheese factory building and an office building. On the southerly two lots of the four lots there were an incinerator and a cold storage building. The four lots were fenced. The fence on the Eastern Avenue side of the northerly two lots (of the four lots) is back about 20 feet from the street. At the first trial, Mr. Hagan, the owner-manager of the cheese factory, testified that he parked his trucks on that 20-foot setback.

On the two lots (on the east side of Eastern Avenue), which were sought to be taken by condemnation, there were an old shed, incinerator, and trailer bed or body. At the time of the first trial, the shed was used as a repair shop; the trailer bed was used for storing old bolts and scrap iron; the two lots were covered with junk, such as old machinery, scrap iron, scrap lumber, cans, tables, and old motors. At the time of the first trial those two lots "were so piled up" with old machinery and junk that only one automobile could be parked on the lots. At the time of the second trial those lots had been "somewhat cleaned up," and some of the junk had been removed to the southerly two lots (of the four lots) on the west side of the street and the junk had been "loosely spread" over those lots. When the jury viewed the premises, at the second trial, three or four trucks were parked on the two lots on the east side of the street (the lots from which junk had been removed after the first trial).

Mr. Hagan, the owner-manager of the cheese factory, testified that the severance damage was 20 per cent of the value of the six lots as improved. Mr. Stone, an expert appraiser of real property, testified that the severance damage was 20 per cent of such value. Mr. Allen, another such expert, testified that the severance damage was 15 per cent of such value. Those expert witnesses considered the six lots as one parcel. Those witnesses, in giving their reasons for their opinions as to severance damage, stated that the defendants would be deprived of the use of the two lots on the east side of the street for parking purposes.

Mr. Hall and Mr. Wood, expert appraisers of real estate, called as witnesses for plaintiff, testified that there was no severance damage. They also considered the six lots as one parcel. In giving their reasons for their opinions, they stated that there was ample space on the southerly two lots on the west side of the street for a repair shop and for storage of materials necessary in connection with the operation of the cheese factory, and that it would be more convenient to have the repair shop and materials on the same side of the street the factory was on.

At the request of plaintiff, the following instruction was given: "You are instructed that mere inconvenience is not a compensable item of damage. The test is whether the market value of the remaining property has been lessened by the taking of the property here in question. If the remaining property will sell for as much in the open market after the taking as it would before the taking and being a part of the whole then there is no severance damage." Appellants argue that the first sentence of the instruction was erroneous for the reason that inconvenience is a proper item of severance damage; that the error was emphasized because the word "inconvenience" was not defined; and that, by such instruction, the judge told the jury that inconvenience was not to be considered in determining market value. Appellants concede that inconvenience (resulting from condemnation) which causes loss of profits in business is not compensable. They assert, however, that inconvenience or convenience in the use of property (sought to be condemned) is an element to be considered in determining market value.

[1, 2] "Severance damages are determined by ascertaining the market value of the property not taken as it was on the date fixed for determining such damages, and by deducting therefrom the market value of such remaining property after the severance of the part taken and the construction of the improvement in the manner proposed by the plaintiff." People v. Loop, 127 Cal.App.2d 786, 799, 274 P.2d 885, 894. Market value is "the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable." Sacramento Southern R. Co. v. Heilbron, 156 Cal. 408, 409, 104 P. 979, 980. "[I]njury to the business of the owner or occupant of the property does not form an element of the compensating damages to be awarded. [Citation.] This is so because it is only the value of, and the damage to, the property itself, which may be considered." People v. Ricciardi, 23 Cal.2d 390, 396, 144 P.2d 799, 802.

[3] In determining market value a proper consideration is the convenient or inconvenient location of the property with respect to other property in the vicinity. Since the matter of such location is a proper consideration in determining market value, the instruction that mere inconvenience is not a compensable item of damage was uncertain and would tend to confuse the jury as to whether it might consider the convenient or inconvenient location of the property. That instruction should not have been given. It was not prejudicial, however, for the reason that an instruction was given (at the request of defendants) as follows:

"You are instructed that in determining the fair and reasonable market value of the property taken, and the damage if any to the remaining portion not sought to be taken, that it is necessary and proper for you to take into consideration all facts and elements which would reasonably and necessarily be taken into consideration by a prospective purchaser of said property.

"In that connection, the following elements may be properly taken into consideration in arriving at the fair market value of the part taken and the severance damage if any to the remaining portion; the fact that the property is presently being devoted to industrial purposes, the improvements thereon, the present utility and usability of the land and the improvements thereon for such a present purpose, the area and location of the property, its accessibility to centers of population and markets, its relation to existing traffic arteries, including the Ramona Freeway and Olympic Boulevard, the fact of highly developed business areas or centers in the immediate vicinity, and all available uses to which said property is adapted, including its present use and its highest available and potential use."

[4, 5] Appellants contend further, as above stated, that the court erred in permitting the jury to view the premises. Appellants objected to such permission being granted, upon the ground that the property was not in the same condition it was in at the time of the first trial. They argue that the premises had undergone alterations since the action was commenced and that the court should have pointed out the alterations and should have told the jury to disregard them. The alleged alterations consisted of (1) the removal of old machinery and junk from the two lots (on the east side of the street) to the lots on the west side of the street, and (2) the parking of three or four trucks on the two lots on the east side of the street. There was no change in the condition of the land. It would seem that the change with reference to the location of the personal property was favorable to defendants' contention as to the appearance of the premises; in that, after the change the trucks could be, and

were, parked on the two lots on the east side of the street. The question as to whether the jury should be permitted to view the premises is a matter within the discretion of the trial judge. (See Code of Civ.Proc. § 610; Laguna Salada Union Elementary School Dist. v. Pacific Development Co., 119 Cal.App.2d 470, 477, 259 P.2d 498. The judge did not err in permitting the jury to view the premises.

[6] Appellants contend further that the trial court erred in sustaining plaintiff's objection to their offer of certain testimony. As above stated, the appeal is presented upon a settled statement. The statement recites, with reference to the offer of proof, that: "After plaintiff had put in its evidence and rested, defendants called as a witness for rebuttal testimony one Charles M. Farrington who had at one time acted as assistant manager of the cheese plant and sought to introduce additional testimony covering the same matters that Mr. Hagan, the owner-manager of the cheese plant, had previously testified to on direct examination and plaintiff's objection was sustained. Defendants then made an offer of proof which plaintiff objected to and the court sustained the objection." Appellants state in their brief that the matters in the offer of proof were not cumulative but were rebuttal. Appellants ask, in their brief, that this court refer to the original offer of appellants in the first trial. The record in the first trial is immaterial, and is not before the court, on this appeal. The record on the present appeal does not state specifically the testimony that was offered in the second trial, but it does state generally that the offered testimony covered the same matters that defendants' witness, Mr. Hagan, had testified to on direct examination. It appears that the offered testimony would have been repetitious. The court was not required to receive repetitious testimony. See Laguna Salada etc. Dist. v. Pacific Development Co., supra, 119 Cal. App.2d at page 477, 259 P.2d 498. It was not error to sustain the objection to the offer of proof.

[7] An appeal does not lie from a verdict. Jackson v. Lovas, 106 Cal.App.2d 426, 427, 235 P.2d 232.

The judgment is affirmed. The purported appeal from the verdict is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

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145 Cal.App.2d 737

Jack H. HIGBEE, Plaintiff and Appellant,
v.
Arthur LA SALLE, Individually and doing business under the fictitious firm name and style of Christian's Hut, Defendant and Respondent.

Civ. 5260.

District Court of Appeal, Fourth District, California.

Nov. 9, 1956.

Hearing Denied Jan. 4, 1957.

Action by restaurant patron against owner and operator of restaurant for injuries sustained when patron fell down steps at front entrance. From a judgment of the Superior Court of Orange County, Kenneth E. Morrison, J., for defendant, the plaintiff appealed. The District Court of Appeal, Griffin, J., held that exhibit, which consisted of extracts copied from certain sections of Uniform Building Code and which was attached to back cover of certified copy of ordinance adopting code but which did not indicate that it was a correct or full copy of the code or that there were no other provisions of the code that qualified the provisions set forth in the extract, was properly excluded for want of sufficient foundation.

Affirmed.

1. Appeal and Error 🔑712

Where Uniform Building Code was not produced, was not pleaded or offered in evidence, was not marked for identification and was not a part of record on appeal, District Court of Appeal could not determine from record whether or not code was applicable to facts of case.

2. Appeal and Error ⚷714(5)
Evidence ⚷32

Judicial notice is not taken of county or municipal ordinances or of the time when they take effect, and an appellate court will not take cognizance of municipal ordinances in a proceeding originating in the superior court unless they were introduced in evidence in the trial court and are made a part of record on appeal, even though they may be referred to in the briefs. West's Ann. Code Civ.Proc., § 1918.

3. Evidence ⚷370(1)

It is error to allow an ordinance in evidence without proper foundation. West's Ann.Code Civ.Proc., § 1918.

4. Evidence ⚷373(6)

Exhibit which consisted of extracts copied from certain sections of Uniform Building Code filed in city clerk's office and which was attached to back cover of certified copy of ordinance adopting code but which did not indicate that it was a correct or full copy of code or that there were no other provisions of code that qualified the provisions set forth in the extract was properly excluded for want of sufficient foundation, and it would have had no meaning without introduction of applicable portions of properly identified Uniform Building Code to which it referred. West's Ann. Code Civ.Proc., § 1918.

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Maury, Larsen & Hunt, Los Angeles, for appellant.

Head, Jacobs, Corfman & Jacobs, Santa Ana, for respondent.

GRIFFIN, Justice.

Defendant and respondent Arthur La Shelle (sued as La Salle) owns and operates the cafe-bar known as Christian's Hut in the City of Newport Beach. After patronizing the upstairs bar at about midnight on March 14, 1954, plaintiff, his wife and a guest went downstairs to another bar on the first floor to have another "nightcap". They then left by the front entrance where they came in. Plaintiff opened an opaque front door, about three feet wide, leading to five steps. He stepped forward and fell to the bottom of these steps on the cement sidewalk and suffered a severe fracture of his left leg, causing shock and other injuries. The top step is about 2½ feet above the level of the sidewalk. Each step is about 7 feet 6 inches in length and 13 inches wide with 6-inch risers. The top step (just outside the door which opens outward in the center of the step) is approximately 5 to 5¼ inches wide and extends into the first floor level or main entrance for another 5 inches. Over the outside steps was a floodlight. There were no handrails on the steps.

Plaintiff and appellant filed this action seeking damages for the injuries sustained, claiming defendant negligently and unlawfully permitted said stairway or steps to remain in an unsafe, dangerous and defective condition. Defendant denied negligence and alleged contributory negligence of plaintiff. A jury verdict resulted in favor of defendant. The evidence showed that this building had been built and was continuously operated in the same manner as indicated long prior to May, 1949.

[1] The main error claimed on this appeal is the refusal of the trial court to receive in evidence a proffered ordinance adopted in May, 1949, adopting a certain designated "Uniform Building Code, 1949 Edition", on file in the office of the City Clerk, as the Building Code of the City of Newport Beach "as if here fully set forth" for the purpose of regulating the "erection, construction * * * use, * * * occupancy * * * of buildings or structures", and providing for the issuance of permits. Apparently, counsel for plaintiff copied extracts from certain sections of this Uniform Building Code filed in the City Clerk's office indicating that those sections required handrails on "stairways" under certain conditions, that certain width landings must be maintained on stairways, and other claimed

provisions with which plaintiff contends defendant did not comply. Plaintiff did not place in evidence the document itself or any testimony of the City Clerk in respect to it or its provisions. The typewritten copy of these extracts was not a part of the ordinance certified by the City Clerk but it was attached to the back cover of the certified copy by counsel for plaintiff, and there is no indication that it is a correct or full copy of said Uniform Building Code or that there was no other provision of said Uniform Building Code that qualified the provisions set forth in the extract. In this form it was offered in evidence as plaintiff's Exhibit No. 10. Objections were made as being incompetent, irrelevant and immaterial and that no proper foundation had been laid. The objection was sustained and it was marked for identification only. The Uniform Building Code was not produced, was not pleaded or offered in evidence, was not marked for identification, and is not a part of the record before us on appeal. Consequently we are unable to determine from the record whether or not it was applicable to the facts in the instant case. Apparently, from the reporter's transcript, a witness of plaintiff's claimed to have a copy of the Uniform Building Code in his possession, and several questions were propounded to the witness by counsel for plaintiff respecting its requirements. Objection was made, whereupon counsel for defendant, out of the presence of the jury, apparently read from certain sections thereof, including the final paragraph:

> "Buildings in existence at the time of the passage of this code may have their existing use or occupancy continued if such use or occupancy was legal at the time of the passage of this code, provided such continued use is not dangerous to life."

He argued that the provisions of the Uniform Code were not applicable. At the conclusion of this argument, counsel for plaintiff stated: "I am disposed to withdraw the question" and "Suggest we proceed with the trial". At the close of the case the offer of the document marked Exhibit 10 for identification was made as indicated. An objection was sustained. Whether it was sustained on the ground that the proper foundation for its admission had not been laid or because its provisions were inapplicable cannot be determined from the record. Respective counsel referred to some of the provisions of the Uniform Building Code in their respective briefs.

[2, 3] Judicial notice is not taken of county or municipal ordinances or of the time when they take effect, and an appellate court will not take cognizance of municipal ordinances in a proceeding originating in the Superior Court unless they were introduced in evidence in the trial court and are made a part of the record on appeal, and even though they may be referred to in the briefs. City of Oakland v. Brock, 8 Cal.2d 639, 641, 67 P.2d 344; Stamper v. City of Los Angeles, 80 Cal.App.2d 242, 181 P.2d 687; 2 Cal.Jur.2d page 451, sec. 28. Section 1918 of the Code of Civil Procedure provides the proper manner of proving such documents and those requirements have not here been met. It is error to allow an ordinance in evidence without proper foundation. Diederichsen v. Sutch, 47 Cal.App.2d 646, 649, 118 P.2d 863; Marysville Woolen Mills v. Smith, 178 Cal. 786, 175 P. 13. In Merced County v. Fleming, 111 Cal. 46, 43 P. 392, relied upon by plaintiff, an original ordinance book was produced and duly identified.

[4] We must conclude that a sufficient foundation was not laid to admit Exhibit 10, as marked for identification, into evidence, and it would have no meaning without introducing the applicable portions of the properly identified Uniform Building Code to which it referred.

This sufficiently disposes of the remaining questions raised on this appeal, i. e., as to whether the Uniform Building Code was applicable to the facts of the instant case or might well have operated to prove a standard of care under the authority of Finnegan v. Royal Realty Co., 35 Cal.2d 409, 218 P.2d 17; and Clinkscales v. Carver, 22 Cal.2d 72, 136 P.2d 777, relied upon by plaintiff. It also disposes of the question of claimed error of the trial court in refusing certain proffered instructions based on the provisions of that Building Code, as well as the claimed error in the refusal of the trial court to give plaintiff's proffered instruction on the diminished value of the dollar.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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145 Cal.App.2d 778

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Frank BROWN, Defendant and Appellant.

Cr. 5679.

District Court of Appeal, Second District, Division 1, California.

Nov. 13, 1956.

Rehearing Denied Nov. 26, 1956.

Hearing Denied Dec. 12, 1956.

Defendant was convicted of robbery. The Superior Court of Los Angeles County, Clement D. Nye, J., entered judgment and defendant appealed. The District Court of Appeal, Fourt, J., held that where it was stipulated in open court by counsel for defendant and in defendant's presence that case would be submitted on the transcript of the testimony taken at preliminary examination, subject to the right of either side to offer additional testimony if desired, such procedure was proper and did not deny defendant a fair trial and right to be confronted with witnesses.

Judgment affirmed.

1. Criminal Law ⚷662(8)

Where defendant's counsel stipulated in open court in presence of defendant that the criminal case would be submitted on the transcript of testimony taken at preliminary examination subject to the right of either side to offer additional testimony if desired, fact that defendant had not personally joined in such stipulation did not result in the denial of fair trial to him and right to be confronted with witnesses against him.

2. Constitutional Law ⚷266

In prosecution for robbery, record did not support defendant's contention that he was denied due process of law in that his principal witness was not subpoenaed. West's Ann.Pen.Code, § 211.

3. Criminal Law ⚷633(1)

In prosecution for robbery, evidence was insufficient to show that the trial court permitted police to take alleged victim and defendant out of courtroom and into another room and told the alleged victim that defendant was the person who robbed him. West's Ann.Pen.Code, § 211.

4. Stipulations ⚷14(7)

In criminal prosecution, admission of hearsay testimony by stipulation as part of the people's case in chief was not error where defendant had been confronted by witness who gave hearsay testimony and had examined him.

5. Criminal Law ⚷698(1)
Stipulations ⚷14(7)

Hearsay evidence admitted without objection or by stipulation may be properly considered in support of the criminal charge.

Frank Brown, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

FOURT, Justice.

In an information the defendant and appellant was charged with the crime of robbery in violation of section 211, Penal Code, a felony, in that he did, on or about January 2, 1956, in the county of Los Angeles, feloniously and by means of force and fear take from the person of Joe N. Williams certain personal property, namely, a wallet valued at $7, and $38 in money. It was also alleged that prior to the offense in question the defendant had been convicted of the crime of burglary, a felony, in Los Angeles county, and that he served a term of imprisonment therefor in the State Prison.

The defendant was represented by the public defender. At the time of the trial the defendant and all counsel waived a jury trial and it was stipulated that the People's case might be submitted on the testimony taken at the preliminary examination, subject to the right of either side to offer additional testimony if desired. The prior conviction was admitted.

The transcript of the preliminary examination set forth, among other things, the following: That Joe N. Williams, the victim, was a sailor attached to the U.S.S. Catamont, and on January 2, 1956, about 2:00 a. m., was in a restroom of a hotel on First Street in Los Angeles, and the defendant hit and knocked the victim down and took his wallet and money. Apparently the defendant had first seen the victim at a bus station and asked if he wanted a girl, the answer was "Yes", and the defendant told Williams to follow him. When they reached the hotel the defendant directed Williams to go into the restroom and told him that it would be $5, and the victim gave the defendant such amount. The defendant returned and inquired of Williams what kind of a girl he wanted, white, colored or Japanese. Williams informed the defendant he would take his pick. The defendant asked Williams how much money he had and Williams would not tell him, and upon Williams turning his head, the defendant struck him and knocked him down and then took the wallet and money.

The defendant called Malvina Salonie as a witness, who testified that she was a prostitute, living with the defendant. Further, that on the night of January 2, 1956, she and the defendant went to a show and got out about midnight and that thereafter she and the defendant went to the vicinity of Sixth and Main Streets, where she "caught a date" or so and went to a hotel close by. She further stated that she and the defendant then went to Fifth Street where she again engaged in her profession at another hotel. On cross-examination, she admitted signing a statement which was prepared by a police officer and constituted a résumé of what she had told the police upon her arrest. The statement was received in evidence. This statement set forth in substance that she and the defendant were at Sixth and Main, "trying to catch a trick" and that she did so; that a little after midnight or close to 1:00 a. m. she went to East Fifth Street, got a "bindle of narcotics", borrowed a friend's outfit and "fixed the narcotics". The defendant was left at another hotel about 1:00 a. m., and she returned to Sixth and Main and was gone about four hours, until about 5:00 a. m., when she returned to the defendant and they then went home by taxicab.

The defendant testified that he did not rob Williams, and that he did not hit him. He did admit that he was with Malvina Salonie and knew she was engaging in acts of prostitution, and that he was on parole for burglary.

[1] The appellant contends that he was denied due process of law in that he was not given instructions regarding a trial "without witnesses", and that the trial on the preliminary transcript was without his permission. If this is an attempt on the part of the defendant to claim that he was denied the right of confrontation of witnesses, there is no merit in the contention. It was stipulated in open court by counsel for the defendant, in his presence, and by the district attorney, that the matter would be submitted on the transcript of the testimony taken at the preliminary examination subject to the right of either side to offer additional testimony if desired. Such a procedure has been held to be proper. People v. Wallin, 34 Cal.2d 777, 781–782, 215 P.2d 1.

In People v. Hart, 121 Cal.App.2d 301, at pages 301–302, 262 P.2d 865, 866, the court said:

"Defendant's only contention is that he was denied a fair trial and the right to be confronted with the witnesses against him because he did not personally join in the stipulation. The contention is without merit.

"The Constitution of California does not contain a provision that in a criminal prosecution the accused shall have the right to be confronted with the witnesses against him. See Const. Cal., art. I, § 13. Penal Code, section 686, provides that 'In a criminal action the defendant is entitled: * * * to be confronted with the witnesses against him, * * *.' It is uniformly held in this state that this right may be waived, and a trial had on the transcript of the evidence taken at the preliminary examination on stipulation made by the defendant's counsel when made in the defendant's presence without the defendant personally joining in the stipulation. In People v. Dessauer, 38 Cal.2d 547, 241 P.2d 238, certiorari denied, Dessauer v. People, 344 U.S. 858, 73 S.Ct. 96, 97 L.Ed. 666, the court stated, 38 Cal.2d at page 552, 241 P.2d at page 241: 'The right to be confronted by witnesses, whether assured by Constitution or statute, may be waived, and a trial may be had on the transcript of the evidence taken at the preliminary hearing on stipulation by defendant and his counsel, People v. Wallin, 34 Cal.2d 777, 215 P.2d 1, or by the latter's stipulation, at least when made in defendant's presence. [Citing cases.]' In People v. Cohen, 94 Cal.App.2d 451, at page 457, 210 P.2d 911, at page 915, it is said: 'It appears to be well-established law that counsel has the right to stipulate relative to any of the steps of an action or proceeding, particularly where the stipulation was made in the presence of the accused who made no objection to it. [Citing cases.] Moreover, it has been held that the right to be confronted by the witnesses against him is a personal privilege which may be waived by the accused, and such a waiver is accomplished when counsel for defendant stipulates that the evidence taken at the preliminary examination may be considered by the court as evidence at the trial. [Citing case.]' See, also, People v. Donnelly, 95 Cal.App.2d 595, 597–598, 213 P.2d 502."

[2] The defendant's next contention is that he was denied due process of law in that his principal witness was not subpoenaed. The record is devoid of anything whatsoever in this connection, and even now the defendant fails or refuses to disclose who this witness is, nor has he revealed what this witness could testify to concerning the charge in question.

[3] Defendant further contends that the court was prejudiced in "letting the police take the alleged victim and the petitioner out of the courtroom and into another room and told the alleged victim that the petitioner was the person that robbed him". This contention finds no support whatever in the record.

[4, 5] Lastly, the defendant contends that all of the evidence in his case was hearsay. A stipulation submitting the People's case in chief on the transcript of the preliminary examination authorized the consideration by the court of the transcript containing the testimony of the witness Joe N. Williams. The defendant had been confronted by this witness and had examined him. Further, hearsay evidence admitted without objection, or by stipulation, may be properly considered in support of the charge. People v. Ines, 90 Cal.App.2d 495, at page 500, 203 P.2d 540, at page 543, and the cases cited thereof.

The defendant was accorded a fair and proper hearing.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

145 Cal.App.2d 801

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harvey Leroy KARMAN, Defendant and Appellant.

Cr. 5583.

District Court of Appeal, Second District, Division 3, California.

Nov. 13, 1956.

Rehearing Denied Nov. 26, 1956.

Hearing Denied Dec. 12, 1956.

Defendant was convicted of abortion in the Superior Court of Los Angeles County, Charles W. Fricke, J., and from the judgment and from an order denying motion for new trial, he appealed. The District Court of Appeal, Vallée, J., held that argument of district attorney was not prejudicially erroneous.

Affirmed.

See also 303 P.2d 74.

1. Criminal Law 🔑719(3), 1037(1, 2)

In prosecution for abortion, district attorney's expression of his personal belief as to all abortions was improper but not ground for reversal in absence of assignment of misconduct or request that jury be admonished to disregard the statement; it appearing to have been innocuous.

2. Criminal Law 🔑720(7)

In prosecution for abortion, district attorney's statement that what defendant did was "absolute butchery" was fair argument on the facts.

3. Criminal Law 🔑720(5)

Where physician testified that he was being paid specified amount for expert testimony, district attorney's argument referring to him as a "paid expert" and "hired witness" was not objectionable.

4. Criminal Law 🔑722½, 1171(1)

District attorney's argument explaining his purpose in impeaching defendant by cross-examination concerning prior conviction of felony was proper except in referring to misdemeanor conviction, and was not ground for reversal where it did not give jury the impression that defendant had misdemeanor convictions.

5. Criminal Law 🔑1115(1)

Alleged error in granting immunity to witnesses for prosecution, occurring at preliminary hearing, could not be considered on appeal where transcript of the preliminary hearing was not part of the record.

6. Criminal Law 🔑1134(10)

Appeal from conviction was the proper vehicle for reviewing rulings of committing magistrate.

7. Criminal Law 🔑1170(4)

In prosecution for abortion, refusal to permit cross-examination of aborted woman's husband as to his dating another woman, for purpose of showing motive, was not error where husband admitted being interested in having his wife aborted.

8. Abortion 🔑11

Evidence was sufficient to establish that abortion was not necessary to preserve woman's life.

9. Abortion 🔑1

Abortion requires proof of a specific intent.

10. Criminal Law 🔑829(3)

Where court had instructed that proof of specific intent was essential to conviction of abortion, requested instructions that joint operation of act and intent must exist were properly refused.

Godfrey Isaac, Jr., Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., and Robert S. Rose, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was convicted of abortion by a jury. He appeals from the judgment and the order denying his motion for a new trial.

During April 1955 defendant was employed by the Clinical School of the Psychology Department of the University of

California at Los Angeles and was working for a doctorate in psychology. He was not licensed to practice medicine.

About two months before April 6, 1955 Joyce told her husband, Ben, she was pregnant. They discussed an abortion. Ben and Patricia, a friend of Joyce who saw her just before she (Joyce) met defendant, testified Joyce appeared to be in good health and not suffering from any illness or ailment. On April 6, in a motel room, defendant inserted a speculum and a nutcracker into Joyce with intent thereby to procure a miscarriage. She paid him $150. Ben took Joyce to St. Joseph's Hospital on April 8. Joyce was taken to General Hospital on April 13. She died on April 21.

Dr. Moss examined Joyce on April 8. His diagnosis was "an infected criminal abortion." She still had the fetus within her. It had been dead a little while. While in the hospital she expelled it. She was transferred to General Hospial for specialized treatment. An autopsy was had. The autopsy surgeon testified the cause of Joyce's death was bronchial pneumonia due to abortion.

[1, 2] The sufficiency of the evidence to sustain the verdict is not questioned. The first specification of error is that the district attorney was guilty of prejudicial misconduct in the parts of his argument to the jury to be discussed. A photograph taken at the autopsy was in evidence. Referring to the photograph, the district attorney said, "you can look at it up in the jury room if you are so inclined—it's an autopsy picture —I'm not going to show it to you because some people don't like to see things like that—she was 26 years old April 6th. She was a girl in good health. She was pregnant. She wanted to do something about having an abortion for this pregnancy." We find nothing improper in the statement. Shortly thereafter the district attorney said: "Frankly, I don't know how you feel about this matter of abortion—it is a matter of difference of opinion. Some people say well, people can't afford it, it's all right to have an abortion. Some people say if the woman's health won't stand it it's all right to have an abortion. Our law says it's all right to have an abortion if her health is of such nature she can't have a baby. Some people think abortions are all right. Some people are absolutely against all of them. If you want to know the truth, I'm pretty much against all abortions myself, I think it's a terrible thing for a girl to be talked into this." It was of course improper for the district attorney to express his personal belief as to all abortions. However, there was no assignment of misconduct or request that the court admonish the jury to disregard the statement, and it appears to have been innocuous and far from prejudicial. The district attorney told the jury that what defendant did to Joyce was "absolute butchery." We think that on the facts this was fair argument.

[3] A Dr. Gilbert was called by defendant as an expert. He testified that from the medical records and the autopsy report it was his opinion that Joyce did not die of a septic abortion. He testified he was being paid $150 for his testimony. In argument the district attorney referred to Dr. Gilbert as a "paid expert" and as a "hired witness." We find nothing objectionable in the characterization. The district attorney had a right to question the credibility of the witness and the value to be given his opinion on that ground. There was no objection to the argument at the time.

[4] Defendant had previously been convicted of a felony, grand theft. In argument, the district attorney said: "On cross examination I asked him if he had ever been convicted of a felony before. That is not striking a foul blow at a man, it is proper impeachment. It is proper to show a jury that a person has been convicted of a felony before. It has a bearing upon that person's credibility as a witness. You can't show whether or not a person has had a misdemeanor conviction. A misdemeanor conviction is a little light offense—petty theft is a misdemeanor. A felony conviction, such as grand theft, can be shown to the jury, bearing upon that person's character

when he testifies as a witness, because people who do commit these felonies are the most unreliable of people. Probably you have never known a person in your lifetime who has ever been convicted of a felony. An ordinary citizen usually doesn't. That is one way of impeaching him. It can be done by the prosecution or the defense, any witness who testifies, whether for the defendant or not. Every once in a while a jury gets the idea you are trying to play a foul trick on a man by bringing out his record, but the law provides that for any witness, not only defendants." It cannot be said the argument was improper in toto. The reference to a misdemeanor conviction should not have been made. We do not agree, however, that the statement gave the jury the impression defendant had misdemeanor convictions. In other respects the argument was proper.

[5, 6] It is asserted Patricia and Ben, who testified for the prosecution, were improperly granted immunity after they had refused to testify. The assertion is predicated on what defendant says took place at his preliminary hearing. The transcript of the preliminary is not part of the record on appeal and the point may not be considered. Further, this appeal is not the proper vehicle for reviewing the rulings of the committing magistrate.

[7] On cross-examination defendant's counsel asked Ben, "Q. Mr. Johnson, at or about April 6, 1955, were you regularly dating another woman?" An objection on the ground the matter was immaterial was sustained. Defendant asserts error. He argues the question was proper to show Ben's motive to commit the offense of which he (defendant) was accused. There was no error. Ben freely admitted he was interested in having Joyce aborted. Whether he was regularly dating another woman at the time was not material.

[8] Defendant claims there was no proof the abortion was not necessary to preserve Joyce's life. The contention is without merit. The testimony of Patricia and Ben and the circumstantial evidence were enough to prove the fact. People v. Gallardo, 41 Cal.2d 57, 62, 257 P.2d 29; People v. Malone, 82 Cal.App.2d 54, 63, 185 P.2d 870.

[9, 10] Finally, defendant claims the court erred in not giving two instructions he requested, which are set out in the margin,[1] to the effect that in a crime such as that with which defendant was charged there must exist a joint operation of act and intent. Abortion requires proof of a specific intent. The court instructed the jury it was necessary that the prosecution prove the act be done with intent to procure the miscarriage of the woman; in other words, that proof of a specific intent was essential to a conviction. As the trial judge wrote on the refused instructions and as he forcefully pointed out on the hearing of the motion for a new trial, if the requested instructions had been given they would have tended to create a conflict in the minds of the jurors and the giving of them might have been error, see People v. Zerillo, 36 Cal.2d 222, 231–232, 223 P.2d 223; People v. Booth, 111 Cal.App.2d 106, 108–109, 243 P.2d 872; and their refusal in fact protected "the defendant against the jury being misled too strongly adversely to him."

We find no prejudicial error in the record.

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[1] "In a crime such as that of which the defendant is accused by the information in this case, there must exist a union or joint operation of act and intent. (In a crime such as that of which the defendant is accused by the information in this case, there must exist a union or joint operation of act and intent or criminal negligence.)"

"When a person commits an act or makes an omission through misfortune or by accident under circumstances that show no evil design, intention or culpable negligence, he does not thereby commit a crime, although the same act or omission committed under different circumstances and coupled with criminal intent would constitute a crime."

The judgment and the order denying a new trial are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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145 Cal.App.2d 806

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harvey Leroy KARMAN, Defendant and Appellant.

Cr. 5584.

District Court of Appeal, Second District, Division 3, California.

Nov. 13, 1956.

Hearing Denied Dec. 12, 1956.

Defendant was granted probation after plea of guilty of grand theft, and upon his subsequent conviction of abortion, the Superior Court of Los Angeles County, Charles W. Fricke, J., revoked the probation, and defendant appealed from such order and other orders. The District Court of Appeal, Vallée, J., held that conviction of abortion authorized revocation of probation, and that other orders were nonappealable.

Order revoking probation and judgment affirmed, and appeal from other orders dismissed.

1. Criminal Law ⊂⇒982

Commission of abortion was violation of terms of probation imposed on grand theft charge, and affirmance of conviction of abortion established propriety of revocation of probation.

2. Criminal Law ⊂⇒1023(12)

Orders made in connection with revocation of probation, other than judgment sentencing defendant to state prison, were nonappealable.

Godfrey Isaac, Jr., Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., and Robert S. Rose, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

This is a companion case to People v. Karman, 303 P.2d 71, in which defendant's conviction of abortion is affirmed. In 1953 defendant was charged with grand theft. On September 16, 1953 he pleaded guilty. Proceedings were suspended and he was granted probation for a period of three years.

At the time defendant was sentenced on the abortion conviction, the court revoked the probation and sentenced him to state prison on the grand theft charge, the sentence to run concurrently with that on the abortion charge. Defendant appealed from the order revoking probation. The only point made is that on reversal of the judgment in the abortion case the order revoking probation and the order and judgment sentencing defendant on the grand theft charge should be reversed.

[1] The commission of the abortion was a violation of the terms of the probation. People v. Robinson, 43 Cal.2d 143, 146, 271 P.2d 872. Since the judgment in the abortion case has been affirmed, it is patent that probation was properly revoked.

[2] Defendant also appealed from "an order made on the said date sentencing the defendant to the term prescribed by law and from an order remanding the said defendant into custody and from each and every order made in the instant action on said date." We take it that by the order sentencing him to "the term prescribed by law" defendant means the judgment sentencing him to state prison. The other orders are nonappealable.

The order revoking probation and the judgment are affirmed. The appeal from the other orders is dismissed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

146 Cal.App.2d 7

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Cedric Clinton BYNON, Defendant and Appellant.

Cr. 5670.

District Court of Appeal, Second District, Division 1, California.

Nov. 14, 1956.

Rehearing Denied Nov. 26, 1956.

Hearing Denied Dec. 12, 1956.

Defendant was convicted of lewd and lascivious acts upon body of a child under 14. The Superior Court, Los Angeles County, H. Burton Noble, J., entered judgment, and defendant appealed. The District Court of Appeal, Fourt, J., held that, where the child, who gave birth to a baby, testified, at preliminary examination that she had never had sexual intercourse with any person other than defendant, defendant's request, in an ex parte proceeding prior to trial, that a blood test be taken to establish parentage was timely made, and trial court should have ordered the tests made under proper supervision and adequate safeguards, and refusal or neglect to proceed with the blood tests pursuant to defendant's request constituted a miscarriage of justice.

Judgment reversed, and cause remanded for new trial.

1. Infants 🔑20

In prosecution for having committed lewd or lascivious acts upon body of child under 14, main issue was not matter of paternity of child borne by child under 14, but whether defendant had committed the acts charged. West's Ann.Pen.Code, § 288.

2. Constitutional Law 🔑67

All judicial powers are vested in the courts, and the judiciary constitutes a separate, distinct, and co-ordinate department of the government of the sovereign state, and the primary function of the judiciary is the administration of justice, and justice can never be rightly administered unless truth be first ascertained as nearly as may be.

3. Criminal Law 🔑650

Citizen holds his citizenship subject to duty to furnish to the courts, from time to time and within reasonable limits which are for the courts to determine, such assistance as the courts may demand of him in their efforts to ascertain truth in controversies before them, and there is no valid reason why courts of record may not require anyone within their jurisdiction to furnish a few drops of blood for test purposes when, in court's opinion, to do so will or may materially assist in administration of justice in a pending matter. West's Ann.Code Civ.Proc., §§ 1980.3, 1980.7.

4. Criminal Law 🔑650

Where, in prosecution for lewd or lascivious acts upon body of child under 14, the child, who gave birth to a baby, testified, at preliminary examination, that she had never had sexual intercourse with any person other than defendant, defendant's request, in an ex parte proceeding prior to trial, that a blood test be taken to establish parentage was timely made, and trial court should have ordered the tests made under proper supervision and adequate safeguards, and refusal or neglect to proceed with the blood tests pursuant to defendant's request constituted a miscarriage of justice. West's Ann.Pen.Code, § 288; West's Ann.Code Civ.Proc., §§ 1980.3, 1980.7.

◆

Eugene V. McPherson, Joseph A. Armstrong, Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

FOURT, Justice.

The defendant was charged by an information with violating the provisions of section 288, Penal Code (Crimes against children, lewd and lascivious acts), and section

285 of the Penal Code (Incest). The trial was commenced with a jury on October 21, 1955, and prior to the swearing of any witness, and outside the hearing and presence of the jury, upon the motion of the District Attorney, the count having to do with incest was dismissed. It was apparently established by certain birth certificates and adoption papers produced by the defendant that the child in question was not the natural daughter of the defendant.

The jury found the defendant guilty as to the charge under section 288 of the Penal Code. Sexual psychopathy proceedings were had, pursuant to the law, the defendant was found to be a probable sex psychopath and committed to Atascadero State Hospital for a period of observation. Within due time the Superintendent of the Hospital made a report to the court to the effect that the defendant was not a sex psychopath and he was returned to the court for further proceedings. His application for probation was denied and judgment was entered that he be committed to the State prison.

A résumé of the testimony is as follows: Linda Bynon was about twelve years of age and was either adopted by the defendant and his wife or was living with the defendant and his wife under arrangements where adoption proceedings were contemplated. The defendant, his wife and Linda resided in Springfield, Missouri before the episodes complained of in the information. In December of 1954, the defendant and Linda came to Los Angeles county while the wife of the defendant remained in Springfield, Missouri. When they first arrived in Los Angeles county they resided alone in an apartment on Grattan and there the defendant had one or more acts of intercourse with Linda. For about three weeks, in January of 1955, the defendant was ill, and during such time the child resided with a relative in Long Beach. Thereafter, she returned to live with the defendant at a second apartment on Grattan, where he frequently had acts of intercourse with Linda. In about May, 1955, they moved to another apartment on Burlington Avenue, where they lived alone and engaged in acts of intercourse. The child discovered that she was pregnant and told the defendant of her condition. She was instructed by the defendant to say, if anything happened, that she had gotten into trouble with a sailor while in Long Beach. She had never had intercourse with any sailor. After the child informed the defendant of her pregnant condition he continued to have sexual relations with her up until about the early part of August, 1955. On September 21, 1955, Linda gave birth to a baby boy. The defendant did not inform his wife of Linda's condition and he provided no medical care and attention for her. Furthermore, he made no report of the situation to any constituted authority.

The District Attorney, in his case in chief, asked the question of Linda, "Did you ever have any sexual relations with any other individual other than your father?" and her answer was, "No".

On October 13, 1955, in an ex parte proceeding, the following took place in a department of the Superior Court other than the department where the case was tried:

"The Court: Bynon.

"Mr. Rosen (Public Defender): Your Honor, this case is set for trial in this court on October 21st. I have advanced it to this date in order to make a motion and a request of the Court.

"The Charge here is incest, 288, on an adopted daughter of this defendant. This girl gave birth, Your Honor, just recently to the child that is supposed to be the child of this defendant. She had testified at the preliminary hearing that she never had any intercourse with anybody other than this defendant. This defendant has always, to me, proclaimed his innocence in this matter and desires to have blood tests taken of the mother, the child, and himself. ......

"He does not have sufficient funds, Your Honor, with which to pay for these blood tests and he has requested me to ask the Court to appoint a doctor to make these blood tests.

"I feel that they are material. A blood test would be material. Because if it would bring this defendant in the category that eliminated him as the father, why, then in view of the testimony of the child I think it would be almost tantamount to showing that this defendant did not have sexual relations with this child that she claimed.

"The child, I might say, Your Honor, is in Juvenile custody. Her baby is under the control of the Juvenile authorities.

"The Court: Is the mother willing to undergo such procedure?

"Mr. Rosen: I have never talked to her.

"The Court: This Court has no authority to order the witnesses in this matter to submit to any kind of a test.

"Mr. Rosen: Well, it would have—

"The Court: In civil matters, the matter of blood tests are matters of stipulation or a party refusing in a civil case, of course, has certain benefits resulting from a refusal, but that doesn't apply to criminal procedures I am informed. Moreover, I don't know of any procedure whereby this Court can be called upon to supply the funds with which to enable the defendant to conduct his defense other than to appoint a public defender.

"Mr. Rosen: Well, I appreciate those factors, Your Honor.

"The Court: I would say that your point may be well taken, that if you could get a negative test, it would be very beneficial.

"Mr. Rosen: There is no question about that. This defendant having the lack of funds with which to be able to pay a doctor requested that this motion be made.

"The Court: I would say that in a case of this nature, a test would be of no benefit to you whatsoever unless it were negative.

"Mr. Rosen: That is very true. I explained that to the defendant. There is no question about that.

"The Court: I can't see any reason why the mother of the child should not be willing if she is of the conviction that the defendant is the only person with whom she has had relationships. She should be the first one to be willing to undergo such tests.

"I would say that is a matter that you should try to work out with the prosecutor.

"Mr. Rosen: Very well."

Sections 1980.3 and 1980.7 of the Code of Civil Procedure are set forth in the footnote.[1] The trial judge seemed to be of the opinion that the blood tests would be relevant and that they could be important to the defendant.

The Attorney General points out that the court merely stated that he had no authority to order the witnesses to submit to any kind of a test, and that he was unaware of any procedure whereby the court could be called upon to supply the funds with which to enable a defendant to conduct his defense other than to appoint a public defender. However, we believe the action of the judge was, for all intents and purposes, tantamount to a denial of the defendant's motion, and all parties, thereafter, apparently considered that the defendant would not be permitted to have the results of such tests in his defense.

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[1] Uniform Act on Blood Tests to Determine Paternity. "§ 1980.3 [Paternity actions: Blood tests: Effect of refusal to submit thereto.] In a civil action, in which paternity *is a relevant fact*, the court, upon its own initiative or upon suggestion made by or on behalf of any person whose blood is involved may, or upon motion of any party to the action made at a time so as not to delay the proceedings unduly, shall order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve the question of paternity against such party or enforce its order if the rights of others and the interests of justice so require."

"§ 1980.7 [Application of chapter: Limitations.] This chapter shall apply to criminal cases subject to the following limitations and provisions: (a) An order for the tests shall be made only upon application of a party or on the court's initiative; (b) the compensation of the experts shall be paid by the county under order of court; (c) the court may direct a verdict of acquittal upon the conclusions of all the experts under the provisions of Section 1980.6, otherwise the case shall be submitted for determination upon all the evidence."

At the time of the pronouncement of judgment proceedings, the defendant himself stated to the judge:

"Your Honor, when I heard the child was born, I went down before Judge Irwin, who I was originally to be tried before, and requested a blood test to establish parentage, and Judge Irwin denied me the privilege of having that blood test on the ground that he couldn't order the witness to have it."

[1] It is true that in this case the matter of the paternity of the child is not the main issue, but rather whether the defendant committed acts which were prohibited by section 288 of the Penal Code. However, it is also true that the prosecution repeatedly referred to the birth of the child and place great weight in their prosecution on the fact that defendant had failed to supply medical care and that he had not advised his wife of the pregnancy. In other words, the testimony concerning the alleged acts of intercourse, the baby, and who its parents were is so intermixed and comingled that it is impossible to say that in no sense did the jury consider the paternity of the child. Under the circumstances the paternity of the child was a "relevant fact" in the case, and such being true, the blood test results would have been extremely important.

The district attorney had in mind that the matter of the paternity of the child was a relevant fact, otherwise he would not have made the inquiry he did to point up that Linda had never had sexual relations with anyone whomsoever other than the defendant. The prosecution by their own course developed the evidence into a state where according to all of the prosecution testimony the defendant and no one else could possibly have been the father of the child and at the same time he was prevented from possibly showing as a scientific certainty that he could not have been the father of the child.

In argument before the jury the district attorney stated in substance that in cases having to do with burglary or robbery some sort of physical evidence was available, that "in some cases you have seen the results of scientific investigation." Further, he stated, "* * * in these sex cases—we are * * * down to the fundamental issues—that there is obviously no scientific detection that can be applied to a case of this sort, except in this matter there isn't any doubt in the world that an act of sexual intercourse has taken place here, because a baby has been born to this 12-year-old.

* * * * * *

"Now, first of all, we do know that an act of intercourse took place, a youngster was born. * * * who is telling the truth. Is it the defendant or is it this 12-year-old, * * *."

It is evident that if the defendant had been able to establish by the blood tests that he could not possibly have been the father of the child he would have effectively impeached Linda's testimony.

[2, 3] In the case of State v. Damm, 64 S.D. 309, 266 N.W. 667, 670, the court made some observations which seem appropriate here: "All judicial powers are vested in the courts * * * and the judiciary constitutes a separate, distinct, and co-ordinate department of the government of the sovereign state * * *. The primary function of the judiciary is the administration of justice, and justice can never be rightly administered unless truth be first ascertained as nearly as may be. See Brewer, J., dissenting, in Union Pac. Ry. Co. v. Botsford (1891) 141 U.S. 250, 11 S.Ct. 1000, 35 L.Ed. 734. The citizen holds his citizenship subject to the duty to furnish to the courts, from time to time and within reasonable limits (which are for the courts to determine), such assistance as the courts may demand of him in their efforts to ascertain truth in controversies before them. This is just as much a part of the citizen's inescapable duty of supporting his government as is military service in time of war, or any other like obligation. We perceive no valid reason why courts of record

may not require of any person within their jurisdiction the furnishing of a few drops of blood for test purposes when, in the opinion of the court, so to do will or may materially assist in administering justice in a pending matter. We perceive no reason why this is not just as proper, and just as justifiable, as it is for the same court to require the same person to attend in court for days upon end as a witness; to bring in his books, documents, and papers; and even to abide in jail unless he can satisfy the court that he will be present as a witness when desired. The order for such test should be adequately safeguarded of course, which can easily be done, as well pointed out in Hayt v. Brewster, Gordon & Co., supra [199 App.Div. 68, 191 N.Y.S. 176]; and it should issue not as a matter of absolute right, but in the sound discretion of the court, which discretion may be reviewed if it is abused in either direction. Indeed we might even go further. As has been often said, a trial judge should not be a mere umpire presiding over a game of skill conducted by counsel. It is difficult to see any reason why a trial judge might not of his own motion in a given case, if he thought it likely to be helpful, order the making of a blood test by a competent person and a report thereon under oath subject to cross-examination by both parties."

In the Commissioners' Prefatory Note to the Uniform Act on Blood Tests to Determine Paternity it is stated, 9 Uniform Laws Annotated, 1955 Pocket Part, pages 13, 14, 15, 18:

"As to the make-up of the blood, the testing process is reasonably simple. It is practically the same thing in which the 11 million or more men were tested in determining blood types in the service. It is the same kind of test made of the blood of donors to the Red Cross and hospital blood banks. Consequently, this is one of the few classes of cases in which judgment of court may be absolutely right by use of science. In this kind of a situation *it seems intolerable for a court to permit an opposite result to be reached when the judgment may scientifically be one of complete accuracy. For a court to permit the establishment of paternity in cases where it is scientifically impossible to arrive at that result would seem to be a great travesty on justice.*

* * * * * *

"There is, however, one case not involving paternity in which the blood of the defendant was admitted to show that it was of the same type as blood found upon the seat of a car for the purpose of identifying the accused as the man who committed the crime. Commonwealth v. Statti, 166 Pa. Super. 577, 73 A.2d 688. This case was a prosecution for assault with intent to commit rape. The prosecutrix testified that she bit a finger of the assailant during the struggle in his automobile. Evidence that stains on the seat cover in the automobile were made by blood of the same type as defendant's was admitted over objections that the taking of blood from defendant's person was in violation of his privilege against self-incrimination. The Superior Court of Pennsylvania, Hirt, J., held that defendant's constitutional rights were not violated even if the sample of blood was taken without his consent. He also held that such evidence was properly admitted as a circumstance bearing on identification, and that admissibility was not affected by the fact that the type of defendant's blood was common to 45 per cent of all people. It may well be argued that if the blood type could be used affirmatively to identify the accused in a criminal case, it is equally relevant and valuable in a paternity case, particularly if the blood is an infrequent type.

* * * * * *

"In order to avail himself of the provisions of this Act, the *person desiring that the blood test be taken should make a motion to the court a reasonable time before the case is reached for hearing.* What is a reasonable time is left to the discretion of the trial court. The purpose of an early application for the test is to permit the results of the test to become known prior to the trial. If, for example, it would show that non-paternity existed, the whole case might be settled in a pre-trial hearing. At any event, it would point up the issues when the case was reached for hearing. It would also permit the taking of additional tests if there was any claim as to the inaccuracy of the one given. Should the test not eliminate the alleged father, but indicate that he could be the father, it might be determined in pre-trial whether such evidence involved such infrequency of the blood type as to justify the discretion of the court in admitting it. The provisions in the Act leave it to the discretion of the court as to what constitutes reasonable time, taking into consideration the facilities for examination." (Emphasis added.)

[4] We are of the opinion that the application here was timely made, that the trial court, under the circumstances of this case, had the right to, and should have ordered the tests under proper supervision and adequate safeguards.

At the time of the motion in the trial court Linda had testified, at the preliminary examination, that she had never had sexual intercourse with any person other than her father. If that testimony were true then the blood test would show compatibility.

We are not unmindful of the fact that the trial court had the witnesses before him, observed them as they testified and otherwise viewed the overall trial. The trial judge stated at the time of the sentence that he had no question about the guilt of the defendant, and from a reading of the record in this case we can well see how he came to such a conclusion. It was a despicable and revolting offense which was committed upon Linda, and the guilty person should be brought to justice. We further believe, however, that there was a miscarriage of justice in refusing or neglecting to proceed with the blood tests pursuant to the defendant's request in the first instance.

Judgment reversed and the cause remanded for a new trial.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

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145 Cal.App.2d 692

Theodore STEINBERG, Plaintiff and Respondent,

v.

Max M. GOLDSTEIN, Defendant and Appellant,

James E. Arden, Receiver, Respondent.

Civ. 5351.

District Court of Appeal, Fourth District, California.

Nov. 8, 1956.

Proceeding for dissolution of partnership between physicians, wherein receiver filed petition for instructions. The Superior Court of Fresno County, George M. De Wolf, J., entered an order requiring surrender of alleged partnership assets to receiver and payment of rental therefor by former partner who had been permitted to use them, and granting other relief, and the former partner appealed. The District Court of Appeal, Coughlin, J. pro tem., held that the order directing return of property and payment of rental was within court's discretion under circumstances, but ordering sale of lease allegedly owned by partnership was error.

Affirmed in part and reversed in part.

1. Judgment ⚷719

In proceeding upon partnership receiver's petition for instructions, findings made in connection with receiver's previous report and request for instructions, which were within issues presented for determination at hearing thereon, were res judicata. West's Ann.Code Civ.Proc., § 1908.

2. Receivers ⚷1, 16

The purpose of a receivership is preservation of property which is the subject of litigation pending its disposition according to the judgment entered, and to this end, court may direct receiver to take and keep possession of such property. West's Ann. Code Civ.Proc., § 568.

3. Partnership ⚷325(1)

In proceeding for dissolution of physicians' partnership, wherein receiver was appointed but one partner was permitted to use medical equipment, and he used equipment for six years without paying rental to receiver, order requiring return of equipment to receiver was a legal exercise of discretion, depreciation during use being a proper factor to consider. West's Ann. Code Civ.Proc., § 568.

4. Receivers ⚷65

Property subjected to receivership is under control and continuous supervision of the court.

5. Receivers ⚷87

Whether receiver's statutory authority to collect rent should be exercised is discretionary. West's Ann.Code Civ.Proc., § 568.

6. Partnership ⚷325(1)

In proceeding for dissolution of physicians' partnership, wherein receiver was appointed and one partner was permitted to use medical equipment for six years, by order directing him to pay partnership for use or consumption of such equipment as was partnership property, order requiring him to pay receiver forthwith for use of such equipment was proper in view of the protracted trend of litigation, depreciating nature of equipment, hazard of insolvency and alleged use of partnership funds to pay for equipment and expenses. West's Ann. Code Civ.Proc., § 568.

7. Appeal and Error ⚷1033(7)

On appeal from order requiring former member of dissolved partnership to return property to receiver and pay rental therefor, such former partner could not complain of fact that order gave him option of paying market value of the equipment in lieu thereof.

8. Partnership ⚷325(1)

Partnership receiver's petition for instructions, which referred to former order reserving jurisdiction to provide for disposition of partnership property, and asked for instructions with respect to liquidation and disposition thereof, was sufficient basis for order requiring former partner to return property which he had been permitted to use and to pay receiver rental therefor.

9. Partnership ⚷340

Court has authority to direct receiver to sell partnership assets, including a lease, if necessary to preserve assets for disposition under judgment on the merits.

10. Partnership ⚷340

In action for dissolution of partnership and accounting, partnership assets are generally liquidated prior to final judgment, but there are exceptions to this rule and before decreeing sale for purpose of winding up partnership affairs, court hearing action on its merits should determine whether such property is a partnership asset.

11. Partnership ⚷340

On petition by partnership receiver for instructions, order directing the sale of lease owned by partnership without showing of necessity for such sale, or decision as to whether it was a partnership asset, was error and trial court should decide action on the merits, determine extent of partnership assets, settle account between partners, direct sale of assets, and thereafter render personal judgment in favor of one partner against the other if authorized by law and facts.

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Matt Goldstein and John D. Chinello, Fresno, for appellant.

Stammer, McKnight & Barnum, and L. Nelson Hayhurst, Fresno, for respondent.

COUGHLIN, Justice pro tem.

This is an appeal from an order upon a petition by a receiver requesting instructions.

The plaintiff and defendant are licensed physicians and surgeons. In 1947, they formed a partnership to engage in the practice of medicine and surgery with principal offices in the City of Fresno, California.

On April 4, 1950, the plaintiff commenced this action for a dissolution of the partnership, an accounting, the appointment of a receiver, and damages. The plaintiff alleged that, without his consent, the defendant "opened an office *for himself*" in Visalia, using partnership funds to equip and pay its expenses. In his answer, the defendant alleges that the *partnership* opened the Visalia office, with the consent of plaintiff, and admits that partnership funds were used to "equip * * * and to pay expenses" of this office. During all of this time the partners were maintaining an office in Fresno.

A receiver was appointed forthwith. By order dated June 30, 1950, at which time the parties were maintaining separate offices and practicing their professions separate and apart, the receiver was instructed to make an inventory of "all assets of the partnership" and "to permit the defendant to use the equipment and supplies" which were on hand in both the Fresno and Visalia offices; the defendant was to pay "*unto the said partnership*" the rental of such equipment and the market value of such supplies as may be determined to be partnership property at the trial of the action on the merits.

The defendant remained in possession of these offices using the equipment and supplies as needed.

On November 30, 1950, the trial court, in another department, entered an interlocutory judgment decreeing the dissolution of the partnership, appointing a referee to effect an accounting between the parties and reserving jurisdiction to proceed in accordance with law.

Thereafter, in a report and accounting filed by him, the receiver alleged that he had taken possession of the Fresno office together with the equipment and supplies therein, which he described as "property of the partnership" and delivered the same to the defendant. He also alleged that he had taken possession of the equipment "lease, supplies and other property in the medical office operated by the defendant at Visalia"; had delivered the same to the defendant on June 12, 1950, after making an inventory thereof; and that the defendant accepted and used the same but had made no payment on account thereof. In this respect the lease of the Vasalia office was specifically described. It was stated that the defendant had collected rentals from a subtenant. Also, that there had been no decision on the merits as to whether the property in the Visalia office, the lease, or the rental from the subtenant were partnership property.

After a hearing on this report the trial court made findings of fact together with an order dated June 29, 1953, resulting in the following adjudications:

(1) Modified the order of June 30, 1950, by striking therefrom the provisions postponing, until a trial upon the merits, a determination of the amount to be paid to the partnership for the use or consumption of partnership property;

(2) Required the defendant to pay the receiver the market value of the Fresno office supplies;

(3) Directed the defendant to deliver to the receiver all the equipment in the Fresno office together with a specified rental, or pay the receiver a specified market value therefor, with interest from June 12, 1950;

(4) Found that the allegations in the report of the receiver with respect to the Visalia office, with certain minor exceptions, were true; that the reasonable value of the equipment in that office was the sum of $1,992.67; that the reasonable value of the consumed supplies was $944.18; and that the defendant had collected rental for the period of March 15, 1950, to June 12, 1950, in the sum of $362.50, and declared that the court reserved "jurisdiction to provide for the disposition" of the lease of this office, the rental collected by the defendant from the subtenant and of any property not disposed of by the current order, "or to charge or credit the reasonable rental value or the reasonable market value thereof on June 12, 1950, as found by this court, in its final decree on the merits in this action or by a further order in this receivership, as the court may deem proper."

On Appeal by the defendant the order of June 29, 1953, was affirmed by this court, Steinberg v. Goldstein, 129 Cal.App.2d 682, 278 P.2d 22.

On October 24, 1955, the receiver filed a petition for further instructions with respect to the equipment, supplies, rental collected from the subtenant and the lease of the Vasalia office.

After notice, there was a hearing upon this petition in which all parties participated. The defendant contended that the partnership character of the property in question should not be determined in the receivership proceeding. With respect to this matter, the court made the following statement:

> "Well, gentlemen, I am of the opinion that this court not only is not going to determine what is and what is not partnership assets but that to do so would be exceeding the power of this court in operating a receivership * * *."

Thereafter the court made its "order of instructions" and, amongst other things, decreed:

[1] That the defendant deliver to the receiver the equipment in the Visalia office. (This property was specifically described, and its rental and market value, in the amounts previously determined, were set forth.)

[2] That the defendant pay the receiver the rental accruing since June 12, 1950, for the use of said equipment.

[3] That, in lieu of delivering the equipment to the receiver and paying the rental in question, the defendant, at his option, may pay to the receiver the market value thereof.

[4] That the defendant pay to the receiver the market value of the consumed supplies, and the $362.50 rental collected from the subtenant.

[5] That at such time as the defendant had "done and performed the things required of him by this order" the receiver was authorized to assign to him the lease of the Visalia office, provided he executed an agreement assuming its obligations and indemnifying the receiver and the plaintiff against loss, otherwise the lease is to be sold.

From the order so made the defendant has appealed, contending that the property in question never has been in possession of the receiver, that he was not required to pay rental on the equipment, or the market value of the supplies, until it was determined that the equipment or supplies were partnership property, that he was not given notice that the issues decided by this order would be considered at the hearing on the receiver's petition for instructions, and that the trial court, was without jurisdiction to make its order with respect to the lease and the rental collected from the subtenant.

Contrary to the contention of the defendant, the record establishes that the receiver had taken possession of all of the property in question. The findings of fact supporting the order of June 29, 1953, were introduced in evidence and are proof that the receiver had taken possession of the equipment "lease, supplies and other property in the medical offices operated by the defendant at Visalia"; that he delivered the same to the defendant after making an inventory thereof; and that the defendant accepted the same pursuant to the court's order.

[1] These findings were within the issues presented for determination at the prior hearing, and are res judicata, Code Civ.Proc. Sec. 1908; Kline v. Mohr, 142 Cal. 673, 678, 76 P. 650.

Under the order of June 29, 1953, jurisdiction to make further provision in the receivership proceedings with respect to the property in the Visalia office was reserved.

Two conclusions are apparent: The receiver has had possession of this property, and it has been subjected to the jurisdiction of the court in the receivership proceedings.

[2, 3] The order appealed from directs the defendant to return to the receiver the equipment in the Visalia office. The purpose of a receivership is the preservation

of property which is the subject of litigation pending its disposition according to the judgment entered. Kreling v. Kreling, 118 Cal. 421, 422, 50 P. 549; North v. Cecil B. De Mille Productions, Inc., 2 Cal.2d 55, 58, 39 P.2d 199. To this end, the court may direct the receiver to take and keep possession of such property. Code Civ.Proc. Sec. 568; Irer v. Gawn, 99 Cal.App. 17, 31, 277 P. 1053; North v. Cecil B. De Mille Productions, Inc., supra; Steinberg v. Goldstein, supra. In the instant case, the order requiring the return of the equipment to the receiver was a legal exercise of the court's discretion in the premises. Over six years have transpired since the defendant was given permission to use this property. No rental has been paid to the receiver during this time. The depreciation of property while in use is a factor to be considered by those charged with its preservation.

The order of June 30, 1950, instructing the receiver to permit the defendant to use the equipment and supplies at the Visalia office, stated that he should pay the *partnership* for the use or consumption of such part thereof as may be determined to be partnership property. No provision was made with respect to payment by the defendant to the *receiver*.

The order now before this court did not modify any previous order directing the defendant to pay the *partnership* for the use or consumption of its property. On the other hand, the order of June 29, 1953, which is final, did determine the reasonable rental value and the reasonable market value of the equipment and supplies in question, and reserved jurisdiction to provide for the disposition thereof, or to charge or credit such rental or market value either in a final decree, or by a further order in the receivership. The defendant's further use and possession of the equipment and supplies was continued with knowledge of this latter order.

[4–6] The trial court now has decided that, in the interest of good management, it is best to require the defendant forthwith to pay the *receiver* the rental now due upon the equipment and the market value of the supplies consumed. The property subjected to the receivership is under the control and continuous supervision of the court, Lesser & Son v. Seymour, 35 Cal.2d 494, 499, 218 P.2d 536. The authority to collect rent is vested by statute. Code Civ.Proc. Sec. 568. Whether that authority should be exercised is a discretionary matter, Bank of Woodland v. Heron, 120 Cal. 614, 617, 52 P. 1006. In the case at bar, the protracted trend of the litigation, the depreciating nature of the equipment, the ever present hazard of an individual's insolvency and the allegations in the defendant's answer that partnership funds were used to pay for the equipment and expenses of the Visalia office, all are factors in support of the order requiring the defendant to make the payments in question forthwith. At a hearing upon the merits the trial court will determine what part, if any, of the monies paid to the receiver shall be credited to the partners as proceeds from partnership property and what part, if any, shall be credited to the defendant as proceeds from his individual property.

[7] The fact that the order gives the defendant the option of paying the market value of the equipment, in lieu of returning the property and paying the rental found due, is something about which he cannot complain.

The defendant contends that he was not given notice that the receiver's petition for instructions might involve an order requiring him to pay any monies or do any act.

In his petition the receiver referred to the former order of the court reserving jurisdiction "to provide for the disposition of the equipment, supplies, rental collected from the subtenant and the lease" which said lease is alleged to be "an asset of the partnership * * * and which said asset your receiver has not received, nor reduced to possession or disposed of", and reported that the value of the consumed supplies was uncollected. He stated that he was anxious to wind up and terminate the receivership but was unable to do so unless the above-mentioned assets were liquidated or disposed of, and asked the court to instruct him with respect to the liquidation and disposition thereof.

[8] It is the opinion of this court that the contents of the petition for instructions fully advised the defendant of all issues presented to and passed upon by the trial court.

The receiver took possession of the Visalia office and delivered it to the defendant on June 12, 1950. Until that date the defendant was in possession by virtue of his rights as an individual owner or as a member of the partnership. For the period between March 15, 1950, and June 12, 1950, he collected rentals from a subtenant. As these rentals were collected before the receiver had taken possession of this office, it follows that they are not proceeds from receivership property. They will be the subject of an accounting between the partners which must be settled pursuant to the interlocutory judgment of another department of the trial court.

[9] The final objection by the defendant to the order under consideration concerns that part thereof which directs an assignment of the lease to him upon condition that he comply with all other parts of the order and execute an agreement of assumption and indemnity or, in the event he does not comply, to sell the lease. A court has authority to direct a receiver to sell the assets of a partnership, including a lease, if such action is necessary to preserve these assets for disposition under a judgment on the merits, Wulff v. Superior Court, 110 Cal. 215, 42 P. 638. In this case the evidence does not indicate such necessity. No value is placed upon the lease. Whether it is a partnership asset has not been decided. The need for liquidation in order to pay debts or expenses is not present. In his petition the receiver reported that he has partnership funds on hand. He does not report any unpaid debts.

[10] It appears that the trial court was acting under the mistaken belief that all of the assets subjected to the receivership must be liquidated by the receiver preliminary to a trial of the case on the merits. It is true that, in an action seeking dissolution of a partnership and an accounting, as a general rule, partnership assets are liquidated prior to a final judgment, Hooper v. Barranti, 81 Cal.App.2d 570, 578, 184 P.2d 688. However, there are exceptions to this rule. Shuken v. Cohen, 179 Cal. 279, 283, 176 P. 447. Moreover, before decreeing a sale of any property for the purpose of winding up partnership affairs, the court hearing the action on its merits should determine first whether such property is a partnership asset.

[11] The receiver in this case should file a report setting forth the property subjected to the receivership which remains in his hands. Thereupon, the court could decide the action on the merits, determining the extent of the partnership assets, settling an account between the partners, directing a sale of the assets, if such a procedure is indicated in order to pay partnership debts or give effect to the settled accounting, distributing whatever assets remain, and, thereafter, if the law and the facts require such action, render a personal judgment in favor of one partner against the other.

The part of the order appealed from which requires the defendant to pay the receiver the sum of $362.50 as rental from the subtenant and instructs the receiver to assign the lease to the defendant upon his compliance with certain conditions, otherwise to sell the same is reversed. In all other particulars the order is affirmed.

Each party will pay his own costs on appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

145 Cal.App.2d 702

BANK OF AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, a national banking association, et al., Plaintiff, Cross-Defendants and Respondents,

v.

LAMB FINANCE COMPANY, Inc., a corporation, and Leah Lamb Poyet, also known as L. L. Poyet, Leah D. Lamb and Leah Lamb, Defendants, Cross-Complainants and Appellants.

Civ. 21775.

District Court of Appeal, Second District, Division 2, California.

Nov. 9, 1956.

Action by corporate payee against maker and guarantor to enforce payment of a note. Defendants cross-complained against payee and one of its officers and a director and former employee of maker for damages based on alleged fraudulent activities of such parties in connection with certain transactions affecting defendants. The Superior Court, Los Angeles County, Arthur Crum, J., dismissed the cross-complaint and rendered judgment for payee and defendants appealed. The District Court of Appeal, Fox, J., held that where guarantor raised defense of fraud in the inducement to action by payee to enforce payment of a note, guarantor was entitled to a trial by jury, and evidence introduced by guarantor was sufficient to present a question for the jury as to whether guarantor was a victim of fraud in executing note in question.

Judgment reversed and cause remanded for new trial with directions.

Opinion, 301 P.2d 940, vacated.

1. Appeal and Error ⇨158(1)

Where a judgment was paid in full, but such payment was not made by way of compromise or settlement or under an agreement not to appeal, the payment did not preclude right of appeal.

2. Jury ⇨13(1)

If the gist of an action as framed by the pleadings is such that issues raised were cognizable at law in 1850, trial by jury is a matter of right. West's Ann.Const. art. 1, § 7.

3. Jury ⇨13(1)

Even though a case involves equitable principles, if it is one where the common law courts could and would grant relief, trial by jury is preserved. West's Ann. Const. art. 1, § 7.

4. Jury ⇨13(1)

Where law and equity possess concurrent jurisdiction to provide relief, mere existence of a remedy in equity cannot operate to defeat a party's right to elect to proceed at law, and it is only where the issues to be tried are exclusively cognizable in equity that a suitor is deprived of the right to a jury trial. West's Ann.Const. art. 1, § 7.

5. Jury ⇨13(14)

Where an action presents issues of both a legal and equitable nature, a party is entitled to trial by jury of any legal issue remaining after the equitable aspects of the case have been determined by the court. West's Ann.Const. art. 1, § 7.

6. Attorney and Client ⇨86

In the absence of fraud, admissions of an attorney in open court are binding upon his clients.

7. Attorney and Client ⇨86

Where, during a colloquy with a judge during trial of an action by payee against maker to enforce payment of a note, attorney for maker unequivocally conceded liability of maker on the note, the effect of such admission was to eliminate from the case any issue of maker's liability on the note.

8. Appeal and Error ⇨882(14)

Where liability of maker of a note was conceded during the course of trial of an action against it and against guarantor by payee to enforce payment of such note, maker would not on appeal be permitted to say that it suffered prejudice in being denied trial by jury. West's Ann.Const. art. 1, § 7.

9. Equity 🔑11

Equity jurisdiction is not automatically conferred by a mere charge of fraud made affirmatively or defensively.

10. Jury 🔑13(15)

Where guarantor of a note pleaded fraud in the inducement defensively to avoid her apparent obligation on a note, she was entitled to trial by jury of the issues so raised. West's Ann.Const. art. 1, § 7.

11. Jury 🔑13(15)

Where fraud in inducement is relied upon as a defense to a legal demand based upon a simple contractual obligation, issue thus raised is properly triable to a jury.

12. Bills and Notes 🔑103(1)

Fraud in the inducement is available as a defense against a holder not in due course of a negotiable instrument. West's Ann.Civ.Code, § 1629.

13. Bills and Notes 🔑537(4)

In action by corporate payee against maker and guarantor to enforce payment of a note, evidence presented a question for the jury as to whether guarantor was a victim of fraud in executing note in question.

14. Appeal and Error 🔑1168
Judgment 🔑210

Where, in an action by corporate payee against maker and guarantor to enforce payment of a note, maker's cross-complaint for damages against payee was improperly stricken, judgment against maker was premature and would be reversed.

15. Judgment 🔑203

Litigation is not to be tried piecemeal, and generally there can be only one final judgment in an action.

16. Evidence 🔑441(12)

Evidence offered by guarantor for purpose of proving an alleged oral agreement made on part of an officer of payee at the time of execution of a note, to the effect that her guaranty was a matter of form and that no personal liability would attach to her as a result of her execution of a guaranty to the note, contradicted the language of the guaranty signed by guarantor, and was incompetent under the parol evidence rule.

17. Evidence 🔑450(11)

The maker or guarantor of a promissory note which is unambiguous as to maker's or guarantor's liability thereon is precluded from showing an oral agreement accompanying the signing of the instrument that he would never actually be called upon to pay it.

18. Appeal and Error 🔑78(3), 356

Where parties to a cross-complaint were not identical with parties to an original action, order dismissing the cross-complaint amounted to a final adjudication between cross-complainants and new parties joined by the cross-complaint, and was an appealable judgment, and where no appeal was taken from order dismissing cross-complaint against certain cross-defendants and the time for appeal from such judgment elapsed, as to such parties, a purported appeal would be dismissed. West's Ann.Rules on Appeal, rule 2(b) (2).

19. Set-Off and Counterclaim 🔑14

In an action by corporate payee against maker and guarantor to enforce payment of a note, affirmative defense which was essentially a counterclaim on part of guarantor for recoupment of damages sustained by her as a result of payee's alleged fraud was a proper subject of a counterclaim. West's Ann.Code Civ.Proc., § 438.

20. Guaranty 🔑26

In action by corporate payee against maker and guarantor to enforce payment of a note, question of whether guarantor waived alleged fraud of payee by execution of a renewal note after discovery of such antecedent fraud was a question of fact for the jury.

21. Contracts 🔑100

Whether or not a person has ratified a voidable contract, or elected to affirm it rather than to rescind it, depends primarily upon his intention, as shown by his declarations, acts, or conduct, and this is a matter of fact presenting a question for the jury.

22. Pleading ⚷256

An opportunity to amend pleadings should be afforded defendant with respect to explanation of any purported admissions shown to be the result of excusable inadvertence or unfortunate choice of phraseology.

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J. W. Ehrlich, San Francisco, N. E. Youngblood, Beverly Hills, and Robert M. Maslow, Hollywood, for appellants.

Samuel B. Stewart, San Francisco, Hugo A. Steinmeyer, Robert H. Fabian and Richard G. Rypinski, Los Angeles, for respondents.

FOX, Justice.

In an action to enforce payment of a promissory note, defendants appeal from a money judgment rendered upon a directed verdict of the jury in favor of plaintiff.

The fundamental issue presented is whether the court erred in not permitting certain defenses based on fraud to be tried by the jury. Other questions raised are (1) the propriety of the dismissal of defendants' cross-complaints at the time of trial without affording leave to amend, and (2) whether parol evidence is admissible to show an agreement between the payee of the note and a guarantor thereof, by which the former promised not to enforce the latter's liability thereon.

Plaintiff bank instituted the within action for the unpaid balance on a promissory note executed by defendant Lamb Finance Company. In its second count, the bank sought recovery against co-defendant Leah Lamb Poyet, who had guaranteed, by a writing on the reverse side of the note, to pay the indebtedness evidence by said note. Defendants answered with general denials and eleven affirmative defenses. Mrs. Poyet and the Lamb Finance Company filed cross-complaints against plaintiff, W. N. Newton, assistant manager of plaintiff's Hollywood Main Office, W. A. Angione, former president and director of the Lamb Finance Company, and F. J. McFarland, former accountant of the Lamb company. The cross-complaints primarily sought damages of $500,000 based on the alleged fraudulent activities of the cross-defendants in connection with certain transactions affecting the cross-complainants.

At the outset of the trial, while the parties were in the chambers of the court, the cross-defendants moved for dismissal of the cross-complaints on the ground that no cause of action was stated. Mrs. Poyet and the company moved for leave to amend. This latter motion was denied, the cross-defendants' motion was granted, and the cross-complaints dismissed. A motion to strike defendants' eleventh affirmative defense was likewise granted.

[1] Prior to the impanelment of the jury, plaintiff bank moved for segregation of what it termed the legal and equitable issues. It requested that the court try without a jury the first, sixth, seventh and ninth affirmative defenses on the theory that these constituted equitable defenses on which defendants were not entitled to trial by jury. This motion was granted, the court directing that these defenses were to be tried by the court subsequent to the trial of the legal issues by the jury. After four days of trial, the jury was excused. Trial was then resumed before the court only on the four remaining defenses, two of which were grounded on fraud in the inducement or procurement of the note. At the conclusion of this phase of the trial, plaintiff moved for a directed verdict. The court granted said motion, recalled the jury and directed the return of a verdict for plaintiff. The court then signed and filed its findings and rendered judgment for plaintiff.[1] This appeal followed.

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[1] The judgment was paid in full. It is not contended that such payment was made by way of compromise or settlement or under an agreement not to appeal. Such payment, therefore, does not preclude the right of appeal. Reitano v. Yankwich, 38 Cal.2d 1, 237 P.2d 6, 39 A.L.R.2d 191.

The main controversy involved in this appeal hinges on defendants' assertion that they were wrongfully deprived of their right to a jury trial on the issues raised in their first, sixth, seventh and ninth affirmative defenses. The right to a trial by jury is provided by Article I, section 7, of the Constitution of California. This section has been judicially construed as guaranteeing the right to a trial by jury in actions at law of issues which were triable by jury at common law in 1850. People v. One 1941 Chevrolet Coupe, 37 Cal.2d 283, 286–287, 231 P.2d 832.

[2–5] In Ripling v. Superior Court, 112 Cal.App.2d 399, 247 P.2d 117, the court gives cogent expression to the principles determinative of a litigant's right to a trial by jury. These principles, as far as they are here germane, may be epitomized as follows: (1) If the gist of the action as framed by the pleadings is such that the issues raised were cognizable at law in 1850, a trial by jury is a matter of right; (2) even though the case involves equitable principles, if it is one where the common law courts could and would grant relief, trial by jury is preserved; (3) where law and equity possess concurrent jurisdiction to provide relief, the mere existence of a remedy in equity cannot operate to defeat a party's right to elect to proceed at law; (4) it is only where the issues to be tried are exclusively cognizable in equity that a suitor is deprived of the right to a jury trial; (5) those issues that are legal in nature are triable to a jury, 112 Cal.App.2d at pages 401–402, 407, 247 P.2d 117. Where an action presents issues of both a legal and equitable nature, a party is entitled to trial by jury of any legal issue remaining after the equitable aspects of the case have been determined by the court. Connell v. Bowes, 19 Cal.2d 870, 123 P.2d 456.

Adverting now to the essential allegations of the affirmative defenses which the court removed from the jury's consideration, it plainly appears therefrom that defendants rely on plaintiff's fraud in the inducement of the execution of the note to defeat their liability thereon.[2] Out of the prolix and indiscriminate welter of allegations which have been incorporated into the answers with a noticeable disregard for the niceties of pleading or the precepts of grammar, these significant facts may be culled: That defendant Leah Lamb Poyet was one of the incorporators and later sole stockholder in defendant Lamb Finance Company (sometimes referred to as the company) in January, 1952. W. A. Angione became president and a director of the company in March, 1952, and became acquainted with Mrs. Poyet's financial worth. Angione advised her to transfer certain personal bank accounts and the company's bank account to the Hollywood main office of plaintiff bank upon representations that he had known W. N. Newton, the assistant manager thereof, for many years and that Newton would deal fairly and honestly with her. Unknown to Mrs. Poyet at the time, Angione had informed Newton that he was advising Mrs. Poyet to transfer her deposits to his bank and it was arranged that Newton would ingratiate himself with Mrs. Poyet and Angione would induce her to establish her account in Newton's branch and under his control. On March 3, 1952, Angione introduced her to Newton at plaintiff's Hollywood branch office. Newton told her he would personally arrange to make her deposits in her account and would extend various courtesies to her. Mrs. Poyet thereafter opened her personal account at the Hollywood branch and also transferred $50,000.00 in cash in an account opened for defendant company, which Mrs. Poyet told Newton was not to be used until a permit was issued by the Corporation Commissioner. Newton assured Mrs. Poyet that he would see to it that she and the company would at all times be protected. He also advised her that Angione was extremely reliable and a man of integrity. Relying on such representations, she left the company's matters entirely in Angione's hands. Thereafter, pursuant to a conspiracy between them and unknown to Mrs. Poyet, Newton permitted Angione to overdraw the company's account in approximately $20,000. Thereafter, on Newton's representation that the company's business was good, that Angione was managing the business well and that the bank would approve a line of credit to the company in the amount of $200,000, a promissory note was executed by Mrs. Poyet on behalf of the company in favor of the bank in the sum of $50,000, Newton stating he would credit this sum to the company's account. Newton also procured her to sign the note as guarantor, stating the bank would never hold her personally liable but would liquidate the note out of the line of credit to be advanced. Newton failed to disclose that Angione had overdrawn the account at the time the note to the bank was executed. Thereafter, the note was periodically renewed upon maturity, Newton failing to advise her that Angione had again overdrawn the company account, and assuring her that the bank would extend the credit applied for although the application had in fact been denied. It is alleged that had defendants known the true state of affairs which Newton misrepresented and concealed, the various notes would not have been executed or renewed.

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[2] Duress and coercion are included in the defenses removed from the jury.

[6–8] Before pursuing the principal questions postulated by this appeal, it is pertinent to observe that during a colloquy with the judge on the second day of the trial, defendants' counsel, in open court, unequivocally conceded the liability of the defendant company on the note. It is not contended that this express concession was made improvidently or in an unguarded moment, or that it should be given any other meaning or effect. In the absence of fraud, the admissions of an attorney in open court are binding upon the client. Bias v. Reed, 169 Cal. 33, 37, 145 P. 516; Taylor v. Randall, 5 Cal. 79, 80, 81; People v. Hammond, 26 Cal.App.2d 145, 150, 78 P.2d 1172. The effect of this admission was to eliminate from the case any issue of the company's liability on the note. Scafidi v. Western Loan & Bldg. Co., 72 Cal.App.2d 550, 561–562, 165 P.2d 260. Its liability being conceded, the company cannot on appeal be heard to say that it suffered prejudice in being denied trial by jury upon an issue that was removed from the case by its own concession. See Dale v. City Court of Merced, 105 Cal.App.2d 602, 606–607, 234 P.2d 110. The subsequent discussion of whether the court erred in not permitting the defense of fraud in the inducement to be tried by the jury is consequently limited to Mrs. Poyet.

In support of the trial court's removal of the issues referred to from the jury, plaintiff contends that the "constitutional right to a jury trial did not extend to the equitable issues of fraud raised in the answers." It argues "that the defense of fraud in the inducement asserted to defeat an obligation on a contract raises issues solely equitable in nature." This position is manifestly untenable.

[9] The underlying fallacy permeating plaintiff's argument is its contention that where fraud in the inducement of an instrument, as distinguished from fraud in its execution, is interposed by way of defense to the enforceability of the instrument, the issues thereby presented are exclusively cognizable in equity. This is without historical foundation. Equity jurisdiction is not automatically conferred by a mere charge of fraud made affirmatively or defensively. Casaretto v. DeLucchi, 76 Cal.App.2d 800, 808, 174 P.2d 328. From earliest times, law and equity have exercised concurrent jurisdiction in divers types of controversies to suppress and relieve against fraud. "Again, it hath been said that fraud, accident and trust are the proper and peculiar objects of a court of equity. But every kind of *fraud* is equally cognizable, and equally adverted to in a court of law * * *." Cooley's Blackstone (4th Ed.), Vol. II, Book III, p. 1178. Lord Mansfield, in the case of Bright v. Eynon, (1 Burrow, 391, 395), remarks "fraud or covin may, in judgment of law, avoid every kind of act." That case was a suit upon a note, to which defendant

interposed a written discharge. Lord Mansfield granted a new trial so that the jury might consider whether the discharge was obtained from the payee by fraud and imposition. Chief Justice Kent, in delivering the opinion of the court (in 1813) in the case of Jackson ex dem. Gilbert v. Burgott, 10 Johns. 457, says "courts of law have concurrent jurisdiction in all cases of fraud. Fraud will invalidate in a court of law as well as in a court of equity and annul every contract and every conveyance infected with it." 10 Johns. at page 462. In 1938, speaking for the Supreme Court of the United States in the case of Swayze v. Burke, 12 Pet. 11, 9 L.Ed. 980, Mr. Justice McLean states: "That fraud is cognizable in a court of law as well as in a court of equity is a well established principle. It has been often so ruled in this court." In Crane v. Bunnell, 10 Paige, N.Y., 333, an action at law had been brought on a note, to which the defense was asserted that it had been procured by fraudulent misrepresentations regarding a land transaction. Defendant then filed a bill in chancery alleging the same fraudulent misrepresentations as a basis for cancelling the note and enjoining the action at law. The chancellor, conceding he possessed concurrent jurisdiction in cases of fraud, refused to allow the cause to be removed from the court of law which had first taken cognizance. He pointed out that fraud in the inducement in making the note was equally available as a defense in the suit at law, where the parties could have the benefit of a jury trial, 10 Paige at page 340. In Dutil v. Pacheco, 1863, 21 Cal. 438 our Supreme Court dismissed a bill in equity to set aside a judgment in an action growing out of a fraud inducing the sale of property. The court observed that such fraud was a defense which could have been raised in the action at law in which the judgment was rendered.

[10] It is clear that having pleaded fraud defensively to avoid her apparent obligation on the note, Mrs. Poyet was entitled to trial by jury of the issue so raised. The general rule is stated in 50 C.J.S., Juries, § 46, page 758, as follows: "As respects the right to a jury trial, courts of law and courts of equity both have jurisdiction of the issue of fraud in proper cases, and, where the facts constituting the fraud and the relief sought are cognizable in a court of law, the parties are entitled to a jury trial; but, where the case made by the pleadings involves the application of the doctrines of equity and the granting of relief which can be obtained only in a court of equity, the parties are not entitled to a jury trial. So, where fraud is pleaded as a defense in an action at law, the issue is triable by the jury, and in a suit in equity by the court." Professor Pomeroy, in Vol. III of his treatise on Equity Jurisprudence (5th Ed.), remarks (sec. 872, p. 419):

> "Fraud in some of its phases, has long been an occasion for the exercise of jurisdiction both in law and in equity. The various reliefs on the ground of fraud which are possible from the nature of the legal and equitable modes of procedure and remedies are the following:
>
> "At law * * * 2. The affirmative relief whereby the defrauded party suffers the transaction to stand and by action recovers pecuniary damages as compensation for the injury maintained by him from the deceit; 3. Defensive relief, whereby the party sets up the fraud as a defense, and thereby defeats any action brought to enforce the apparent fraudulent obligation."

The defense of fraud in the inducement to defeat an apparent contractual obligation or to avoid the effect of various types of written instruments is well recognized in California as raising a legal issue triable before a jury. In Kearney v. Bell, 160 Cal. 661, 117 P. 925, plaintiff sued on an account stated. Defendant's answer contained a defense that she had been induced to execute the account stated by virtue of plaintiff's false representations. At the outset of the trial by jury, plaintiff's motion that the court alone try what he termed the equitable defense of fraud was denied. This ruling was urged as error upon the appeal. In repelling plaintiff's argument, the court observed, 160 Cal. at page 663, 117 P. at page 926: "'"An account stated is a contract, and like any other contract may be avoided by showing that the assent of one party thereto was procured by the fraud of the one seeking to enforce the contract. Such a defense is a legal and complete defense. * * * The action upon an account stated is an action at law, and we know of no reason why the defense that the defendant's assent to the account stated was procured by fraud may not be passed upon by the jury, under the instructions of the court. This is what was done in this case, and there was no error in so doing."'"

In Ito v. Watanabe, 213 Cal. 487, 488, 2 P.2d 799, 800, plaintiff sued for the balance of the purchase price under a contract for the sale of a business. Defendant's answer alleged fraudulent misrepresentation inducing the making of the contract, partial failure of consideration, and a prior notice of rescission. Eleven special interrogatories were submitted to the jury, four of which related to the alleged fraudulent misrepresentations, upon which the jury found in defendant's favor. Plaintiff moved the court to disregard this verdict and enter judgment in his favor, which it did. In support of the court's disregard of the jury's verdict, plaintiff maintained that the answer raised only equitable issues, a jury trial was unnecessary, and its verdict only advisory. The court stated: "The present action is brought by the seller for the balance of the purchase price, and the buyer is defending on the ground of fraud, and alleging a prior rescission * * *. Fraud is the issue, and, as raised in this case, it is a legal issue. No equitable doctrine is involved and no equitable remedy is sought. [Citation]."

In Johnstone v. Morris, 210 Cal. 580, 292 P. 970, plaintiff brought an action on a promissory note. Defendant's answer alleged that he had been defrauded of $15,000 by plaintiff and set this up by way of counterclaim. Defendant also filed a cross-complaint, alleging the note had been given upon dissolution of a partnership during which time plaintiff and his wife had misappropriated funds belonging to the partnership. Plaintiff demanded an accounting to determine the exact amount misappropriated and prayed damages for the difference between the amount misappropriated and the amount due on the note. The trial court, over plaintiff's protest, granted a jury trial on all the issues. The Supreme Court held that the action was cognizable at law, that fraud was a defense to the note and that trial by jury was proper.

Landreth v. Ducommun, 8 Cal.2d 694, 68 P.2d 231, offers an interesting parallel to the matter before us. There, plaintiff sued upon a promissory note. Defendant's answer relied principally upon fraud in the inducement as a bar to his liability upon the note. Upon plaintiff's motion the court directed the jury to render a verdict in her favor. Upon appeal defendant claimed that there was sufficient evidence of fraud to require submission of the case to the jury. The Supreme Court held it to be reversible error to direct a verdict for plaintiff where the state of the record warranted the jury's determination on the issue of fraud in the inducement.

In Wilson v. San Francisco-Oakland Terminal Railway, 48 Cal.App. 343, 191 P. 975, plaintiff brought an action to recover for personal injuries. Defendant pleaded a release executed by plaintiff as a defense to the action. Plaintiff offered to prove the release was obtained from him by various fraudulent misrepresentations of defendant's agents. The court refused to entertain such evidence and directed the jury to enter a verdict for defendant. Upon appeal the case was reversed, the court holding that the question of whether the release was obtained through the fraud alleged is a question for the jury.

[11, 12] The authorities and texts referred to unmistakably establish that where fraud in the inducement is relied upon as a defense to a legal demand based upon a simple contractual obligation, the issue thus

raised is properly triable to a jury.[3] For the proposition that only equity can vitiate a contract where fraud occurred in its inducement, plaintiff relies upon Hartshorn v. Day, 19 How. 211, 15 L.Ed. 605, and George v. Tate, 102 U.S. 564, 26 L.Ed. 232. The Hartshorn case related to a sealed assignment of a patent; the George case to a bond. These instruments were specialties at the common law. In each case it was held that fraud relating to the consideration for the sealed instrument could not be shown in an action at law. In the George case, which cites the earlier decision, the court said: "It is well settled that the only fraud permissible to be proved at law *in these cases* is fraud touching the execution of the instrument * * *." (Italics added.) It is clear from the italicized language that the rule announced applies to contracts falling within the class of sealed instruments or specialities, which enjoyed a peculiar sanctity at common law. This limited interpretation of the language in the George and Hartshorn cases is, after close analysis, set out in American Sign Co. v. Electro-Lens Sign Co., D.C., 211 F. 196, where the court notes that all of the cases cited involved contracts under seal. As pointed out by Professor Ames in 9 Harv.L.R., 49, a seal was a sacred thing at common law. It showed that the document to which it was attached was executed with studied formality and could not be lightly abrogated. The seal was accorded such reverence, that neither fraud in the inducement, illegality, payment of the obligation, or failure of consideration would be heard as a defense in an action at law upon sealed contracts. 9 Harv.L.R., 49, 51–54. Such considerations do not prevail in this contemporary age in an action on a promissory note, since distinctions between sealed and unsealed instruments have been abolished, Civil Code, sec. 1629. Thus, fraud in the inducement is available as a defense against the holder, not in due course, of a negotiable instrument. Landreth v. Ducommun, 8 Cal.2d 694, 699, 68 P.2d 231. In the American Sign Company case, supra, the court held that fraud in the inducement interposed by way of defense to an action on a promissory note raises issues cognizable at law. This case is cited as authority for the same proposition in Ito v. Watanabe, 213 Cal. 487, 489, 2 P.2d 799.

Plaintiff asserts that by reason of the prayer, the litigation was transmuted into an equitable proceeding, citing First National Bank of San Pedro v. Superior Court, 71 Cal.App. 64, 234 P. 420. The case cited was one in which a proceeding originally commenced as an action at law was transformed by subsequent pleadings into a suit in equity for a partnership accounting and for the termination of the partnership relationship. The prayer in the instant action does not require the invocation of equitable relief or remedies. The prayer "for the sum of $500,000.00 as damages" is a request for a money judgment based on allegations sounding in tort and which, if established, would constitute a counterclaim predicated on deceit. Both the remedy pursued and the relief asked are legal in nature. It is also prayed that "plaintiff take nothing by its action" and that defendants "be released of any and all liability by reason of the notes, endorsements and guaranties." It is suggested that the latter is a prayer for affirmative relief and indicates the equitable character of the action. A similar contention was repelled in Locke v. Moulton, 108 Cal. 49, 52–53, 41 P. 28, where the court points out that the essential relief sought by defendant is that plaintiff take nothing by the action. A judgment that plaintiff take nothing would effectively release Mrs.

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[3] Plaintiff has cited no California authority to the contrary. On the other hand, the reports are replete with cases in which jury trials are granted in causes where fraud in the inducement has been raised as a defense to a simple contract. In addition to Landreth v. Ducommun, supra, reference may be made to cases where such defense was tried to a jury in actions to enforce a promissory note. Simon Newman Co. v. Lassing, 141 Cal. 174, 74 P. 761; Conner v. Butler, 113 Cal.App. 502, 298 P. 546; J. B. Colt v. Freitas, 76 Cal.App. 278, 244 P. 916.

Poyet of liability as guarantor and guaranty.

[13] It is also urged that even if the issue of fraud had been tried to the jury, the court would have been justified in directing a verdict for plaintiff because "there was no competent evidence of fraud introduced sufficient to justify sending the case to the jury." Having read the voluminous evidence and having examined the numerous exhibits introduced, we are convinced that there was substantial evidence upon which the jury might have found that Mrs. Poyet was a victim of fraud in executing the notes in question. There was evidence that Newton told Mrs. Poyet that the money deposited in the company's account would not be used until a stock permit had been issued, that Newton would keep her informed of any irregularities in the company's accounts, that prior to the execution of the first note Newton failed to inform her that Angione had overdrawn the company's account, that Newton instead told her the company was in good condition, and that Newton assured Mrs. Poyet that the bank intended to extend a line of credit to the company at a time when he knew credit had been denied. Mrs. Poyet testified that not until February, 1954, did she learn that the company's account was overdrawn over $20,000 as of August 6, 1952. The jury might have believed, in the light of such evidence, that but for Newton's misstatements and concealments on these subjects peculiarly within his knowledge, which cast the financial position of the company in a more favorable light than was warranted by the facts known to Newton, Mrs. Poyet would not have executed the instrument on which her liability is predicated. Landreth v. Ducommun, supra, 8 Cal.2d at page 699, 68 P.2d 231.

[14, 15] Since Mrs. Poyet was deprived of a jury trial to which she was entitled, the judgment adverse to her must be reversed. Although defendant company is concededly liable on the note, its cross-complaint for damages was as will be subsequently developed, improperly stricken and must be reinstated as against plaintiff bank. Until all issues raised by the cross-pleadings against plaintiff are adjudicated and the action finally disposed of, the judgment against defendant company is obviously premature and, if it should prevail in the cross action, clearly incorrect. See Moss Construction Co. v. Wulffsohn, 116 Cal.App.2d 203, 205, 253 P.2d 483. Therefore, the judgment against defendant company should likewise be reversed, to await final disposition of all the issues of law and fact raised by the cross-complaint and the rendition of a single judgment determinative of the rights of the parties in relation to the matters in controversy. It is well settled that litigation is not to be tried piecemeal and that the general rule is that there can be only one final judgment in an action. See Nicholson v. Henderson, 25 Cal.2d 375, 381, 153 P.2d 945; Moss Construction Co. v. Wulffsohn, supra; Vallera v. Vallera, 64 Cal.App.2d 266, 270, 148 P.2d 694.

[16, 17] It might be useful, in the event of a new trial, to consider defendant's assignment of error based on the court's exclusion of evidence offered by Mrs. Poyet for the purpose of proving an alleged oral agreement, made on the part of Newton at the time of the execution of the note, to the effect that her guaranty was a matter of form and no personal liability would attach to her as a result of the transaction. The court properly sustained plaintiff's objection to the reception of such testimony, which contradicted the plain language of the guaranty signed by Mrs. Poyet, as incompetent under the parol evidence rule. In Newmark v. H. & H. Products Co., 128 Cal.App.2d 35, 37, 274 P.2d 702, 703, this court stated: "Parol evidence of fraud to establish the invalidity of a written instrument induced by a promise made without any intention of performing it is only permissible in the case of a promise to do some additional act which was not covered by the terms of the contract and such evidence is not admissible in the case of a promise directly at variance with the terms of the

written instrument. [Citations.]" It is well settled that the maker or guarantor of a promissory note which is unambiguous as to his liability thereon is precluded from showing an oral agreement accompanying the signing of the instrument that he would never actually be called upon to pay it. Shyvers v. Mitchell, 133 Cal.App.2d 569, 572–574, 284 P.2d 826; Shaw v. McCaslin, 50 Cal.App.2d 467, 471, 123 P.2d 102; see Bank of America Nat. Trust & Savings Ass'n v. Pendergrass, 4 Cal.2d 258, 263, 48 P.2d 659. The case of Shyvers v. Mitchell, supra, is squarely in point. The court below admitted oral evidence that at the time respondent signed a promissory note as guarantor, one Partridge, president of the payee bank, represented that respondent would never be held liable thereunder. One of appellant's contentions on appeal was that the court erred in admitting Partridge's statements that respondent would not be required to pay the note he guaranteed. This contention was sustained, the court stating, 133 Cal.App. at pages 573–574, 284 P.2d at page 830: "We think it is clear that evidence of the promises of Partridge hereinbefore set forth could not properly be received or considered as constituting a defense to the action, for to do so would in our opinion, violate the parol evidence rule. While it may be true that 'where the execution of a contract has been induced by a promise made without any intention of performing it, this constitutes such fraud in obtaining the contract that it may be declared null and void' [citation], yet when that promise which, because it is squarely against the terms of the writing, does by its very nature, if counted on, supersede that writing, then, even though it be made with intent on the part of the promisor that the promise will not be kept, evidence of it can neither be received nor counted upon to support a finding of fraud. [Citation.] If the judgment in the instant case depended upon the admission of the promises of Partridge we would be required to hold that it was reversible error to admit them and that the judgment was without evidentiary support." That states the rule here applicable.

[18] Defendants also contend that it was error for the trial court to dismiss their cross-complaints on the ground that they failed to state a cause of action, without affording them an opportunity to amend their pleadings. As has been stated, defendants filed cross-complaints against the bank and joined as new parties therein cross-defendants Angione, Newton and McFarland. On September 28, 1955, the motions of each of the cross-defendants to dismiss the cross-complaints were granted with an award of costs except as to plaintiff. The order embodying this ruling was entered in the permanent minutes on September 30, 1955, there being no direction that a written order be filed, Rules on Appeal, rule 2(b)(2). Where the parties to the cross-complaint are not identical with the parties to the original action, the order dismissing the cross-complaint amounts to a final adjudication between the cross-complainants and the new parties joined by the cross-complaint and is an appealable judgment. Keenan v. Dean, 134 Cal.App.2d 189, 191, 285 P.2d 300; Herrscher v. Herrscher, 41 Cal.2d 300, 303, 259 P.2d 901; Kennedy v. Owen, 85 Cal.App.2d 517, 520, 193 P.2d 141. Defendants have never appealed from this order. Therefore, as to cross-defendants Angione, Newton and McFarland such judgment has become final, the time for appeal therefrom having elapsed. As to these parties the purported appeal must be dismissed.[4]

[19] As to the plaintiff bank, the rulings dismissing the cross-complaints, striking Mrs. Poyet's eleventh affirmative defense and denying defendants' motions to amend their cross-complaints were interlocutory in character. Since the judgment in favor of plaintiff bank must be reversed and the cause remanded for a new trial of part of the issues, these interlocutory rulings are, of course, set aside and the parties restored to the position in which they found them-

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[4] The only appeal taken is from the judgment in favor of the bank.

selves at the outset of the proceedings, except as qualified by the opinion and judgment herein rendered. Hall v. Superior Court, 45 Cal.2d 377, 381, 289 P.2d 431. So far as concerns Mrs. Poyet, the order striking her eleventh affirmative defense was clearly erroneous. That defense is essentially a counterclaim on the part of Mrs. Poyet for recoupment of damages sustained by her as a result of plaintiff's alleged fraud. It was the proper subject of a counterclaim under section 438 of the Code of Civil Procedure. Johnstone v. Morris, 210 Cal. 580, 587, 292 P. 970; Bechtel v. Baglieto, 13 Cal.App.2d 495, 499, 57 P.2d 192.

[20] Apart from certain criticisms directed to the insufficiency of the cross-complaints to state the requisite elements of actionable fraud, which could ordinarily be supplied by amendment, plaintiff asserts that the pleadings are, in effect, incurably defective because of certain admissions and allegations destructive of defendants' cause of action predicated on fraud. It contends that the pleadings affirmatively show that Mrs. Poyet discovered the alleged fraud prior to the execution of the renewal note in October, 1953. It urges that by renewing the notes with knowledge of the antecedent fraud, she ratified the prior transactions and waived the fraud. It is true that there are numerous cases holding that the renewal of a note with full knowledge of the exercise of fraud in procuring the original may estop the maker from denying the obligation on that ground. However, the allegations of the lengthy pleadings, which need not be discussed in detail, negative the argument that Mrs. Poyet was in full possession of the facts constituting the frauds charged at the time of the renewal was executed. There are allegations that Mrs. Poyet did not discover the full extent of Newton's alleged duplicity, misrepresentations and fraudulent concealment of the truth until after the note was last renewed. One example is Newton's statement to her that the bank was granting the company a line of credit far in excess of the amount of the note and that capital would thus be available to pay off the face of the note. Newton reiterated this statement when the note was renewed in October, 1953, and also concealed the fact that the bank had previously rejected the application, a fact that Mrs. Poyet did not discover until November or December, 1953. Furthermore, accepting, as we must, the veracity of this allegation, it would thus appear that fraud infected the renewal of the guaranty. The principle governing guaranty contracts is thus stated in American Nat. Bank of San Francisco v. Donnellan, 170 Cal. 9, 22–23, 148 P. 188, 193: "'The contract of surety imparts entire good faith and confidence between the parties in regard to the whole transaction. Any concealment of material facts, or any express or implied misrepresentation of such facts, or any undue advantage taken of the surety by the creditor, either by surprise or by withholding proper information, will undoubtedly furnish a sufficient ground to invalidate the contract.' Story, Eq.Jur. § 324. 'If the creditor conceal any fact unknown to the proposed surety which, had he known it, would have deterred him from becoming surety * * * it is fraud upon him and relieves him from obligation. Especially is this so where the obligation is entered into at the request of the person to whom the security is given.' [Citation.]"

It is asserted, however, that the pleadings show that Mrs. Poyet discovered some elements of the claimed fraud prior to the execution of the renewal note here sued upon, and that "these earlier discoveries would put Mrs. Poyet upon inquiry and would charge her with all knowledge which a diligent investigation would have discovered." This claim is without merit as a statement of a proposition of immutable law. As stated in French v. Freeman, 191 Cal. 579, 589, 217 P. 515, 519: "We cannot say as a matter of law that when plaintiff discovered the shortage of chickens he was put on constructive notice as to the other frauds. The rule that a person who has discovered that he has been cheated in one particular is put on inquiry as to other possible frauds must be applied with reference to all the circumstances of the case, and is, of course, a question for the trial court to determine."

[21] A more significant infirmity in plaintiff's attack on the sufficiency of the cross-complaints, however, stems from its suggestion that the allegations respecting discovery of the fraud and subsequent renewal of the notes compel the conclusion that defendants waived fraud as a defense. However, whether there was an implied waiver of the defense of fraud is not ordinarily decided as a matter of law but is essentially a question of intention—an issue of fact which can be resolved only when the trier has before it the evidence bearing on that issue. In French v. Freeman, supra, 191 Cal. at page 590, 217 P. at page 519, the rule is thus stated: "The question of waiver or nonwaiver was one of fact for the trial court to pass upon, and the acts or conduct which defendant claims constituted said waiver were the evidence to be considered in determining the ultimate fact of waiver or nonwaiver. * * * Whether or not a person has ratified a voidable contract, or elected to affirm it rather than to rescind it, depends primarily upon his intention, and this is shown by his declarations, his acts, or his conduct, which are matters of fact. The question is therefore a question of fact for the determination of the jury." In Conner v. Butler, 113 Cal. App. 502, 514, 298 P. 546, 551, it is said: "The defense to the note on the ground of fraud was not waived by the mere renewal of the note. There is a conflict of evidence regarding the defendant's knowledge of alleged fraud at the time he renewed the note. * * * 'Ratification of a fraudulent transaction can only be made where there is a full knowledge of the facts constituting the fraud [citation] and depends primarily on the intention of the party as shown by his declarations, acts and conduct. [Citation].'" In Chung v. Johnston, 128 Cal.App.2d 157, 164, 274 P.2d 922, 926, the court states: "In the case of fraud the courts are reluctant to spell out a ratification unless the evidence thereof is clear. * * * Waiver of fraud is a question for the determination of the trier of fact. [Citation.] No general rule fits all cases. The question whether acts of the defrauded party do or do not constitute a waiver must be determined in connection with the circumstances of each case [citation]." It has been said that a claimed waiver of fraud by the subsequent acts of the party imposed on "'ought to be watched with the utmost strictness, and to stand only upon the clearest evidence as an act done with all the deliberation that ought to attend a transaction the effect of which is to ratify that which in justice ought never to have taken place.'" Green v. Duvergey, 146 Cal. 379, 391, 80 P. 234, 239. It cannot be said as a matter of law from the pleadings that Mrs. Poyet had full knowledge of the facts and clearly intended to waive the alleged antecedent fraud at the time she renewed the notes. See Brakhage v. McCaslin, 52 Cal.App.2d 382, 386, 126 P.2d 378. On the contrary, the matter of waiver was an issue of fact to be decided by the jury after a consideration of all the circumstances of the particular case. Hefferan v. Freebairn, 34 Cal.2d 715, 722, 214 P.2d 386; Friedberg v. Weissbuch, 135 Cal. App.2d 750, 756, 287 P.2d 785; Lobdell v. Miller, 114 Cal.App.2d 328, 338, 250 P.2d 357. For the foregoing reasons the cross-complaints were not vulnerable to a general demurrer and were improperly stricken.

[22] It is not amiss at this point to comment on the draftsmanship reflected by defendants' pleadings, which were not authored by present counsel. The cross-complaints are most egregious examples of maladroit pleading, being over-freighted with surplusage, and in places obscure, ambiguous, equivocal and confusing. Some of the language which plaintiff relies upon and narrowly construes as purported admissions that Mrs. Poyet discovered certain matters relating to the frauds charged at a time earlier than that to which she testified under oath, may as readily be the product either of tangled syntax or inadvertent mistake or general ineptness in

stating facts. In dismissing the cross-complaints without allowing an opportunity to amend, the judge stated: "The reason for the court's ruling is simply this: This is a trial department, and this case has come in here and it is claimed to be at issue by all of the parties. It has come here for trial. This is a trial department. That is the reason." Defendants' pleadings were never amended and present counsel was never given an opportunity to clarify ambiguities, amend insufficiencies, eliminate surplusage or explain mistaken statements, if any. After reversal, on appeal, the trial court may, in its discretion, permit such amendment of the pleadings as may be proper and appropriate. Holt v. Morgan, 128 Cal.App.2d 113, 118, 274 P.2d 915; Mitchel v. Brown, 78 Cal.App.2d 58, 62, 176 P.2d 957; Heidt v. Minor, 113 Cal. 385, 388, 45 P. 700. Such an opportunity should be afforded, particularly with respect to explanation of any purported admissions shown to be the result of excusable inadvertence or unfortunate choice of phraseology. See Meyer v. State Board of Equalization, 42 Cal.2d 376, 386, 267 P.2d 257; Jorgensen v. Dahlstrom, 53 Cal.App.2d 322, 330–331, 127 P.2d 551; Jackson v. Pacific Gas & Electric Co., 95 Cal.App.2d 204, 211, 212 P.2d 591, 595. The controlling philosophy underlying this latter consideration is well expressed in the Jackson case, last cited, as follows: "We think the correct rule with respect to reference to former pleadings which have been substituted by amended pleadings filed by leave of court is that the abandoned and substituted pleadings may be considered only for certain limited purposes, but not to bind the pleader to an untrue and erroneous admission against interest which was inadvertently contained therein, but which has been subsequently disavowed and corrected in an amended pleading filed by leave of court, in which or accompanying which, satisfactory explanation is made of the reason which caused the original erroneous statement. Otherwise, it would be useless and futile to correct an innocent mistake of fact by stating the truth with respect thereto and explaining the cause of the erroneous statement. The primary function of our courts of justice is to ascertain the truth and real facts of a case and to administer justice accordingly. If courts were to bind litigants to inadvertent untrue statements of facts and forbid them the inherent right to correct the false by substituting the true facts, they would become partisans to miscarriages of justice. Our courts not only permit, but strive to elicit, the true facts of all cases, and to render justice by applying the law to such facts."

The judgment in favor of plaintiff bank is reversed and the cause remanded for a new trial of the issues raised by plaintiff's second cause of action against defendant Poyet and her answer thereto and for a trial of the issues raised by the cross-complaints of defendants Poyet and Lamb Finance Company. The trial court is directed to consider such application as may be made for an amendment to the pleadings. As to cross-defendants W. N. Newton, W. A. Angione and F. J. McFarland, the purported appeal is dismissed.

MOORE, P. J., and ASHBURN, J., concur.

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145 Cal.App.2d 722

COACHELLA VALLEY LUMBER & SUPPLY CO., Inc., a corporation, Plaintiff and Appellant,

v.

E. Clyde HOLLENBECK and H. & H. Lumber & Hardware Company, Inc., a corporation, Defendants and Respondents.

Civ. 5218.

District Court of Appeal, Fourth District, California.

Nov. 9, 1956.

Action by a corporation to set aside a sale and transfer of a share of stock in defendant corporation to codefendant. The

Superior Court, Riverside County, Hilton H. McCabe, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that evidence sustained findings that stock in question had been sold to buyer for a fair, reasonable and adequate consideration and that plaintiff corporation was guilty of laches and unreasonable delay in seeking to rescind such sale.

Judgment affirmed.

1. Appeal and Error ⚷1010(1)

Where findings of trial court were supported by substantial evidence they could not be disturbed on appeal.

2. Appeal and Error ⚷1011(1)

Where there was a conflict in testimony, determination of questions of fact and weight to be given to testimony of various witnesses, including consideration of report of results of lie detector tests, were matters to be determined by trial court.

3. Corporations ⚷117

Mere fact that price paid for a share of corporate stock might have been inadequate was not sufficient ground for rescinding a contract for sale of such share.

4. Corporations ⚷116

Where both corporate seller of a share of stock and individual buyer were in a situation where they could form an independent judgment concerning the transaction and both acted knowingly and intentionally the sale was not invalid for inadequacy of consideration.

5. Corporations ⚷121(6)

In action by corporation to rescind sale of a share of stock in another corporation to buyer, where complaint contained no allegation of a promise of buyer to retransfer to president of selling corporation, and trial court found buyer was entitled to stock in question, and found that all conflicting evidence was in favor of buyer and against plaintiff, such finding amounted to an implied finding that buyer did not agree to resell or retransfer the stock to selling corporation, and failure to specifically find on issue of promise to retransfer did not constitute error.

6. Trial ⚷397(2)

Where trial court findings were supported by substantial evidence, and supported its judgment, it was unnecessary for it to make a finding as to an issue raised by plaintiff during course of trial.

7. Corporations ⚷121(5)

In action by corporation for rescission of a sale of a share of stock in another corporation, evidence, including the delay of more than a year from the time of sale until attempted rescission, sustained finding that selling corporation was guilty of laches in its attempt to set aside the transfer of stock in question.

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Thompson & Colegate, Roy W. Colegate, H. M. Dougherty, Riverside, for appellant.

Best, Best & Krieger, James H. Krieger, Arthur L. Littleworth, Riverside, for respondents.

MUSSELL, Justice.

This is an action to set aside the sale and transfer of one share of stock in defendant corporation, made by Lorena J. Young as president of plaintiff corporation, to E. Clyde Hollenbeck, one of the defendants herein. It is alleged in the complaint that the sale was made without authority or action by plaintiff corporation and was therefore invalid; that the defendant E. Clyde Hollenbeck occupied a position of trust and confidence with Lorena J. Young; that he induced her to sell the share of stock involved for less than its value; that plaintiff is the owner of said stock and that defendant Hollenbeck has no right, title or interest therein. A trial was had by the court without a jury and a judgment was rendered for defendants, from which plaintiff appeals.

In 1947, James W. Young owned some 85% of the stock of the Coachella Valley Lumber and Supply Company, Inc., a corporation (hereinafter referred to as "plaintiff corporation"), and was conducting a lumber and hardware business in Indio, in Riverside county. Defendant Hollenbeck started a lumber business in Indio in partnership with one Harry Hartsell and one of their suppliers was plaintiff corporation. In the latter part of 1947 Young purchased the interest of Harry Hartsell and Young and Hollenbeck operated this business for a short period of time until it was incorporated under the name of H. & H. Lumber and Hardware Company, Inc., a corporation, (hereinafter referred to as "defendant sued 84 shares of stock. 42 of these shares were issued to Young personally and were later turned in and reissued to plaintiff Coachella Valley Lumber and Supply Company, Inc. The remaining 42 shares were issued and held by Hollenbeck. James Young died on August 25, 1951. Two days later Hollenbeck called on Lorena Young and offered to help her out in any way he could and offered to lend her money if she needed it. About two weeks later he saw her again and suggested she employ a good attorney or see a business consultant. This advice was repeated on several occasions and in September, 1951, Hollenbeck took Mrs. Young to Riverside to the office of Elden Smith, President of the Citizens National Trust and Savings Bank. Mr. Smith called in Mr. Steves, the trust officer of the bank, and from that time on Steves was Mrs. Young's adviser in business affairs. She asked him to recommend a law firm and, while he refused to do this, he gave her the names of several responsible firms. Shortly thereafter she engaged the firm of attorneys who represented her at all times thereafter.

Lorena Young at one time was employed as bookkeeper for the plaintiff corporation and she had been an officer of the company since its incorporation. After her husband's death, she, in September, 1951, assumed the responsibilities of president of the Valley Lumber Company and at the same time she was a director in the defendant lumber company, and, according to her testimony, was secretary of that company from its beginning. Shortly after her husband's death she also assumed the job of vice-president of this corporation. Both before and after her husband's death Mrs. Young had access to the books, records and financial statements of both companies. She assumed an active role in the management of plaintiff corporation, and at the time of the sale and transfer of the stock here involved, she was president of the corporation.

Hollenbeck testified that soon after Mr. Young's death he, Hollenbeck, had a conversation with Mrs. Young in which she asked him if he would consider leaving his position to become manager of plaintiff corporation; that he agreed, was made director and vice-president of plaintiff corporation in 1951, and started as manager on or about January 1, 1952; that he had several conversations with Mrs. Young about buying into the plaintiff corporation; that in May or June of 1952 he asked Mrs. Young if she would consider selling one share of stock in the defendant corporation to him in order that he might have controlling interest in the corporation so that in the event of a sale of the plaintiff corporation or "in the event that she would some day remarry and it would change the picture, then I might have the opportunity of going my own way, whether or not I sold with the corporation, if it sold, that is, the Coachella Valley Lumber and Supply, or whether or not I continued on in the business"; that he asked Mrs. Young if she would like to talk it over with Frank Cooper, who was also a shareholder in plaintiff corporation, and also with Mr. Steves, who was advising her at that time; that he next talked to Mrs. Young in late June or early July of 1952 and then asked her if she had reached a decision on the sale of one share of the stock in the defendant corporation; that she said "Yes", and he stated that he would bring the share book and the seal with him on a later occasion and would go ahead and issue stock "in lieu of the one to be picked up"; that in one of the conversations with Mrs. Young he told her that the price of the share of stock involved, to wit, $551, was taken from the first quarterly financial statement of 1952, the book value of the stock; that Mrs. Young then said, "Whatever it is."

Mrs. Young testified that late in May, 1952, after she had been to Riverside to talk to Mr. Steves, she had a conversation with Hollenbeck in which she told him that Mr. Steves was going to help her find a buyer for the business; that Hollenbeck expressed concern in the event he would find himself with a new partner if such a sale took place and that he wanted some protection; that he asked her if she would consider selling him a share of defendant corporation stock so that he would not have that worry; that she told him she would not mind doing that "because he promised me at that time he would return the share of stock if the business was not sold." Hollenbeck denied making any such promise or any promise to return said share of stock to Mrs. Young. Mrs. Young testified further that in May, 1953, she told Hollenbeck she had decided not to sell the business, that she was going to marry Kenneth Eckert, and that if they were married, he would help her run the business and she would no longer need Hollenbeck; that at that time she asked Hollenbeck to sell the share of the corporation stock back to her and he said he would consider it.

On or about July 2, 1952, Hollenbeck took stock certificate No. 3 for 42 shares of defendant corporation, issued to plaintiff corporation, to Mrs. Young and she signed a transfer thereof in blank "as president for the company." At the same time Hollenbeck brought over a new stock certificate, No. 7, in defendant corporation, for 41 shares, issued to plaintiff corporation. This certificate was signed by Hollenbeck as president and Frank Cooper as secretary of defendant corporation. Hollenbeck then delivered a check to Mrs. Young for $551, which she accepted and deposited in the plaintiff corporation account. Hollenbeck, as president of defendant corporation, then issued certificate No. 6 (of defendant corporation) to himself for one share, which gave him a total of 43 shares, with Coachella Valley Lumber and Supply Company owning 41. Frank Cooper, the only other stockholder in plaintiff corporation besides Mrs. Young, was fully aware of these stock transactions and consented thereto. He was secretary of the defendant corporation and in that capacity signed a new certificate, No. 7, for the 41 shares issued to plaintiff corporation. On July 27, 1953, plaintiff corporation gave notice of rescission and demanded the return of the shares of stock involved, tendering a check for $551 therefor, and this action was filed December 18, 1953.

After the trial was concluded, the parties stipulated that Lorena Eckert (formerly Lorena Young), Kenneth Eckert and Clyde Hollenbeck would submit to a lie detector test, to be arranged by the court on its terms, and that the results of such tests might be considered by the court in determining the credibility of said witnesses. The case was reopened for this purpose and a report of the examiner filed. The questions asked the witnesses on the test related to whether there was an agreement for an outright sale of the share of stock involved without any "strings attached." The report of the examiner indicated that "deception" was indicated in the answers given by defendant Hollenbeck to the questions asked and that no deception was indicated in the answers given by Mrs. Eckert and her husband.

The trial court found that "certificate No. 3 was endorsed by Lorena J. Young, as president of Coachella Valley Lumber & Supply Co., Inc., and voluntarily surrendered by her as president of said company to E. Clyde Hollenbeck, as president of defendant H. & H. Lumber & Hardware Company, Inc., on or about July 2, 1952, in exchange for said Certificate No. 7, and the sum of Five Hundred Fifty-one Dollars * * * as consideration for the one (1) share of stock which was subtracted from said Certificate No. 3 and sold to E. Clyde Hollenbeck"; that the value of the stock was more than $551; that Hollenbeck did not occupy a position of special trust and confidence with Lorena Young with respect to the sale by plaintiff of its stock to E. Clyde Hollenbeck; that all facts and terms involved in the sale of said share of stock were well known to plaintiff and said Lorena Young or were expressly made known to plaintiff before said transaction was completed and that plaintiff and Lorena Young consented to said sale with full knowledge of all facts connected therewith; that plaintiff corporation has been guilty of laches and unreasonable delay; that on or about July 2, 1952, the transaction was completed by plaintiff and it was not until on or about July 27, 1953, that plaintiff offered to restore to defendants said money; that "it is also true that plaintiff has never offered to restore to defendants said Certificate No. 7, representing forty-one (41) shares of the capital stock of defendant corporation, but said Certificate No. 7 has been retained by plaintiff as a valid issuance of forty-one (41) shares of the capital stock of defendant corporation"; that "plaintiff and its president, Lorena J. Young, had every opportunity to investgate all matters involved in said transaction as the same were represented by defendant E. Clyde Hollenbeck, and it is true that plaintiff and its president, Lorena J. Young, knowing full well all of the affairs of defendant corporation, and particularly its financial status, sold the one share of stock now evidenced by Certificate No. 6 of defendant corporation to the defendant E. Clyde Hollenbeck for a fair, reasonable and adequate consideration of Five Hundred Fifty One Dollars * * * and did not demand the return of said share until on or about July 27, 1953."

[1,2] These findings are supported by substantial evidence and therefore cannot be here disturbed. While there was a conflict in the testimony relative to the terms of the sale and while it was stipulated that lie detector tests be conducted and that the report thereon might be considered by the court, the determination of the questions of fact involved and the weight to be given to the testimony of the various witnesses were matters to be determined by the trial court.

It is claimed by appellant that Clyde Hollenbeck was a fiduciary; that he acquired the share of stock involved without corporate action or authority; that he violated his trust and failed to fulfill his promise to reconvey said stock, and that the trial court failed to fully determine the issues before it. We do not agree with these assertions.

The finding that Hollenbeck did not occupy a position of trust and confidence with Lorena Young with respect to the sale of the share of stock involved is substantially supported by the evidence that Hollenbeck was an employee and co-manager with Frank Cooper, secretary of the corporation; that Hollenbeck advised Mrs. Young to employ a good attorney or see a business consulant, and that she followed this advice; that she was familiar with the affairs of both corporations and was president of plaintiff corporation, withdrawing therefrom approximately $14,000 per year as salary and interest in the business. While the evidence indicates that Hollenbeck and Mrs. Young were friendly, such a relationship, without something further, is not sufficient to establish a confidential relationship. (15 Cal.Jur.2d, Deeds, Sec. 29.)

The finding that plaintiff corporation consented to the sale and transfer of the share of stock involved is supported by the testimony of Mrs. Young that she endorsed the certificate, No. 3, transferring 42 shares of stock of defendant corporation, that she deposited the check for $551 paid for the share involved in the corporation account, and deposited the new certificate for 41 shares in the Coachella stockbook. She was the only person beneficially interested, owning 85% of the stock, except Frank Cooper, who knew and consented to said sale. The financial statement of plaintiff corporation for 1952 showed that the corporation owned only 41 shares of defendant corporation stock and the purchase price of the one share involved was kept by the plaintiff corporation for approximately 13 months before an attempt was made to rescind the sale. It is true that no directors' meetings were held or corporate minutes kept relative to said sale. However, as is said in Brainard v. De La Montanya, 18 Cal.2d 502, 511, 116 P.2d 66, 70:

> "It is immaterial that no formal directors' meetings were held. While it is true that a corporation ordinarily acts by resolutions which are adopted at formal meetings of its board of directors and are entered in its minutes, it is also true that decisions reached by all the directors and stockholders of a closed corporation at informal conferences will be binding upon the corporation when, by custom and with the consent of all concerned, corporate formalities have been dispensed with and the corporate affairs have been carried on through such informal conferences." (Citations.)

In Mannon v. Pesula, 59 Cal.App.2d 597, 139 P.2d 336, no formal meeting of the corporation was held or minutes kept. However, two directors, the majority stockholders and the president and secretary of the corporation, consented to a sale of the corporate property and it was held that the consent of a third director and stockholder was not required. Where, as here, the action of Mrs. Young was ratified by the corporation by the acceptance of the benefits of the sale, it is binding on the corporation. Gribble v. Columbus Brewing Co., 100 Cal. 67, 71, 34 P. 527; Underhill v. Santa Barbara etc. Co., 93 Cal. 300, 312, 28 P. 1049.

[3, 4] Appellant claims that the price paid for the stock involved was inadequate. However, this alone is not sufficient ground for rescinding the contract of sale. Here, the parties were both in a situation to form an independent judgment concerning the transaction and acted knowingly and intentionally. Under such circumstances the sale is not invalid for inadequacy of consideration. Hallidie v. First Federal Trust Co., 177 Cal. 600, 604, 171 P. 431.

[5, 6] Appellant complains of the trial court's refusal to make a finding on the alleged promise of Hollenbeck to retransfer the stock involved to Mrs. Young. However, the complaint contains no allegation of such a promise, by amendment or otherwise. There was a conflict in the evidence concerning the claimed promise and the court's finding that E. Clyde Hollenbeck is entitled to 43 shares of defendant corporation stock and the finding that all conflicting evidence is resolved in favor of defendants and against plaintiffs amounts to an implied finding that defendant Hollenbeck did not agree to resell or retransfer said stock to Mrs. Young. It follows that the failure to specifically find on the issue of a promise to retransfer the stock did not constitute reversible error. The findings made are supported by substantial evidence and support the judgment. It was therefore unnecessary to find as to this issue. Horney v. Horney, 118 Cal.App.2d 679, 682, 258 P.2d 555.

[7] The trial court also found that the appellant corporation was guilty of laches in its attempt to set aside the transfer of the said stock. This finding is also supported by substantial evidence for the record discloses that more than a year elapsed from the time of the sale until the attempted rescission. There are many cases in which delays for a shorter period than one year have been held fatal to the right to rescind, King v. Los Angeles County Fair Ass'n, 70 Cal.App.2d 592, 596, 161 P.2d 468 and we cannot say, as a matter of law, that the trial court's finding in this respect is not supported by the record.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

145 Cal.App.2d 783

David I. SOBO, Petitioner and Appellant,
v.
BOARD OF POLICE COMMISSIONERS OF CITY OF LOS ANGELES, Defendant and Respondent.
Civ. 21507.

District Court of Appeal, Second District, Division 3, California.

Nov. 13, 1956.

Proceeding upon petition for writ of mandate compelling Board of Police Commissioners to renew permits to conduct secondhand business. The Superior Court of Los Angeles County, Arnold Praeger, J., entered judgment for board, and petitioner appealed. The District Court of Appeal, Parker Wood, J., held that where, though trial court affirmed decision of Board of Police Commissioners denying permits of person to operate secondhand business, trial court declared in memorandum to counsel that it was not true that person had failed to keep accurate records, as found by board, matter would be referred to board for reconsideration of its order, and consideration of appropriate order in light of trial court's finding that board's finding was not supported by evidence.

Judgment reversed with directions.

1. Evidence 🔑31

Upon mandamus proceedings to compel Board of Police Commissioners to renew permits to conduct secondhand business of person whose application had been denied by board, the District Court of Appeal would take judicial notice of provisions of charter that city council shall prescribe by ordinance procedure for appointment of examiners, by boards, to conduct any investigation or hearing, and submit report, giving conclusions and recommendations in writing stating briefly reasons therefor, and that each board may adopt, reject or modify report of examiner in whole or in part.

2. Licenses 🔑22

Where paragraph 3 of each of three complaints before Board of Police Commissioners against person seeking renewal of secondhand business permits, alleged, in effect, that person was not fit and proper person to be such permittee, that he committed petty theft, and that he charged excessive interest, and charges in complaints were substantially the same, finding by board that charges in "complaint" were proved would be regarded as applying to three complaints.

3. Licenses 🔑22

Statements in report of examiner to Board of Police Commissioners, relating to complaint against pawnbroker and secondhand dealer who sought renewal of secondhand dealer permits, that character and conduct of this type of pawnbroker did not comport with general public welfare, and that character of those of his type did not warrant permit of any type by board, were sufficient as findings, even though report did not label or designate them as findings.

4. Licenses 🔑22

Under ordinance prohibiting person from operating as secondhand jewelry dealer or as general secondhand dealer dealing in secondhand jewelry or in general secondhand merchandise without first receiving permit in writing from Board of Police Commissioners, board has power to determine whether applicant is fit and proper person to conduct business for which he seeks permit.

5. Licenses 🔑22

Finding adopted by Board of Police Commissioners that person seeking renewal of secondhand dealer's permit had committed petty theft as pawnbroker was properly considered by board as relevant to determination of his moral fitness to operate as secondhand dealer.

6. Licenses 🔑22

Where, though trial court affirmed decision of Board of Police Commissioners denying permits of person to operate secondhand business, trial court declared in memorandum to counsel that it was not true that person had failed to keep accurate records, as found by board, District Court of Appeal would give consideration to that declaration or finding of court, since review was of an administrative proceeding.

7. Licenses ⚷22

Where, apparently, Board of Police Commissioners, in determining that permits for secondhand businesses should not be renewed gave consideration to its own finding that person did not keep accurate records of articles purchased, and finding of board was not supported by evidence, question whether board would have taken same action if it had not found that person had failed to keep accurate records could not be determined by District Court of Appeal, and matter would be referred to board for reconsideration of its order, and consideration of appropriate order in light of trial court's finding that board's finding was not supported by evidence.

Minsky & Garber and B. W. Minsky, Los Angeles, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., and Eugene Didak, Deputy City Atty., Los Angeles, for respondent.

PARKER WOOD, Justice.

Petitioner sought a writ of mandate compelling the Board of Police Commissioners of Los Angeles (referred to as the board) to renew permits to conduct a secondhand business. Judgment was in favor of the board. Petitioner appeals from the judgment.

On April 8, 1955, the board cited petitioner to show cause why his 1955 applications for renewal of (1) his pawnbroker's permit, (2) his secondhand (general) permit, and (3) his secondhand (jewelry) permit should not be denied in accordance with the complaints which were served with the citations. The complaint, with respect to the pawnbroker's permit, alleged (in paragraph III) that petitioner was not a fit and proper person to engage in the pawnbroker business and that said business as carried on by him did not comport with public welfare, in that: about December 28, 1954, he committed petty theft of $12 from Daniel Couron; on said date he charged said Couron an excessive rate of interest; on and prior to December 29, 1954, petitioner did not keep an accurate record of charges on pawned articles; on and prior to said December 29 he did not keep a fully described record of articles pawned; about October 27, 1954, and thereafter he charged Mary Clark an excessive rate of interest; about June 16, July 16, and August 10, 1954, he charged Esther Hallis an excessive rate of interest. The complaints, with respect to the secondhand permits, alleged (in paragraph III of each complaint) that petitioner was not a fit and proper person to engage in the secondhand dealer business and that said business as carried on by him did not comport with the public welfare, in that: about December 28, 1954, he committed petty theft of $12 from Daniel Couron; on said date he charged said Couron an excessive rate of interest; on and prior to December 29, 1954, he did not keep fully described records of the articles purchased or pawned; about October 27, 1954, and thereafter he charged Mary Clark an excessive rate of interest; about June 16, July 16, and August 10, 1954, he charged Esther Hallis an excessive rate of interest.

A hearing on the citations was held before a hearing examiner of the board on April 29, 1955. The examiner's report, recommending denial of the three applications, was filed with the board. Petitioner filed exceptions to the report. The board denied the exceptions, adopted the recommendation of the examiner, and denied the applications for permits.

In the petition for a writ of mandate, petitioner did not seek an order requiring the board to renew his pawnbroker's permit.

The court found that the examiner submitted a written report containing a summary of the evidence considered, findings, conclusions and recommendations, and a proposed decision that the applications be denied, with a statement of the examiner's reasons therefor; that there was substantial evidence in the light of the whole record to support the findings of the examiner and the board that the renewal of the three permits would not comport with the public welfare and that petitioner was not a fit and proper person to receive said renewals; that the action of the board in denying the applications was not arbitrary, unreasonable, or contrary to the evidence or findings.

Appellant contends that the board did not make sufficient findings of fact as required by law; and that the decision of the board is not supported by the evidence.

Police Officer Benn, an investigator for the board testified at the hearing before the examiner that Daniel Couron had complained that he had been overcharged for interest on three rings he had pawned at appellant's pawn shop at 553 South Main Street, Los Angeles; on December 28, 1954, Officers Benn and Scroggins met Couron and Mr. Engel outside the shop; then the officers followed Couron and Engel into the shop; Couron asked appellant how much he owed on the unredeemed pledges; appellant said, "That will be $37.00, which includes interest"; Couron said that he paid $4 interest on December 6; appellant said, "Well, you still owe $37.00 for the redemption of the three rings"; Couron paid $37 to appellant; then the officers identified themselves, and appellant said: "I got nothing to say. You got me. All the pawnbrokers are doing things—I have read the rules of the Police Commission and know the pawnbrokers orders. I also know what the legal charges are relative to pawnbrokers." Officer Benn testified further that in checking over the pawn records of appellant he found a pawn ticket for $20 that had the name Esther Hallis on it (the ticket was received in evidence); the ticket had been issued on May 10, 1954; on the back of the ticket there were dates and amounts as follows: June 16, $1; July 16, 1954, $1; August 10, 1954, $1; the word "polished" is stamped on the front of the ticket, and the figures "2.00" are written after that word; appellant told him that the entries on the back of that ticket indicated the payment of interest; he (witness) could not find Esther Hallis.

Mary Clark testified that she pawned a watch at appellant's pawnshop on September 28, 1954, for $5; the lady at the pawnshop told her that the interest would be $1 a month; she paid $1 interest in October and each month thereafter until the last time she saw appellant (February, 1955); about December, 1954, she pawned three rings there for $10; she also paid $1 a month interest on that loan; each time she paid interest (after the first two times) the lady at appellant's shop took the two pawn tickets and issued new ones; in February, 1955, when she paid $2 to appellant, she told him that she was not charged like that in Long Beach—that she was charged only fifty cents there; appellant said, "We're not in Long Beach"; she asked him why he gave a new ticket each time; he said that it was better for his bookkeeping, and "We do our business our way"; then he threw "50 cents back" at her; he gave her two new pawn tickets, dated February 15, 1955 (received in evidence as Exhibit III), in the amounts of $5 and $10 respectively; she never redeemed the watch.

The pawn ticket (for the watch), issued to Mary Clark on September 28, 1954, was received in evidence. Stamped words and figures on that ticket are: "Redeemed Oct 27 1954."

Appellant testified that he told Couron that he owed $37 on the pawn transaction; Couron paid $37; thereafter appellant determined that the correct amount was a great deal less; he did not knowingly make the overcharge. He also testified that he did not remember Mary Clark; his records do not indicate a pawn of three rings by her prior to February 15, 1955; his records show that she paid $1 on October 27, 1954; he does not consider any payment as interest until the final adjustment or until the merchandise is redeemed. He also testified that Esther Hallis had redeemed her merchandise in September; an adjustment was made in her matter; he collected for polishing service; she was not charged more than fifty cents a month as interest.

[1] The court found that section 89 of article VI of the charter of the city of Los Angeles provides that the city council shall prescribe by ordinance for procedure for the appointment of examiners, by boards, to conduct any investigation or hearing, and submit his report, giving his conclusions and recommendations in writing stating briefly his reasons therefor, and that each board may adopt, reject or modify the report of any examiner in whole or in part. The court takes judicial notice of the provisions of that charter. Coen v. City of Los Angeles, 70 Cal.App. 752, 762, 234 P. 426; Thompson v. City of Los Angeles, 82 Cal.App.2d 45, 47, 185 P.2d 393. Section 9 of ordinance No. 95,338 of the city of Los Angeles provides that the examiner shall submit a written report to the board, containing a brief summary of the evidence considered and stating the examiner's conclusions and recommendations, and if the matter is then ready for decision, containing a proposed decision, in such form that it may be adopted by the board as its decision in the case, and a brief statement of the examiner's reasons therefor. The ordinance was not introduced in evidence at the hearing before the examiner, but it was attached (as Exhibit C) to the board's answer to the petition for a writ of mandate. Petitioner did not deny the existence of the ordinance. The court found that the ordinance provided as hereinabove stated. The examiner submitted a report to the board in accordance with the provisions of the ordinance. Appellant asserts, however, as above stated, that there were no findings of fact in the report. It is to be noted that the ordinance does not state expressly that the hearing examiner is required to make findings.

In Swars v. Council of City of Vallejo, 33 Cal.2d 867, at page 872, 206 P.2d 355 at page 358, it was said: "Although administrative findings must conform to the statutes governing the particular agency, they need not be stated with the formality required in judicial proceedings". See also Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90, 101–102, 280 P.2d 1. In Swars v. Council of City of Vallejo, supra, it was also said 33 Cal.2d at page 872, 206 P.2d at page 358: "In connection with the action of an administrative board, the fact that certain action is taken or recommendation made may raise a presumption that the existence of the necessary facts was ascertained and found".

[2, 3] The hearing examiner (officer) stated in his report: "The Hearing Officer is of the firm conviction, from the weight of the testimony, that Mr. Sobo [appellant] charged usurious interest knowingly. This Hearing Officer feels that the complainant [investigator for the board] proved each and every allegation in paragraph III of the complaint." Paragraph III of each complaint, as above shown, contained the charges against appellant. The charges in that paragraph of each complaint were substantially the same, except that in the complaint regarding the pawnbroker's permit it was alleged that he did not keep an accurate record of articles pawned, and in the two complaints regarding secondhand permits it was alleged that he did not keep accurate records of articles purchased. Paragraph III of each of the three complaints (except as just noted) alleged, in effect, that appellant was not a fit and proper person to be a pawnbroker or secondhand dealer; he committed petty theft; and he charged excessive interest. Since the charges in the complaints were substantially the same, the finding that the charges in the "complaint" were proved should be regarded as applying to the complaints. The hearing examiner also stated in his report: "By trick of the pawnbroker and insufficient force of people to closely check the work, she [Mrs. Clark] pays $1.00 per month interest. The character and conduct of this type pawnbroker does not comport with General Public Welfare.

The character of those of this type does not warrant a permit of any type by this Board." Those statements in the report of the examiner were sufficient as findings, even though the report did not label or designate them as findings. It appears from those statements that the examiner found that appellant charged usurious interest knowingly; and (as alleged in paragraph III of the complaint) he was not a fit and proper person to engage in the pawnbroker or secondhand business; those businesses as carried on by him did not comport with public welfare; he committed petty theft; he charged excessive interest; and he did not keep accurate records of articles pawned or purchased.

[4] It is to be noted also that appellant alleged in his petition for a writ of mandate: "That under the aforesaid ordinances [No. 95,338, section 24.01], no organization, person or corporation can operate as a secondhand jewelry dealer or as a general secondhand dealer dealing in secondhand jewelry or in general secondhand merchandise without first having received a permit in writing so to do from respondent [board]." It thus appears, irrespective of the failure to introduce the ordinance in evidence at the hearing, that appellant considered that there was an ordinance requiring him to have a permit to operate a secondhand business. When there is such an ordinance as that alleged by appellant, the board has power to determine whether an applicant is a fit and proper person to conduct the business for which he seeks a permit. In Zemansky v. Board of Police Com'rs, 61 Cal.App.2d 450, at page 453, 143 P.2d 361, at page 363, it was said: "[W]hen by ordinance it is provided that a license shall not be issued until a permit has been granted by the Board of Police Commissioners, said Board is vested with the power to determine whether the applicant is a fit and proper person to be permitted to conduct the business for which he seeks a license. * * * It is a fact, of which courts take judicial notice, that secondhand stores and pawn shops constitute a ready and customary outlet for stolen property [citation], which indicates that such businesses should be conducted by persons who are above suspicion."

Appellant concedes that the evidence was sufficient to support the order of the board denying a renewal of his pawnbroker's permit. He contends, however, as above stated, that the decision of the board denying renewals of his secondhand permits is not supported by the evidence. His argument is to the effect that all the evidence pertained to his conduct as a pawnbroker and not to his conduct as a secondhand dealer; that there was no evidence of wrongdoing in the operation of his secondhand business, and consequently there was no evidence upon which to base an order denying a renewal of his secondhand permits.

[5–7] It is true that the finding that appellant committed petty theft was based upon appellant's conduct as a pawnbroker. That, of course, was a finding that he was dishonest, as a licensee of the board, in dealing with the public. Even though that dishonesty related to a transaction as a pawnbroker, the dishonesty would be a material consideration in determining appellant's moral fitness to have a permit as a secondhand dealer. The hearing examiner and the board were justified in considering that dishonest transaction, as a pawnbroker, in determining appellant's applications for permits to conduct a secondhand jewelry business and a general secondhand business. Other evidence considered by the examiner and the board with reference to the secondhand permits related to alleged violations of rules which require the keeping of accurate records of articles purchased. The trial court, in its formal findings, did not make an express finding with respect to the matter of keeping records. In its formal findings, the court did not find that the evidence was insufficient to support the finding of the board that appellant did not keep accurate records. In a "Memorandum to Counsel," the trial judge stated that the rules with reference to the matter of keeping records were not offered in evidence (before the examiner) and were not before the court;

and that there was no evidence to support the charge that accurate records were not kept. Although that finding, in the memorandum, is not in the formal findings of the court, it is a declaration of the court that the charge with reference to the records is not supported by the evidence. Since this is a review of an administrative proceeding, and the trial court has declared in effect that it is not true that appellant failed to keep accurate records, this court should, under the circumstances here, give consideration to that declaration or finding of the court. Apparently, the board in determining that permits for the secondhand businesses should not be renewed gave consideration to its own finding that appellant did not keep accurate records of articles purchased. It appearing that that finding of the board is not supported by the evidence, a question arises as to whether the board would have fixed the same penalty, i. e., denial of renewal of permits for the secondhand businesses, if it had not found that appellant failed to keep accurate records. This court cannot make that determination. In Bonham v. McConnell, 45 Cal.2d 304, 288 P.2d 502, the insurance commissioner revoked Bonham's licenses as an insurance broker and agent upon making 15 findings that the broker was guilty of misconduct, consisting of wilfully inserting false answers in applications for insurance and knowingly misrepresenting the terms of insurance policies. In that case the superior court found that three of the 15 findings were not supported by the evidence, but upheld 12 of the findings and concluded that they were sufficient to sustain the revocation. The Supreme Court said, 45 Cal.2d at page 305, 288 P.2d at page 503: "There is no claim that the wrongdoing of which the court found Bonham guilty is not established by the evidence or is not sufficient to warrant revocation of his licenses. The sole question is whether the court erred in failing to remand the case to the commissioner for reconsideration of the penalty to be imposed." The court stated further therein, 45 Cal.2d at page 306, 288 P.2d at page 503: "He [commissioner] should not be precluded from exercising his discretion either initially or where, as here, some of his findings of misconduct are upheld on judicial review and others are not. Where some of the findings are not supported by the evidence, it is obvious that his discretion has been exercised under a misconception as to the extent of the licensee's misconduct. * * * The decisions involving this problem have generally adopted the practice of directing the administrative agency to reconsider the penalty to be imposed. [Citations.] We are of the view that orderly procedure will be preserved, without working a hardship upon anyone involved, by remanding this type of case to the administrative official who has been empowered to act in matters of discipline so that he may reconsider the penalty to be imposed." In the present case the denial of the applications for renewal of licenses is in practical effect similar to revocation of a license. Since the trial court in the present case has found that one of the findings of the board, namely, failure to keep accurate records, is not supported by the evidence, the matter should be referred to the board for reconsideration of its order denying the applications for renewal of secondhand licenses, and for consideration of the order that should be made in view of the trial court's finding that the board's finding regarding failure to keep accurate records is not supported by the evidence.

The judgment is reversed with the direction that the trial court issue a writ commanding the board to vacate its order denying renewal of secondhand permits and to proceed further only as to the matter of making an order, regarding the applications for renewal of secondhand permits, based upon the findings of the board heretofore made, except that portion of the findings which is to the effect that appellant did not keep accurate records of articles purchased. Each party to pay his own costs on appeal.

SHINN, P. J., and VALLÉE, J., concur.

145 Cal.App.2d 676

J. Frederick ROSEN, Plaintiff and Appellant,

v.

Leslie M. KESSLER et al., Defendants and Respondents.

Civ. 5268.

District Court of Appeal, Fourth District, California.

Nov. 7, 1956.

Hearing Denied Jan. 4, 1957.

Four causes of action praying for rescission, damages and other relief based on alleged fraudulent representations whereby plaintiff was induced to transfer real and personal property, brought against several corporate as well as individual defendants. One of the defendants moved for change of venue to county of residence and the Superior Court, Riverside County, O. K. Morton, J., entered order granting motion and plaintiff appealed. The District Court of Appeal, Griffin, J., held that under general rule, where an action is partly local and partly transitory and stated in separate causes of action, it is to be regarded as transitory in determining place of trial, change of venue must be granted.

Affirmed.

1. Venue ⚷4

Nature of the action is to be determined from the complaint and a determination of whether it is a local or transitory one depends on its character and the character of judgment permissible on default.

2. Corporations ⚷503(2)

Where allegations of complaint were sufficient to establish venue in a particular county as to defendant corporations under constitutional provision allowing contract action against a domestic corporation to be tried in a county court other than that in which the corporation has its principal place of business where the county in which the suit is begun is that in which the contract is to be performed, action could proceed as to those corporations even though causes of action might be transitory in nature, provided that no nonresident individuals were made parties to the action. West's Ann.Const. art. 12, § 16; U.S.C.A. Const. Amend. 14.

3. Venue ⚷22(1)

Where action is brought against several corporate as well as individual defendants, based upon fraud in execution of certain agreements in a particular county, if causes of action are transitory or one is local and the other is transitory, by including the individual defendants as parties to action along with the corporations, plaintiff waives right to maintain action against corporation in county in which contract is to be performed regardless of corporation's principal place of business. West's Ann.Const. art. 12, § 16; U.S.C.A.Const. Amend. 14.

4. Venue ⚷4

Action by plaintiff alleging ownership of an interest in property and that he has been deprived of its income for which he seeks an accounting, is a transitory action.

5. Venue ⚷4

Action for damages for refusal of defendant to carry out terms of an alleged agreement entered into between plaintiff and defendant, is a transitory action. West's Ann.Code Civ.Proc. § 395.

6. Venue ⚷4

Action predicated upon breach of contract, slander and damage to plaintiff's business, is a personal and transitory action. West's Ann.Code Civ.Proc. § 395.

7. Venue ⚷41

Where at least one of several combined causes of action is transitory in nature, defendants are entitled to have case transferred to county of their residence no matter how many other causes of action may be set forth in which they are not entitled to change. West's Ann.Code Civ. Proc. § 395.

8. Venue ⚷41

Where plaintiff's complaint alleged four separate causes of action for rescission, damages and other relief based upon alleged fraudulent representations whereby plaintiff was induced to transfer real and personal property, and joined as parties' defendant several domestic corporations as well as individuals, under rule that where action is partly local and partly transitory and stated in separate causes of action, it is to be regarded as transitory in determining place of trial, individual defendant was entitled to change of venue to county of residence. West's Ann.Code Civ.Proc. § 395; West's Ann.Const. art. 12, § 16.

◆

Shaw & Barnett, Riverside, for appellant.

Kessler & Kessler and Harold J. Abraham, Oakland, for respondents.

GRIFFIN, Justice.

Plaintiff, an attorney at law, brought this action entitled: "Complaint for Rescission, Accounting and Damages" against defendants Leslie M. Kessler, Albert H. Kessler, Frank Maun, Edith Maun, Jack H. Zamsky, Robert L. Lippert, Charles J. Maestri, F & E Theatre Co., Inc., a corporation, Desert Valley Theatres, Inc., Indio Associates, et al.

It is alleged in the first cause of action that Lippert and Maestri were and are the owners and operators of numerous theatres throughout the State; that the Kesslers were and are attorneys and associates of Lippert and Maestri with offices in Oakland, and that Maun was an employee of said defendants in the theatre operations; that Maun and Zamsky were officers and equal owners and operators of the Coachella Valley Drive-in Theatre, Inc. (hereinafter referred to as the Drive-in Theatre) located on certain described real property in Coachella Valley in Riverside County owned by plaintiff and which was worth about $25,000, subject to a note and trust deed for $13,000; that about December 15, 1952, plaintiff advanced to the Drive-in Theatre about $10,000, and obligated himself for the payment of debts of said corporation by certain written and oral guarantees in excess of $10,000; and that prior thereto he had executed a note as co-maker with Zamsky for $7,500. It is alleged that the Drive-in Theatre had financial difficulties and defendants promised plaintiff that if he would convey said Drive-in Theatre property to defendant Maestri and transfer his interest to the F & E Theatre Co. and waive any claim for monies he had advanced to said Drive-in Theatre, defendants would assume and pay all debts of the Drive-in Theatre and pay the balance due on the note for $13,000, pay plaintiff $2,000 in cash plus a note for $1,500 and pay plaintiff, as a retainer for legal services, the sum of $2,200; that plaintiff executed a deed of conveyance of said Drive-in Theatre property to Maestri, agreed in writing to sell and assign his interest in it to F & E Theatre Co. and waived all claims for monies advanced to the Drive-in Theatre; that defendants paid plaintiff $2,000 and delivered a promissory note to him executed by Maestri, for $1,500 and one for $2,200 executed by F & E Theatre Co., and that defendants verbally agreed to assume and pay the balance due on the $13,000 note; that pursuant to the agreement defendants entered into possession of the Drive-in Theatre on December 23, 1952; that payments were made to plaintiff on the $1,500 and $2,200 notes but defendants failed to pay the $13,000 note they orally agreed to pay or assume, and failed to pay obligations due to creditors of the Drive-in Theatre; that suits were filed by said creditors against plaintiff and he was required to defend them; that plaintiff was compelled to pay some of said claims and, for failure of defendants to pay money on the $13,000 bank note plaintiff was compelled to pay $1,000 thereon to avoid suit; that thereafter, on July 24, 1953, Maestri and wife conveyed the Drive-in Theatre property to the Lipperts and they conveyed undivided portions to the Kesslers; that certain representations made proved to be false and untrue and were made for the purpose of inducing plaintiff to part with his Drive-in Theatre property; and that on December 20, 1954, plaintiff elected to and did rescind the agreement and deed of conveyance. Notice of rescission was mailed to defendant Kessler in Alameda County. It is then alleged that the "transactions, agreements and contracts" herein mentioned were made and entered into in the County of Riverside.

As a second cause of action, an accounting is sought of the earnings of the Drive-in Theatre while in the defendants' possession. In a third cause of action he seeks damages for $35,000 for refusal of the defendants to carry out the agreement. The fourth cause of action is for damages for $15,000 for failure of defendants to pay the creditors and the bank note, for humiliation and embarrassment and loss of income from the practice of his profession. The relief sought is rescission of all contracts and conveyances and an order that defendants be required to reconvey the property to plaintiff, that the parties be restored to their prior status, for an accounting, judgment for damages as claimed in the fourth and fifth causes of action, and general relief. A general and special demurrer was filed and a motion for change of venue to Oakland was granted on a showing by affidavit that the defendant Albert H. Kessler was a resident of Alameda County and that none of the defendants resided in Riverside County; that the corporations sued likewise had their principal places of business in San Francisco; that Indio Associates, one of the defendants, is a joint venture whose members are the non-resident defendants and do business in San Francisco. No opposing affidavits were filed. This appeal is from the order. A petition for writ of supersedeas to stay the execution of the order was denied.

In support of the order, defendants argue that the first cause of action purports to set forth a cause of action for fraud which is transitory in character; that it also contains an allegation seeking rescission of some claimed agreement, which is also a transitory action; that although it seeks rescission of a conveyance of real property it also, in said cause of action, seeks the cancellation of an agreement involving the sale of personal property, i. e., the theatre business and equipment; that the theatre business was owned and operated by a corporation entirely distinct from plaintiff and that plaintiff personally owned the real property; that even though the first cause of action may be considered a local action, if joined with a transitory action, such as the second, third and fourth causes of action, venue is determined from the transitory action; and that since the notice of rescission was served in Alameda County, the right of action arose there, citing such authority as Myers v. Superior Court, 75 Cal.App.2d 925, 172 P.2d 84; Smith v. Smith, 88 Cal. 572, 576, 26 P. 356; Vaughan v. Roberts, 45 Cal.App.2d 246, 113 P.2d 884; Stesel v. Santa Ana River Water Co., 35 Cal.App.2d 117, 94 P.2d 1052; Strosnider v. Pomin, 32 Cal.App.2d 103, 89 P.2d 179; Bybee v. Fairchild, 75 Cal.App.2d 35, 170 P.2d 54; Postin v. Griggs, 66 Cal.App.2d 147, 151 P.2d 887; and Fitzhugh v. University Realty Co., 46 Cal.App. 198, 188 P. 1023.

[1] It is well established in this state that the nature of the action is to be determined from the complaint and whether it is a local or transitory action depends on its character and the character of the judgment permissible on default. Hale v. Bohannon, 38 Cal.2d 458, 466, 241 P.2d 4; Kaluzok v. Brisson, 27 Cal.2d 760, 762, 167 P.2d 481, 163 A.L.R. 1308, and cases cited. In the latter case the plaintiff elected to seek affirmance of a contract and sued for damages. The court held such an action transitory. It pointed out a distinction if plaintiff had elected to rescind the contract, cancel the debt and restore the real property to defendants, thus effecting a reconveyance. In Postin v. Griggs, supra, which involved an action for rescission of certain relinquishment of interest in a partnership involving mining property, several of the cited authorities were discussed, which stated that an action, the gravamen of which is fraud, is triable in the county of the residence of the defendant, and the mere fact that incidentally rights in real property may be involved does not change the rule; that an accounting and an injunction based upon fraud is a personal

action which the defendants are entitled to have tried in the county of their residence; and that an action based on fraud, in which plaintiff seeks rescission and an accounting is triable in the county of the residence of the defendant regardless of where the contract sought to be canceled was executed.

Plaintiff concedes the general rule that where a transitory cause of action is joined with a local action, defendants have the right to have the case tried in the county of their residence. He claims, however, that this rule is not here applicable and relies principally upon the allegation that, by reference, each count alleged that the "transactions, agreements and contracts" were made and entered into in the County of Riverside, and that each separate cause of action is entirely dependent on the first cause of action which concerns itself with title to the real property, which is local in character, citing such authority as Brown Materials Co., Ltd. v. Angus, 20 Cal.App.2d 32, 66 P.2d 470. It is further contended that regardless of these respective contentions, as applied to individuals, Article XII, Section 16 of the Constitution of California provides that an action against a corporation may be brought in a county where the contract is made or is to be performed or where the obligation or liability arises or the breach occurs or in the county of its principal place of business, and accordingly venue in Riverside County was established by the allegations of the complaint in this respect, citing Hale v. Bohannon, 38 Cal. 2d 458, 469, 241 P.2d 4, which fully discusses this subject. It is there said that the purpose of the constitutional provision is to provide a venue for actions against corporations greatly enlarged over that for actions against other defendants; that section 395 of the Code of Civil Procedure may not be applied to a transitory action against a domestic corporation; and where plaintiff has brought himself within the terms of the Constitution, the corporation may not secure a change of venue to its "residence" (principal place of business) as may other defendants under section 395, supra.

[2] It has been held that the provisions of the Constitution, Article XII, Section 16, allowing a personal action against a domestic corporation to be tried in a county court other than that in which the corporation has its principal place of business, where the county in which suit is begun is that in which the contract is to be performed, does not violate U. S. Constitutional Amendment 14, by denying to private corporations the right conferred by this section to residents of the state to have personal actions tried in the county of their residence, and that an action against a domestic corporation may be begun and prosecuted to final judgment in a county other than that in which the corporation has its principal place of business, where the contract is to be performed in the county of suit, and this is so notwithstanding this section, providing that personal actions shall be tried in the county in which the defendants or some of them reside. Raphael v. People's Bank, 45 Cal.App. 115, 187 P. 53. From the authorities, if the allegations of the complaint are sufficient to establish venue in Riverside County as to defendant corporations under the constitutional provision, the action might well proceed as to those corporations, even though the causes of action may be transitory in nature provided no nonresident individuals are made parties to the action. Konig v. Associated Almond Growers, 37 Cal.App. 2d 360, 99 P.2d 678; Liera v. Los Angeles Finance Co., 99 Cal.App.2d 254, 221 P.2d 737.

[3] The question then arises, notwithstanding this, are the individual defendants here served entitled to have the action transferred to the county of their residence? If the causes of action are transitory or one is local and the other is transitory so as to come within the rule above cited, then by including such defendants as parties to the action along with the corporations sued, plaintiff waives the right given by the constitution, and

the motion of the individual defendants for change of place of trial must be determined by the provisions of the statute. Brady v. Times-Mirror Co., 106 Cal. 56, 39 P. 209; Liera v. Los Angeles Finance Co., supra. We will therefore consider the causes of action as alleged in this light.

As applied to the first cause of action, under the authorities cited it is a close question whether that cause of action is purely local. Coe v. Kessler, 139 Cal.App. 2d 536, 294 P.2d 83. It involves the rescission of an alleged agreement. It also involves the purported sale of a theatre business consisting of real and personal property in Riverside County. The representation referred to as an agreement was that defendant Kessler, as attorney for defendant F & E Theatre Co., a corporation, represented that the corporation was financially sound and could and would return to plaintiff the amount invested by plaintiff and would assume and pay the outstanding obligations of said theatre in full and would assume and pay the note co-signed by plaintiff and defendant Zamsky; that he later learned from them that that theatre company was in strained financial condition and subject to suits and attachments by creditors; that he later found that defendant Albert H. Kessler had purchased the note in question and would not extend the time for payment; that "said defendants promised plaintiff" that if he would convey said real property to defendant Maestri and transfer his interest in the theatre to F & E Theatre Co. "said defendants" would assume and pay all debts of said theatre, etc.; that he executed the deed and assigned his interest and defendants failed in their promise.

[4] Assuming these allegations as to the alleged agreement to be sufficient to show compliance with section 395 of the Code of Civil Procedure and to show a personal liability of the nonresident defendants, as distinguished from the corporate liability, there still remains a second cause of action for an accounting, realleging by reference, the first cause of action, alleging plaintiff's ownership of a one-third interest in the Drive-in Theatre, that he has been deprived of its income, and seeks an accounting. This cause of action, standing alone, is transitory in nature. Stesel v. Santa Ana River Water Company, 35 Cal.App.2d 117, 94 P.2d 1052.

[5] The third cause of action, similarly stated, is but a cause of action for damages for refusal of defendant to carry out the terms of the alleged agreement. This is a transitory action. Krogh v. Pacific Gateway, etc., 11 Cal.App. 237, 104 P. 698; Strosnider v. Pomin, 32 Cal.App.2d 103, 89 P.2d 179; Claycomb v. Caronna, 113 Cal.App.2d 561, 248 P.2d 779.

[6, 7] The fourth cause of action, similarly stated, is predicated solely upon claimed breach of contract, slander and damage to plaintiff's legal business, claimed loss of money from the practice of his profession for the reasons expressed, and is personal and transitory within the meaning of section 395 of the Code of Civil Procedure. At least this last claimed cause of action is clearly a transitory action and could not be classified as incidental to, and dependent upon, the first cause of action for its success, so as to bring it within the exceptions noted in Brown Materials Company, Ltd. v. Angus, 20 Cal.App.2d 32, 66 P.2d 470, relied upon by plaintiff. See also Bybee v. Fairchild, 75 Cal.App.2d 35, 170 P.2d 54. If there is one such cause of action, then the defendants are entitled to the change no matter how many other causes may be set forth in which they are not entitled to the change. Goossen v. Clifton, 75 Cal.App.2d 44, 170 P.2d 104; Sanborn v. Pomona Pump Company, 131 Cal.App. 241, 21 P.2d 124.

[8] Under the general rule, when an action is partly local and partly transitory and stated in separate causes of action, it is to be regarded as transitory in determining the place of trial. Accordingly, the order here involved must be sustained.

Henderson v. Henderson, 85 Cal.App.2d 476, 193 P.2d 135.

Order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

145 Cal.App.2d 792

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Joseph E. JAGER, George Zachario and James F. Stewart, Defendants and Appellants.
Cr. 5456.

District Court of Appeal, Second District, Division 3, California.

Nov. 13, 1956.

Rehearing Denied Nov. 27, 1956.

Hearing Denied Dec. 12, 1956.

Defendants were charged with burglary and with conspiracy. From a judgment of conviction and from the denial of their motion in arrest of judgment and the denial of the motion for new trial by the Superior Court, Los Angeles County, Edwin L. Jefferson, J., the defendants appealed. The District Court of Appeal, Shinn, P. J., held, inter alia, that in prosecution for burglary arising from wilful entry of offices of wholesale jeweler which were adjacent to offices occupied by defendants with intent to commit theft, wherein evidence disclosed that officers picked lock of wholesaler's room for purpose of installing tape recording microphone, presumption that entry of private premises by police officers is made in legal manner could not be given effect, and hence defendants did not, by their objection to questions propounded to officer regarding his conversation with building superintendent regarding the room where machine had been installed, lose the right to contend that it was serious error for the court to admit the record of statements and conversations picked up by microphone in such room, and that the admission of such evidence constituted prejudicial error.

Judgment and order reversed.

1. Burglary 🔑45

In burglary prosecution, locksmith's testimony regarding entries was not inherently incredible so that it made question for jury as to whether one of defendants opened door with a pocket knife.

2. Criminal Law 🔑1036(1)

Alleged error in admitting illegally obtained evidence would be considered notwithstanding objection to admission was first raised on motion for new trial, where case was tried before Supreme Court decision rendering illegally obtained evidence inadmissible.

3. Criminal Law 🔑322

In absence of evidence to the contrary it will be presumed that entry of private premises by police officers was made in a legal manner.

4. Criminal Law 🔑1043(1)

In prosecution for burglary based upon wilful entry of offices of wholesale jeweler which were adjacent to offices occupied by defendants with intent to commit theft therein, wherein evidence disclosed that officers had picked lock of wholesaler's outer room with purpose of installing a tape recording machine, presumption that entry of private premises by police officers is made in legal manner could not be given effect, and hence defendants did not, by their objection to questions propounded to police officer as to conversations which he had had with building superintendent regarding the room lose the right to contend that it was serious error for court to admit a record of statements and conversations picked up by microphone in such room.

5. Criminal Law 🔑394

The rule excluding illegally obtained evidence applies to evidence obtained through an unlawful entry of premises of persons other than the accused.

6. Criminal Law ⚷394, 1169(1)

Where at time tape recording microphone was installed by officers in jeweler's office which adjoined offices of defendants charged with burglary resulting from wilful entry of jeweler's office with intent to commit theft therein, officers had no information that a robbery was taking place or was about to take place, officers did not expect to find anyone on the premises and their sole purpose was to obtain evidence at some future time for use against defendants, evidence obtained by use of microphone was illegally obtained and hence admission of such evidence was prejudicial error.

7. Criminal Law ⚷1169(1)

The test for determining whether error requires reversal is whether there was a deprivation of a fair trial which amounted to a miscarriage of justice, which test is to be applied to all errors and irregularities of procedure, including all errors in admission of evidence, regardless of particular nature of evidence which renders it inadmissible.

8. Arrest ⚷63(4), 71

Criminal Law ⚷395

In burglary prosecution, a bag of tools belonging to locksmith who had been contacted by defendants for purpose of picking safe lock, which bag was found in defendant's office was properly admitted, where tools were found in office which was searched at time of arrest of two of the three defendants and information officers had received from locksmith was sufficient to create a reasonable suspicion that defendants had committed a felony which justified arrest and search of immediate premises which was incidental to the arrest.

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Kenny & Morris and Eleanor V. Jackson, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Robert S. Rose, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Joseph E. Jager, George Zachario and James F. Stewart were charged with burglary, two counts, in that they wilfully entered the offices of Edgar Grollnek, a wholesale jeweler, on January 16 and January 27, 1954, with the intent to commit theft therein. A third count accused them of conspiracy to violate section 484 of the Penal Code (theft). The information set out four overt acts allegedly committed in furtherance of the conspiracy. Trial was to a jury. Each defendant was represented at the trial by separate counsel, who do not represent them on this appeal. They were convicted on each of the three counts and sentenced to eight months in the County Jail, the terms to be served concurrently. They appeal from the judgment, the denial of their motion in arrest of judgment, and the denial of their motion for a new trial.

There was evidence of the following facts. Edgar Grollnek was a wholesale diamond jeweler with offices in suite 1017–18 of the Loew's State Building in downtown Los Angeles. The safe in 1018, his private office, contained about $25,000 worth of jewelry in January 1954. Suite 1015–6 was immediately adjacent to Grollnek's offices. It was occupied by the James Stewart Detective Agency. Room 1016 was Stewart's office. It was separated from Grollnek's private office by a door which opened inwards into Stewart's office and could be locked, on Grollnek's side, by means of a double dead-bolt lock. There was some dispute in the evidence as to whether the door had a knob. Zachario was employed by Stewart as a private investigator. Jager, Stewart's brother-in-law, was a part time employe of the agency.

Thomas Curren was the chief witness for the People. The following is the substance of his testimony. He operated a locksmith's shop in Pasadena. He testified that another locksmith, Ed Nixon, introduced him to Zachario on January 8, 1954. He picked a lock for Zachario in connection with a case Zachario was investigating. On January 16th Zachario telephoned Curren and asked him if Nixon had talked to him. Curren said that he had and Zachario asked Curren if he would be interested. Curren replied that he did not know. Zachario said that he would come out to the shop to talk to Curren. Curren then telephoned the Pasadena police, told them of the call, and two officers were dispatched to his shop. Zachario arrived at about 3:30 p. m. and asked Curren if he could open a safe. He told Curren that the safe contained between $20,000 and $100,000 worth of jewelry and that if the jewelry were stolen, Curren would get a share of the proceeds. Curren said he would have to see the safe and agreed to take a look at it. After this conversation Curren informed the two officers that he was going to Los Angeles with Zachario and they counseled him to go ahead. Zachario introduced Curren to Jager and the three men drove to Los Angeles where they met Stewart at the detective agency. Stewart asked Curren if he thought he could open Grollnek's safe and Curren replied that he would have to see. Stewart suggested that Curren work on the safe, and after Stewart had dialed the telephone number in Grollnek's office to see if anyone was there, Jager slipped a pocket knife between the latch of the door connecting Stewart's office with Grollnek's office. Curren and Jager entered 1018 and Curren manipulated the dial of the safe. He copied the model number from the safe dial and tried some combinations, without success. Before the men left, Jager and Zachario removed fingerprints with handkerchiefs. The four men left the building at about 5 p. m. and Jager drove the others to Pasadena. On the way Stewart asked Curren if he could do anything with the safe. Curren said that he would have to check his books. When they separated Stewart told Curren that he would be called in a few days. Curren then told the Pasadena police what had happened and promised to inform them of future developments. Curren testified that Stewart telephoned him on January 27th and asked him to come to the detective agency that evening. He relayed this to the Los Angeles police, who were now in charge of the case. They instructed him to go along. At about 6 p. m. he took a bag of miscellaneous tools from his shop and was picked up by Jager who drove him to the Loew's State Building. They met Stewart at the agency and Curren copied some numbers out of a safe manual. Zachario arrived a few minutes later and the four men played poker until about 11 p. m. Since the building was quiet, they decided to crack the safe. Jager opened the door leading in to Grollnek's private office and both he and Curren used the safe manual in an attempt to open the safe with various series of numbers. They were again unsuccessful. Curren and defendants left the building before midnight. Stewart told Curren to leave his tool bag in his office as some one might see it. Curren complied with this request. Curren telephoned the police the next day and several times afterwards telephoned the agency asking for the return of his tools.

On January 20th, four days after the first attempt to crack Grollnek's safe, Officer Bishonden obtained a key to room 1021 from Arthur Kempner, superintendent of the Loew's State Building. He and four other officers entered the building after midnight on January 22nd. Officer Lee picked the lock of 1018 and installed a microphone in a wooden molding about four feet from the top of the safe. Lee and Bishonden ran a wire from the microphone to room 1021. At about 5 p. m. on January 27th, after being alerted by Curren, Officers Eggenweiler, Bishonden and Lauritzen entered 1021. They remained there until after midnight, except for a few inspection trips down the hall. They connected a Revere tape recorder to the wire running from Grollnek's office. Until 11 p. m. they heard mostly traffic noises. Between 11 and 11:45 p. m., the lights in the detective agency were on and the officers heard continuous noises over the tape recorder. They heard male voices calling out numbers and heard pounding and scratching noises. Some one called out "Hey, Joe" and "This is an old son of a bitch." They heard no female voices. The officers left shortly after midnight. At that time the agency's offices were dark and apparently unoccupied. The tape recording was introduced into evidence and played to the jury.

On March 10, 1954, Officers Bishonden and Lauritzen entered the detective agency. Bishonden spoke to Zachario in the outer office and walked into Stewart's office. He searched the room and discovered a brown leather tool bag in a closet behind a partition. The bag was introduced into evidence over defendants' objection that it was irrelevant and immaterial. Stewart and Zachario were then placed under arrest. Jager was arrested the same day.

Defendants, testifying in their own behalf, denied the conspiracy and denied having tried to open the safe. Zachario testified that Curren had picked the lock of a place defendants had under surveillance and that he and Jager invited Curren to the agency on January 16th to meet Stewart. Curren met Mr. and Mrs. Stewart and left soon after. On the evening of January 27th, Curren and defendants played penny ante in Stewart's office while Mrs. Stewart was doing some accounting work. They were drinking bourbon and Zachario testified that Curren became drunk and argumentative. Curren happened to have his tool bag with him that evening and set it down in the outer office. Jager, Stewart and Mrs. Stewart generally corroborated Zachario's testimony.

Defendants first contend that the verdict was contrary to undisputed testimony which demonstrated that it was impossible for them to have entered Grollnek's private office on January 16th and January 27th in the manner described by Curren. Grollnek and Glenn M. Smith, an expert witness called by the defense, testified that the connecting door could only be locked when the dead-bolt was in place. Smith stated that if the bolt was in place the lock could not be picked from Stewart's side. Therefore, defendants argue, Jager could not have manipulated the lock and Curren's testimony was unquestionably false.

[1] We do not agree with the contention that Curren's testimony regarding the entries was so inherently improbable as to amount to no evidence at all. Defendants' reasoning is based upon the supposition that the door was bolted on both occasions. But the evidence does not compel the acceptance of this premise. Grollnek testified that he did not pay particular attention to the door and checked it at infrequent intervals. He was not in his office on January 16th and when he went home on January 15th he did not check the door. He assumed that it was locked. He was not asked whether he checked the door on January 27th to see if it was locked. There was no positive evidence that the connecting door was locked on either day. The jury could have inferred that it was locked and it could have inferred, with equal justification, that it was not. Smith, defendants' expert, testified that if the dead-bolt was not locked, the door could have been opened by slipping a small object between the door and the door-jamb and he demonstrated the procedure to the jury. It does not appear as a matter of law that the door could not have been opened from Stewart's room. Therefore we cannot conclude that Curren's testimony was inherently incredible or that the jury had no rational basis for believing that Jager opened the door with a pocket knife.

[2] Defendants' next contention is that the tool bag and tape recording were erroneously admitted into evidence over their objections that they were illegally obtained. This ground of objection was not asserted at the trial. It was first raised on the motion for a new trial. But since this case was tried before the decision in People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, the contention may be considered although no objection was made. People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17.

Defendants argue with respect to the tape recording that the officers committed a trespass in entering Grollnek's office on January 22nd and installing a microphone and wiring therein, that this trespass was a violation of Grollnek's constitutional rights, and hence the evidence obtained by such lawless conduct was inadmissible. Citing People v. Martin, 45 Cal.2d 755, 290 P.2d 855.

[3, 4] The People contend that defendants cannot be heard to claim error in the

admission as evidence of the tape-recorded record. They direct our attention to questions propounded by the district attorney to Officer Bishonden respecting conversations he may have had with Kempner at the time he obtained from Kempner a key to room 1021. He was asked whether he had discussed rooms 1017–18 with Kempner. An objection was made upon the ground of hearsay and it was sustained. The district attorney did not make a statement as to his purpose in asking the question nor did he make a statement as to the nature or substance of the testimony he expected to elicit concerning the conversation. The attorney general argues that it was the purpose of the district attorney to prove that Bishonden sought permission from Kempner to enter rooms 1017–18 and that permission was granted. Therefore he says that the People were prevented from proving that the officers had permission of the building manager to enter the premises and that by their objection defendants lost their right to claim that the entry was illegal. People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535, is cited in support of this contention. The case is not in point. There the defendant by her objections prevented the prosecution from introducing evidence respecting the officers' reasons for believing a felony was being committed at the time of the arrest, the sufficiency of which reasons was for the court to determine. In the absence of evidence to the contrary it will be presumed that an entry of private premises by police officers was made in a legal manner. People v. Kelsey, 140 Cal.App.2d 722, 295 P.2d 462. But that presumption cannot be given effect in the present case. The officers picked the lock of room 1017 which was Grollnek's outer room. It would be absurd to assume that the district attorney intended to prove that Grollnek gave Kempner permission to allow police officers or anyone else to gain entrance to his jewelry establishment by picking the lock and that Kempner gave the officers permission to enter by that means. Common sense dictates that if Kempner had given permission to the officers to enter the room he would either have given them a key or opened the door himself. The private premises of strangers are not entered by picking door locks when permission to enter has been given and the presumption that official duty has been properly performed can scarcely be extended to the picking of door locks by police officers. We conclude that defendants did not by their objection lose the right to contend that it was serious error for the court to admit the record of statements and conversations picked up by the microphone in room 1018 on the night of January 27th.

[5] The entry of room 1017 was not in violation of the constitutional rights of defendants. They had no right to the possession of Grollnek's offices. The attorney general readily agrees that the exclusionary rule applies to evidence obtained through an unlawful entry of premises of persons other than the accused. Such was the holding of the court in People v. Martin, 45 Cal.2d 755, 290 P.2d 855, 857. In that case, after discussing the rule followed in some of the federal courts to the effect that the exclusionary rule is inapplicable unless the accused himself has been wronged, the court said: "Thus, the rule of the lower federal courts is based on the theory that the evidence is excluded to provide a remedy for a wrong done to the defendant, and that accordingly, if the defendant has not been wronged he is entitled to no remedy. Connolly v. Medalie, supra, [2 Cir.] 58 F.2d 629, 630. In adopting the exclusionary rule, however, this court recognized that it could not be justified on that theory, People v. Cahan, 44 Cal.2d 434, 443, 282 P.2d 905, and based its decision on the ground that 'other remedies have completely failed to secure compliance with the constitutional provisions on the part of police officers with the attendant result that the courts under the old rule have been constantly required to participate in, and in effect condone, the lawless activities of law enforcement officers.' 44 Cal.2d at page 445, 282 P.2d at page 911. This result occurs whenever the government is allowed to profit by its own wrong by basing a conviction on illegally obtained evidence, and if law enforcement

officers are allowed to evade the exclusionary rule by obtaining evidence in violation of the rights of third parties, its deterrent effect is to that extent nullified. Moreover, such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them." See, also, People v. Gale, 46 Cal.2d 253, 294 P.2d 13; People v. Kitchens, supra, 46 Cal.2d 260, 294 P.2d 17.

[6, 7] The attorney general seeks to avoid application of this rule, contending that it should not be applied where officers enter upon premises solely for the protection of the owner. But these are not the facts of the case. The entry was not made for the purpose of protecting Grollnek's property. When the microphone was installed on January 22nd the officers had no information that a robbery was taking place or was about to take place. They did not expect to find anyone on the premises. Their sole purpose was to obtain evidence at some future time for use against the defendants. The officers had no right to make the entry; the evidence obtained by use of the microphone was illegaly obtained and it was error for the court to admit it. We do not doubt that the transcription of the conversation added materially to the strength of the case of the People. We believe it is not improbable that this evidence was the decisive factor in the finding of guilt of the defendants. The attorney general very properly does not contend that the evidence, if improperly admitted, was not prejudicial. Whether the error requires a reversal is to be determined under the general rule, namely, whether there was a deprivation of a fair trial which amounted to a miscarriage of justice. We understand that is the test to be applied to all errors and irregularities of procedure, including all errors in the admission of evidence, regardless of the particular nature of the evidence which renders it inadmissible.

[8] We do not believe it was error to receive in evidence the bag of tools belonging to Curren which was found in Stewart's office. The tools were found in the office which was searched at the time of the arrest of Stewart and Jager. The information the officers had received from Curren was sufficient to create a reasonable suspicion that defendants had committed a felony. This justified the arrest and the search of the immediate premises, which was incidental to the arrest. People v. Boyles, supra, 45 Cal.2d 652, 290 P.2d 535; Willson v. Superior Court, 46 Cal.2d 291, 294 P.2d 36. It is unnecessary to discuss other grounds of appeal urged by defendants.

The judgment, the order denying motion for new trial or in the alternative to grant defendants' motion in arrest of judgment are reversed.

PARKER WOOD and VALLÉE, JJ., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

47 Cal.2d 311

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Leonard LYONS, Defendant and Appellant.
Cr. 5795.

Supreme Court of California.
In Bank.
Nov. 20, 1956.

Rehearing Denied Dec. 19, 1956.

Prosecution for violating section 288 of the Penal Code on the person of a nine year old girl and on the person of an 11 year old girl. The Superior Court of Los Angeles County, Charles W. Fricke, J., entered judgment of conviction and order denying defendant's motion for new trial and defendant appealed. The Supreme Court held that where evidence was in sharp conflict, improper reference of prosecution's to prior conviction of defendant and court's improper handwritten addition to cautionary instruction of statement that fact charge was one difficult to disprove should not deter jury rendering a verdict of guilty if jury was convinced beyond a reasonable doubt of guilt, constituted reversible error.

Judgment and order reversed.

Shenk, J., Gibson, C. J., and Spence, J., dissented.

Opinion, 286 P.2d 993, vacated.

1. Criminal Law 🔑706

Where defendant had not yet testified as a witness, it was improper for prosecution on cross-examination of defendant's wife to refer to an alleged prior conviction of defendant.

2. Criminal Law 🔑562

Courts look with disfavor on a complaint made long after the event in question.

3. Criminal Law 🔑1037(2)

Generally, if harmful effect of improper statements of prosecuting attorney could probably have been removed by admonition to jury, failure of defendant to request such admonition is a waiver of right of defendant to rely on statements as misconduct.

4. Criminal Law 🔑1037(1, 2), 1171(1)

Where misconduct of prosecuting attorney is of such character it cannot be purged of its harmful effect by an admonition, it will be considered as possible ground for reversal in cases where jury has been admonished, as well as in cases where no objection was made or admonition requested on behalf of defendant.

5. Criminal Law 🔑1171(1)

Where the case is closely balanced and guilt has not been so clearly established as to render it improbable that harmful effect of misconduct of prosecuting attorney may have turned scales against defendant, such misconduct is ground for reversal.

6. Constitutional Law 🔑257

Where accused is denied a fair and impartial trial as guaranteed by law, procedure amounts to a denial of due process of law.

7. Criminal Law 🔑1186(4)

Criminal cases should not be conducted with an eye to the saving grace of section of Constitution permitting reversal only for error resulting in miscarriage of justice, since, except on motion for new trial, section is of no concern to the trial court and so far as its application goes, it is only of interest to courts of review. West's Ann.Const. art. 6, § 4½.

8. Infants 🔑20

In prosecution for violation of section 288 of Penal Code on persons of 9 and 11 year old girls, testimony of girls was not inherently improbable. Pen.Code, § 288.

9. Criminal Law 🔑1159(2)

Although a reviewing court will not uphold a judgment or verdict based on evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category.

10. Criminal Law 🔑1159(2)

To warrant rejection of statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true or their falsity must be apparent without resorting to inferences or deductions.

11. Criminal Law ⟹768(1)

In prosecution for violation of section 288 of the Penal Code on the persons of 9 and 11 year old girls, it was improper for trial judge to add in his own handwriting to cautionary instructions the statement that difficulty of disproving charge should not deter jury from rendering a verdict of guilty if the jury was convinced of guilt beyond a reasonable doubt. Pen. Code, § 288.

12. Criminal Law ⟹1186(4)

In prosecution for violating section 288 of Penal Code on the persons of 9 and 11 year old girls, where evidence was in sharp conflict and no complaint had been made by prosecution witnesses for several weeks after occurrence of alleged offenses, improper reference by prosecuting attorney to prior conviction of defendant before he had testified and court's improper handwritten addition to cautionary instruction of statement that difficulty of disproving charge should not deter jury from rendering a verdict of guilty if jury was convinced of guilt beyond reasonable doubt constituted reversible error. Pen.Code, § 288; West's Ann.Code Civ.Proc., § 2051; West's Ann.Const. art. 6, § 4½.

13. Criminal Law ⟹1186(4)

The denial of a fair trial is a miscarriage of justice within meaning of constitutional provision requiring reversals only for errors resulting in miscarriage of justice. West's Ann.Const. art. 6, § 4½.

Matthews & Hill and John J. Hamilton, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James and Marvin Gross, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

Defendant was charged by information with two violations of section 288 of the Penal Code and with a prior conviction of robbery in New York in 1931 under the name Leonard Leibowitz. He pleaded not guilty and admitted the prior conviction. A jury found him guilty of the charged offenses. Defendant appeals from the ensuing judgment of conviction and from an order denying his motion for a new trial.

After decision by the District Court of Appeal, Second Appellate District, Division One, which reversed the judgment and order, this court granted a hearing to give consideration to an argument advanced by the People and hereinafter discussed. We have concluded that the opinion prepared for the District Court of Appeal by Mr. Presiding Justice White correctly disposes of the cause. Therefore, we adopt the opinion with appropriate deletions and additions indicated as follows:[1]

[] Defendant and the two complaining witnesses [Linda and Cheryl] lived in the same general neighborhood. Linda, 9 years old, testified that on one occasion toward the end of July, 1954, about 1 o'clock in the afternoon, she went to defendant's home to call on his daughter Gail. Opening the door, defendant told Linda that his daughter was in the kitchen; after Linda had entered, defendant locked the doors. Upon finding that Gail was not in the kitchen, Linda was invited by defendant into the den, where she sat down on the couch to watch television. At that time defendant "started to tickle me," "from the top of me and went down." Then "he pushed me down and he made me lay down and he got on top of me," "and he took my shorts and panties down." Linda then testified that defendant then "opened a part of his pants and then he lay on top of me," "and stuck his thing into mine" "and he moved up and down." Linda testified that during this time she made no outcry nor did she say anything to defendant.

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[1] Brackets together, in this manner [], are used to indicate deletions from the opinion of the District Court of Appeal; brackets enclosing material (other than editor's added parallel citations) are, unless otherwise indicated, used to denote insertions or additions by this court. We thus avoid the extension of quotation marks within quotation marks which would be incident to the use of such conventional punctuation, and at the same time accurately indicate the matter quoted.

Afterwards defendant told Linda that she had better not tell anyone about this. Linda did not tell her parents about the incident for five or six weeks, because "I was afraid he was going to do something to me."

About a week after the incident defendant called Linda on the telephone several days in succession telling her, "I have got some candy for you, come over." Linda refused the invitation.

[] [T]he father of Linda corroborated the fact that Linda had informed him of the incident on the Friday after Labor Day of that year.

Cheryl, 11 years old, testified to substantially the same personal experiences as did Linda; that she went to defendant's home to visit Gail; that defendant told her that Gail was in the kitchen; that after Cheryl entered, defendant locked all the doors; that Gail was not in the house and that defendant invited Cheryl to enter the den and sit on the couch; that he tickled her from the head down, then asked her to lie down and pull her panties down; and that defendant then fondled her private parts; also, that he opened his trousers and Cheryl "saw his thing." Then defendant lay on top of Cheryl "and he put his thing between my legs," "he moved around," and "he laid on me for a long time and then he got off, and said, 'I will be right back' "; and that she then unlocked a door and left. Due to her fear of defendant, Cheryl postponed telling her parents until the same day on which Linda told hers. This complaint was corroborated by Cheryl's mother. []

Dr. Light, a qualified pediatrician, testified that he examined Linda on October 4, 1954, and found that her hymen was ruptured; his notations from a previous examination of April 29, 1953, disclosed that there was no ruptured hymen at that time.

In his own behalf defendant took the witness stand and denied putting his private parts next to those of either of the complaining witnesses; and he further denied that Cheryl ever came to his home during June, when his daughter was not at home. Lillian Lyons, the wife of defendant, testified that her husband was never home alone on any Saturday from June until September of 1954 because it was their habit to go shopping together every Saturday.

Esther Appleton testified that she is the principal of the school attended by Linda; that she had talked with other teachers and pupils at the school and had written reports from teachers concerning Linda. Based on the foregoing the witness testified that Linda's reputation for truth and veracity was bad. On cross-examination of Mrs. Appleton she was questioned as follows:

"Q. (By Deputy District Attorney) Let me ask it this way: In your discussions with Mrs. Kirkham, did she tell you that this little girl was a liar? A. Yes.

"Q. More than one occasion? A. Yes, sir.

"Q. All right. How about Mr. Prenn? A. The name is Prenn.

"Q. Mr. Prenn. Mr. or Mrs.? A. Mr. Prenn.

"Q. And did he tell you that this little girl tells stories? A. Yes, sir; because we never use the word lie."

Six witnesses testified that defendant's general reputation for chastity was "good," "very good," and "above reproach." Other witnesses were present and ready to testify but the court restricted the number to six on the ground that there being no rebuttal testimony on the issue of reputation, further evidence "becomes cumulative definitely."

In view of subsequent discussion it might here be noted that during the cross-examination of the complaining witness Cheryl, the following transpired:

"Q. And every time he put it between your legs; is that right? A. Yes, sir.

"Q. Well, he put it inside of you too, didn't he? A. No.

"Q. Never? A. No. * * *

"Q. Cheryl, when you were in the other court (Preliminary Examination), didn't you say, 'He put his in mine'? 'His private parts in mine and he left it there for about three minutes'? A. But mother had an examination at the doctor's office and the doctor said it didn't happen.

"Q. The doctor said it didn't happen? A. Yes.

"Q. That is all."

As his first ground for a reversal appellant urges that the district attorney was guilty of prejudicial misconduct in alluding to appellant's prior conviction during the cross-examination of the latter's wife. She had testified that she never left home on Saturdays (the day of the week on which both offenses allegedly occurred) without her husband because that was the day on which they did their shopping. Then the following ensued:

"Q. (By Deputy District Attorney) And there is some reason, then, for your not leaving Mr. Leibowitz at your home on Saturday by himself? A. My husband's name is not Mr. Leibowitz, sir.

"Q. Oh, it is not Leibowitz? A. Not now.

"Q. You knew him back in 1931, didn't you? A. Yes.

"Q. You knew of his conviction back in New York under that name? A. Yes, sir.

"Q. His real name now is Lyons? A. His real name is Lyons now.

"Q. Was it something else before that? A. Pardon?

"Q. Was it something else before that? A. Leibowitz.

"Q. Before that it was Leibowitz? A. Yes.

"Q. I thought you just told us his name is not Leibowitz. A. Now, I said.

"Q. Oh, I see. However, in 1931 it was? A. Yes, sir; it was."

With commendable fairness, the attorney general does not contend that the foregoing cross-examination was proper but asserts there was no actual prejudice or resultant miscarriage of justice (Cal.Const., art. VI, § 4½). Respondent urges that while, at the time of the foregoing interrogations, appellant had not yet taken the witness stand, he ultimately became a witness in his own behalf, at which time the prior conviction was properly alluded to for the purpose of impeachment (Code Civ.Proc., § 2051).

[1] It would be an impeachment of the legal learning of counsel for the People to intimate that he did not know the aforesaid questions to be improper, wholly unjustifiable and peculiarly calculated to prejudice the appellant before the jury. One has but to read the foregoing questions to observe in them the subtle insinuations that appellant had used names other than Leibowitz or his present name of Lyons. The prosecuting attorney may well be assumed to be a man of fair standing before the jury, and the members thereof may well have thought that he could prove the innuendo contained in the improper questions.

[2] In the instant case, the evidence is in sharp conflict. All the material facts testified to by the witnesses for the prosecution were denied and controverted. There was creditable evidence to support appellant's alibi. No complaint was made by either of the victims for several weeks after the occurrence of the acts charged. Courts look with disfavor upon a complaint made long after the event in question (People v. Musumeci [1955], 133 Cal.App. 2d 354, 364 [284 P.2d 168]). The general reputation of one of the complainants for truth and veracity was characterized as bad by her teachers at school, while the other complainant was impeached by showing that she changed her testimony given at

the preliminary examination because thereafter her "mother had an examination at the doctor's and the doctor said it didn't happen."

Several witnesses testified that appellant's general reputation in the community where he lived was good. When consideration is given to the evidence in this case in its entirety it seems manifest that if the jury attached the slightest weight to the insinuating questions of the prosecution, and the innuendo therein contained, it would be sufficient to turn the scales.

[3–5] It is true, as urged by respondent, that no objection to the foregoing questions was made at the trial, and the court was not requested to admonish the jury to disregard them. And it is contended that the issue cannot be raised for the first time on appeal. However, as was said in People v. Ford [1948], 89 Cal.App.2d 467, 470–471 [200 P.2d 867]: "As a general rule, if the harmful effect of improper statements could probably have been removed by an admonition to the jury, failure to request such admonition is regarded as a waiver of the right to rely upon the statements as misconduct. (People v. Simon [1927], 80 Cal.App. 675, 678–679 [252 P. 758], and many cases cited.) Upon the other hand, where the misconduct is of such a character that it cannot be purged of its harmful effect by an admonition, it will be considered as a possible ground for reversal in cases where the jury has been admonished (citing cases), as well as in cases where no objection was made or admonition requested on behalf of the accused (citing cases). *In either situation, where the case is closely balanced and guilt has not been so clearly established as to render it improbable that the harmful effect of the misconduct may have turned the scales against the accused, such misconduct has consistently been deemed ground for reversal.* (Citing cases.)" (Emphasis added.)

What was said by the Chief Justice of the United States in the case of Viereck v. United States [1943], 318 U.S. 236, 248 [63 S.Ct. 561, 87 L.Ed. 734] (quoting from Berger v. United States [1935], 295 U.S. 78, 88 [55 S.Ct. 629, 79 L.Ed. 1314, 1321]), reflects our views as to the duties and obligations of a prosecuting officer. We quote: "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In the recent case of People v. Wilkes [1955], 44 Cal.2d 679, 687 [284 P.2d 481], our Supreme Court in dealing with the propensity of some prosecutors to transcend the bounds of legitimate methods to secure a conviction, had this to say: "It was error for the prosecution to comment on the failure of Mrs. Wilkes to testify. (Citing cases.) Such error has repeatedly been denounced but held not to have been prejudicial in the circumstances of the particular cases in which it has occurred. Because of such repeated holdings, it appears from the brief of the People, prosecuting officials have come to the belief that erroneous conduct in this regard is, as a matter of law, not cause for reversal. The conduct here, as in previous cases where it has been rebuked but held not prejudicial, was manifestly deliberate. Regrettably, the circumstances make it apparent that we must recognize and deal with the fact that such conduct will not be discontinued as long as it is merely rebuked. (See People v. Ford (1948), 89 Cal.App.2d 467, 472 [200 P.2d 867] ["we have extended our remarks respecting misconduct in the hope that they will be taken as a serious effort to inspire a greater degree of responsibility, duty and caution on the part of those prosecutors who are either careless in the observance of the rights of the accused or wholly indifferent to the consequences of their misconduct. It is regrettable that so much is left for reviewing courts in the way of discouraging misconduct. Fewer judgments would have to be reversed if the trial courts were more firm in controlling the comparatively few prosecutors who need restraint"].[2])"

[6, 7] It is axiomatic that when an accused is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law (Powell v. State of Alabama [1932], 287 U.S. 45 [53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527]). Criminal cases should not be conducted with an eye to the saving grace of section 4½, article VI of our state Constitution. Excepting motions for a new trial, the constitutional section is of no concern to the trial courts, and so far as its application goes, it is of interest only to the courts of review (People v. Black [1925], 73 Cal.App. 13, 43 [238 P. 374]).

[8–10] Appellant next assails the testimony of the prosecuting witnesses as inherently improbable. This contention cannot be sustained. The rule is thus stated in People v. Huston [1943], 21 Cal.2d 690, 693 [134 P.2d 758]:

"Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. (Kidroski v. Anderson [1940], 39 Cal.App.2d 602, 605 [103 P.2d 1000].) To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citing cases.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (Hicks v. Ocean Shore Railroad, Inc. [1941], 18 Cal.2d 773, 781 [117 P.2d 850].)"

[11] It is next urged that the trial court was guilty of prejudicial error in modifying the cautionary instruction given the jury. In that regard the record shows that the trial judge read to the jury the following instruction, which was in printed form:

"It is not essential to a conviction in this case that the testimony of the prosecuting witness be corroborated by other evidence, provided that from all the evidence you are convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt. However, a charge such as that made against the defendant in this case is one which, generally speaking, is easily made, and, once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution.

"[In giving this instruction I do not mean to imply an opinion of my own as to the credibility of any witness.]"[3]

To the foregoing the judge added in his own handwriting the following: "and the fact that the charge here made is one difficult to disprove should not deter you from rendering a verdict of guilty, if you are convinced beyond a reasonable doubt that the defendant is guilty."

In an affidavit by the bailiff of the trial court, received by augmentation of the record, he avers that he recalls the instant case, "that in all cases of jury trials he always takes the jury instructions in to the jury room * * * that he recalls no case in which a jury trial was had that he did not take the jury instructions in to the jury room."

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[2] These brackets appear in the authority quoted (People v. Wilkes [1955], supra, at page 687 of 44 Cal.2d at page 486 of 284 P.2d).

[3] These brackets are included in the record as it comes to us.

Appellant argues that "It is within reason to anticipate that most, if not all, jurors entertain a belief that the judge or the Court is a person of great importance and hence such jurors undoubtedly would pay great attention to any expression either oral or in writing of any judge and upon viewing the said instruction in connection with the personal writing of the trial judge must have realized that the overemphasis caused solely by the said additional writing by the judge re-emphasized the judge's belief that he leaned definitely toward guilt rather than a neutral position in the matter and in this regard it must be noted that no saving phraseology is included in the instruction or no effort to neutralize the possible danger of the jury viewing such handwritten handwriting by the judge."

The reason for giving cautionary instructions in cases of the kind now before us was thus stated by the Supreme Court in People v. Adams [1939], 14 Cal.2d 154, 167 [93 P.2d 146], wherein it is stated: "As frequently has been said regarding cases of the instant character, 'No charge can be more easily made, and none more difficult to disprove.' As a matter of practical observation to many judges who have presided over trials of this nature, it is plainly recognized that, notwithstanding the salutary rule that an accused is presumed to be innocent until his guilt has been established beyond a reasonable doubt, nevertheless, to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of 'guilty'; and that—instead of its being necessary for the prosecution to prove his guilt beyond a reasonable doubt—in order to secure an acquittal of the charge, it becomes incumbent upon the accused to completely establish his innocence, and to accomplish that result not only by a preponderance of the evidence but beyond a reasonable doubt. In such a situation, the only defense available, ordinarily, to the accused is his own denial of any asserted misconduct, together with evidence of a former good reputation; otherwise, he is utterly defenseless and at the mercy of a jury which probably is very much prejudiced."

In the case just cited it is further stated, 14 Cal.2d at page 168, 93 P.2d at page 153: "It is because of the recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind that courts are at pains to insist upon fair trials in all respects being accorded to the accused. Errors committed either by the prosecution or by the court in the course of the trial, which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse effect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved."

By other instructions the jury had been fully admonished that "if, after weighing all the evidence, you are convinced beyond a reasonable doubt that the defendant is guilty of (a) crime charged against him in the information, your duty will be to find him guilty * * *." The jury was also advised that "You are to be governed solely by the evidence introduced in this trial and the law as stated to you by me. The law forbids you to be governed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. Both the People and the defendant have a right to demand, and they do demand and expect, that you will conscientiously and dispassionately consider and weigh the evidence and apply the law of the case, and that you will reach a just verdict, regardless of what the consequences of such verdict may be."

[12] Since in no other instruction did the trial judge add anything in his own handwriting, it may well be that if the jury read the instructions they might have been influenced to the belief that notwithstanding the cautionary admonition as to the testimony of the complaining witnesses, the court was inclined to the belief of the guilt of the accused. To us it appears that in the case at bar there was no reason to add to the cautionary instruction the admonition that notwithstanding the caution with which they should view the testimony of the complainants that "should not deter you from rendering a verdict of guilty, if you are convinced beyond a reasonable doubt that the defendant is guilty." They had already been fully advised in that regard, and to emphasize it as was done in this case might well have turned the scales to the prejudice of appellant. In other words, [it would appear] that the court leaned toward the view that notwithstanding the "recognized existence of the ease with which convictions of men, even those of unblemished reputation, may be secured in cases of the instant kind" (People v. Adams [1939], supra, 14 Cal.2d at page 168, 93 P.2d at page 153), such was not the case in the instant prosecution. The overemphasis contained in the language appended to the cautionary instruction in the handwriting of the trial judge might well have militated against a fair or dispassionate consideration by the jury of the cautionary elements of the instruction which is the outgrowth of human experience. The portion of the instruction added in the handwriting of the trial judge would seem to be an admonition to exercise caution in the application of the cautionary instruction. To us this seems contrary to the philosophy and reasons which gave rise to the necessity for giving the cautionary instruction in cases such as the one now engaging our attention. [ ]

[Cautionary instructions which concluded with words materially similar to those added here by the trial court, in its own handwriting, have been upheld by a majority of this court in People v. Westek (1948), 31 Cal.2d 469, 481–482, 190 P.2d 9, and by the District Court of Appeal, Second Appellate District, Division Two, in People v. Ernst (1953), 121 Cal.App.2d 287, 295–296, 263 P.2d 114; People v. Ahsbahs (1946), 77 Cal.App.2d 244, 250–251, 175 P.2d 33; and People v. Arechiga (1945), 72 Cal.App.2d 238, 240–241, 164 P.2d 503. The People argue that the decisions last cited preclude a holding that the addition of the handwritten words was prejudicial error. This contention goes too far and misses the point. The fact that the words standing alone do not state an erroneous proposition of law does not mean that the addition of them in the circumstances of this case may not be considered in determining whether the defendant has been accorded a fair trial. The addition of such words to the cautionary instruction was wholly unnecessary. Just as the accurate statement of a proposition of law which is entirely inapplicable to the facts of a case may mislead a jury to the prejudice of a party (People v. Silver (1940), 16 Cal.2d 714, 722, 108 P.2d 4; People v. Roe (1922), 189 Cal. 548, 558, 209 P. 560), so may overemphasis on a particular point (People v. Hatchett (1944), 63 Cal.App.2d 144, 158, 146 P.2d 469). In the circumstances of this case, where the words were wholly unnecessary to a fair and clear statement of the pertinent proposition of law and were supererogated in the handwriting of the judge on the already adequate printed instruction which was taken into the jury room, their overemphasis upon conviction is manifest.]

[13] [ ] The ultimate question presented to us in the case at bar is, *Has the accused been accorded a fair trial?* In reviewing, as we have herein, the overall picture framed by the evidentiary features of this case and the errors to which we have referred, we are persuaded that the question must be answered in the negative. [ ]

[In the circumstances the conviction cannot be supported by section 4½ of article VI of the state Constitution, for the denial of a fair trial is a miscarriage of justice. (People v. Sarazzawski (1945), 27 Cal.2d 7, 11, 161 P.2d 934; People v. Hooper (1949), 92 Cal.App.2d 524, 531, 207 P.2d 117; People v. Mason (1946), 72 Cal.App. 2d 699, 716, 165 P.2d 481.)]

For the reasons above stated the judgment and order appealed from are reversed.

CARTER, TRAYNOR and McCOMB, JJ., concur.

SHENK, Justice.

I dissent.

That the evidence is sufficient to support the verdict is beyond question. The determination of the credibility of the witnesses, that is, the truth or falsity of their testimony, is of course within the exclusive province of the trier of fact and the jury should be so instructed. Penal Code, § 1127. It was so instructed in this case. It is properly held by the majority that the testimony of the witnesses for the prosecution was not inherently improbable.

Misconduct on the part of the prosecuting attorney is held to be one of the reasons requiring a reversal. It appears that in cross-examining the defendant's wife remarks were made by the prosecuting attorney which intimated that the defendant had used names in the past other than Lyons and Leibowitz. This line of questioning was apparently not deemed objectionable at the trial for no objection to it was there made. It is first urged on appeal. If an objection had been interposed at the trial it is reasonable to assume that any possible ill effect of those remarks could have been obviated by a request to the court to instruct the jury to disregard them. It is well established that if such an objection is not raised in the trial court it cannot be urged for the first time on appeal. People v. Hampton, 47 Cal.2d 239, 302 P.2d 300; People v. Byrd, 42 Cal.2d 200, 208, 266 P.2d 505; People v. Sampsell, 34 Cal.2d 757, 764, 214 P.2d 813; People v. Codina, 30 Cal.2d 356, 362, 181 P.2d 881; People v. Tolson, 109 Cal.App.2d 579, 582, 241 P.2d 32.

Prejudicial error is held to have resulted from the giving of an instruction cautioning the jury with regard to the testimony of the witnesses for the prosecution. In addition to the cautionary instruction taken from California Jury Instructions Criminal No. 527 (CALJIC pp. 436–437) there was added in the handwriting of the trial judge the language which appears in the 1953 Pocket Part to CALJIC at page 153. This language was so added to the instruction to make it conform to the completed and approved CALJIC form. The completed instruction, with the portion objected to on the ground that it is in the handwriting of the trial judge being italicized, reads as follows:

"It is not essential to a conviction in this case that the testimony of the prosecuting witness be corroborated by other evidence, provided that from all the evidence you are convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt. However, a charge such as that made against the defendant in this case is one which, generally speaking, is easily made, and, once made, difficult to disprove even if the defendant is innocent. From the nature of a case such as this, the complaining witness and the defendant usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution.

"In giving this instruction I do not mean to imply an opinion of my own as to the credibility of any witness *and the fact that the charge here made is one difficult to disprove should not deter you from rendering a verdict of guilty, if you are convinced beyond a reasonable doubt that the defendant is guilty.*"

An instruction in substantially the same language as the above with the italicized portion added to the original instruction was approved in People v. Westek, 31 Cal. 2d 469, 481–482, 190 P.2d 9; People v. Ernst, 121 Cal.App.2d 287, 295–296, 263 P. 2d 114; People v. Ahsbahs, 77 Cal.App.2d 244, 250–251, 175 P.2d 33; and People v.

Arechiga, 72 Cal.App.2d 238, 240–241, 164 P.2d 503. As stated in the Westek case [31 Cal.2d 469, 190 P.2d 17], language such as that added to the instruction does not "weaken, modify or detract, from that portion of the instruction in which [the jurors] were told to examine with caution the testimony of the prosecuting witness * * *. By the language complained of the court did not indicate any opinion of its own as to the guilt or innocence of appellant, but in fact it emphasized the duty of the jury to be convinced beyond a reasonable doubt before returning a verdict of guilty."

If the addition had been made in typewriting it is assumed that no valid objection to it could have been made at the trial or on appeal. It then would have been in the approved form under the Westek case. Now, because the modification was made in the handwriting of the trial judge, the judgment is reversed for the stated reason that it carried to the jury the implication that the judge believed the defendant guilty.

It is the duty of the trial judge to cause the instructions to conform to the law as applied to the facts. §§ 1127, 1176, Penal Code. To accomplish this it is common practice for the judge in his own handwriting to modify a proposed instruction by correction, amendment, addition, or deletion. Completed instructions must be prepared in advance of or at the time of charging the jury. Requested instructions are required to be submitted to the judge before the first witness is sworn. Additional instructions may be requested immediately before argument to cover questions of law developed by the evidence. Every proposed instruction must be endorsed in the handwriting of the judge showing his action thereon. If a modification is made by addition or deletion it is frequently done by the judge in his own handwriting. He then endorses on the instruction "Given as modified." The jury is permitted to take the instruction to the jury room with the signature of the trial judge endorsed thereon. Penal Code, § 1137.

What would the majority of the court have the trial judge do when he is convinced that a proposed instruction is good in part but needs modification? If it is partly good and partly erroneous or incomplete, is the trial judge bound to refuse it in its entirety, as he has the right to do? From the time proposed instructions are considered, which may be not until the first witness is sworn, to the close of argument, the trial judge is engaged at least in part in the delicate task of determining the law applicable to the facts of the case and approving or modifying instructions accordingly. If he is prevented from modifying a proposed instruction in his own handwriting, must he suspend proceedings, call in a stenographer, and have the modification done in typewriting? This would seem to be the requirement from now on. The test on appeal should be, is the instruction as modified free from error? Here it is not erroneous. To my mind the restriction now placed on trial judges in the preparation and submission of instructions is unnecessary and unduly burdensome in the administration of justice in both criminal and civil courts. In my opinion no substantial reason is given for a reversal on any ground. The defendant had a fair trial and the judgment should be affirmed.

GIBSON, C. J., and SPENCE, J., concur.

Rehearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

47 Cal.2d 303

In re ESTATE of Edward J. FRANKLIN, Deceased.

Robert O. PFLEGER, Appellant,
v.
BANK OF AMERICA NATIONAL TRUST and SAVINGS ASSOCIATION, Respondent.
L. A. 24148.

Supreme Court of California.
In Bank.
Nov. 20, 1956.

Proceedings wherein the Superior Court, Los Angeles County, Alfred E. Paonessa, J., rendered an order settling final account, and an appeal was taken. The Supreme Court held that rate of compensation for executors, administrators and their attorneys should be determined by law in effect at date of order allowing compensation, rather than by law in effect at date of decedent's death.

Reversed.

Opinion, 299 P.2d 1037, vacated.

Executors and Administrators 🔑216(2), 489

Rate of compensation for executors, administrators and their attorneys should be determined by law in effect at date of order allowing compensation, rather than by law in effect at date of decedent's death.

Robert O. Pfleger, Tarzana, in pro. per.

No appearance for respondent.

PER CURIAM.

The question here involved is whether the compensation allowed to executors, administrators and their attorneys should be governed by (1) the law in effect at the time of the settlement of the account and making the order allowing compensation, or (2) the law effective at the date of death of decedent.

We are of the opinion that the proper rule is that the rate of compensation should be determined by the law in effect at the date of the order allowing compensation. See In re Estate of Johnston, 47 Cal.2d 265, 303 P.2d 1.

Since the probate court in the instant case did not apply this rule, the order appealed from is reversed.

47 Cal.2d 304

Bart Luis CARITATIVO, Petitioner,
v.
Harley O. TEETS, Warden, California State Prison at San Quentin, Respondent.
S. F. 19603.

Supreme Court of California.
In Bank.
Nov. 20, 1956.

Mandamus proceeding. The Superior Court of Marin County, Jordan L. Martinelli, J., rendered judgment. Petitioner appealed. On respondent's motion to dismiss appeal and for order directing issuance of remittitur forthwith, the Supreme Court, McComb, J., held that where state prison warden had determined that there was not good reason to believe that prisoner in his custody awaiting execution of death penalty was presently insane, in view of the statutes a writ of mandamus would not issue to compel warden to institute proceedings to determine prisoner's present sanity.

Appeal dismissed and order granted.

Carter, J., dissented in part.

1. Mandamus 🔑73(1)

Where state prison warden had determined that there was not good reason to believe that prisoner in his custody awaiting execution of death penalty was presently insane, in view of the statutes a writ of mandamus would not issue to compel warden to institute proceedings to determine prisoner's present sanity. West's Ann.Pen.Code, §§ 3700, 3701.

2. Constitutional Law ⟹255

Due process does not prevent delegation of duty of determining sanity of person awaiting execution of death penalty to administrative official, and judicial review of that officer's determination is not required. West's Ann.Pen.Code, §§ 3700, 3701.

◆

George T. Davis, San Francisco, for petitioner.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

McCOMB, Justice.

This is a motion to dismiss an appeal from an order denying a petition for a writ of mandate and also for an order directing the issuance of the remittitur forthwith.

Chronology

i. Defendant's conviction of two first degree murders was affirmed by this court February 1, 1956. (People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513.)

ii. Petition for a rehearing was denied February 29, 1956.

iii. Petition for a writ of certiorari was filed with the Supreme Court of the United States and denied June 4, 1956. 351 U.S. 972, 76 S.Ct. 1042.

iv. On June 18, 1956, the death penalty was imposed on defendant and the date of execution set for August 31, 1956.

v. On April 27, 1956, George T. Davis, attorney for defendant, was informed that the prison psychiatrists were of the opinion defendant was sane.

vi. On May 24, 1955, three psychiatrists on the medical unit of the California State Prison at San Quentin, to wit, David G. Schmidt, M.D., Chief Psychiatrist, M. M. Kirksey, M.D., and M. D. Willcutts, M.D., Chief Medical Officer, advised the warden relative to defendant:

"We are agreed he has some expansive grandiose ideas and feelings of persecution; but no delusions or hallucinations are elicited and he knows the crime of which he was convicted and sentenced to execution and we are agreed he is not insane, albeit he has a Paranoid Personality with some Schizoid and some Neurotic Elements."

vii. On March 30, 1956, Dr. Willcutts, Dr. Schmidt and Dr. Kirksey, all on the prison staff, advised the warden relative to defendant:

"He shows he is oriented well in all spheres, that he has a good memory and still gives some evidence of some expansive grandiose ideas and feelings of persecution. He has a Paranoid Personality with some Schizoid and Neurotic elements; but we are all agreed that he is not insane."

viii. On May 2, 1956, Dr. Willcutts, Dr. Schmidt and A. D. Kopac, M.D., Psychiatrist, all on the prison staff, informed the warden relative to defendant:

"He knows the crime for which he is sentenced, but he does not know, or will not say definitely where his case is in the courts, but feels that Mr. Davis will take good care of his case.

"This subject has a good memory, he is oriented in all spheres, knows right from wrong, is aware of the crime for which he was sentenced and for which he faces execution. He exhibits some grandiose ideas and feelings of persecution, but we are all agreed that he is not insane. He has a paranoid personality with schizoid and neurotic elements."

ix. On August 7, 1956, Dr. Willcutts, Dr. Schmidt and Dr. Kopac advised the warden concerning defendant:

"This subject has a good memory, is oriented in all spheres. He knows right from wrong and is aware of the crime for which he was sentenced and for which he faces execution. He exhibits many grandiose ideas and feelings of persecution; but we are all agreed that he is not legally insane. He has a Paranoid

Personality with many Schizoid and Neurotic Elements."

The record fails to disclose any evidence contradicting the findings of the doctors as set forth above.

x. On August 30, 1956, defendant filed a petition for a writ of mandate in the Superior Court of Marin County seeking to compel the warden of San Quentin penitentiary to institute proceedings to determine the present sanity of defendant. The writ was denied by the superior court on the same date and a notice of appeal immediately filed with this court. On August 31, 1956, a stay of execution pending the appeal from the order denying the petition for a writ of mandate was granted.

[1] This is the sole question necessary for us to determine: *In view of the provisions of sections 3700 and 3701*[1] *of the Penal Code, will a writ of mandate issue to compel the warden of the state penitentiary to institute proceedings to determine the present sanity of a prisoner in his custody awaiting execution of the death penalty after the warden has determined that there is not "good reason to believe" such prisoner is presently insane?*

No. The method of determining the question of the sanity of a person awaiting execution is controlled by the Legislature. The Legislature has provided in Penal Code section 3700 that the courts shall not suspend the execution of a judgment of death. It has also provided in section 3701 of the Penal Code for a judicial proceeding to determine the question of defendant's present sanity only when the warden invokes such a proceeding. (In re Phyle, 30 Cal.2d 838, at page 843 [2], 186 P.2d 134.)

[2] It is settled that "due process" does not prevent delegation of the duty of determining the sanity of a person awaiting execution of the death penalty to an administrative official, and judicial review of that officer's determination is not required. (McCracken v. Teets, 41 Cal.2d 648, at page 653 [7], 262 P.2d 561;[2] Solesbee v. Balkcom, 339 U.S. 9, 70 S.Ct. 457, at page 459 [3], 94 L.Ed. 604; Nobles v. State of Georgia, 168 U.S. 398, at page 405 et seq., 18 S.Ct. 87, 42 L.Ed. 515.)

Any statements in Phyle v. Duffy, 34 Cal.2d 144, 208 P.2d 668, which imply a contrary view are overruled.

For the reasons above stated the motion to dismiss the appeal is granted and the stay of execution heretofore granted is terminated. Let the remittitur issue forthwith.

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[1] Section 3700 of the Penal Code reads: "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken."

Section 3701 of the Penal Code reads: "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to immediately file in the superior court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry."

[2] Justice Schauer, speaking for this court, with whom Chief Justice Gibson and Justices Shenk and Edmonds concurred, said in the cited case, 41 Cal.2d at page 653 [7], 262 P.2d at page 563: "Petitioner asserts that he is denied due process of law if he is not accorded judicial review of the question whether there is good reason to believe that he has become insane. It has been held that federal due process accords him no such right. (Citation.)"

On page 654, of 41 Cal.2d, on page 564 of 262 P.2d, Justice Traynor, with whom Justice Spence concurred, said: "Procedural due process does not prevent delegation of the duty of determining the sanity of a person under judgment of death to an administrative official and does not require judicial review of that official's determination. (Citations.)"

GIBSON, C. J., and SHENK, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (concurring).

I concur in the judgment and, generally, in the discussion insofar as it relates to petitioner's claimed right to judicial review of the administrative act of the warden. (Mandamus is not a proper vehicle for asserting the right here involved. See concurring and dissenting opinion, Phyle v. Duffy (1949), 34 Cal.2d 144, 170, 208 P.2d 668.) I do not, however, concur in any possible implication that an insane person may be executed or that the right to the writ of habeas corpus may be suspended or denied absolutely as to persons who are insane or who are under sentence of death, merely because they have been so adjudicated.

Penal Code section 1367 has provided ever since 1872, and still provides, that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." Section 26 of the same code declares that "All persons are capable of committing crimes, except those belonging to the following classes: * * *

"Three. Lunatics and insane persons. * * *"

The Constitution of the United States (art. I, § 9(2)) provides that "The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." The Constitution of California (art. I, § 5) declares the same fundamental right.

The Penal Code, section 1473, implementing the Constitution, declares that "Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever, may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint." Section 1474 provides that the petition for the writ (which may be signed either by the party for whose relief it is intended or by some person in his behalf) shall specify "If the imprisonment is alleged to be illegal * * * in what the alleged illegality consists." The illegality may consist in the fact that a warden of a prison refuses to obey the law: a prisoner is insane, is known to the warden to be insane, and is nevertheless being held by the warden for the purpose of executing a sentence of death while the prisoner remains insane. In such a case the order granting the writ of habeas corpus would not require the release of the prisoner from all custody (Pen.Code, § 1486) but should release him from the illegal detention; i. e., the detention which, if not limited, will culminate in illegal execution and, if the prisoner belongs in the custody of the superintendent of a hospital for the criminal insane for safekeeping and treatment rather than in the custody of the warden of a state prison for execution, the writ may so order (Pen.Code, §§ 1487(5), 1493).

Section 3700 of the Penal Code, providing that "No judge, court, or officer, other than the Governor, can suspend the execution of a judgment of death, except the warden of the State prison to whom he is delivered for execution, as provided in the six succeeding sections, unless an appeal is taken," by its own provision has no application to the powers of the court or a judge when an appeal has been taken and manifestly it cannot, by express prohibition of the Constitutions of both the United States and the State of California, operate to suspend the constitutionally granted rights of the citizens to sue out, and the courts and judges to grant, writs of habeas corpus, with such stays of execution as may be appropriate. Manifestly, the power to issue a writ of habeas corpus in a death penalty case includes the power to stay execution. The very issuance of the writ must as a necessary incident effect a stay until after the writ has been discharged or an appropriate order made, else the writ could not be obeyed. Sections 3701, et seq., must, therefore, be construed, as their own language comprehends, as *definitive of the duties* of a warden of a prison when "there is good reason to believe that a defendant, under judgment of death, has become insane," or "that a female * * * [under like commitment] is pregnant." (Certain duties are also imposed upon the district attorney by the mentioned sections in the contemplated circumstances.) *But such sections do not purport to cover the situation where the warden fails to obey the law.*

Certainly no provision in chapter 2 (of tit. 3, pt. 3) of the Penal Code (the chapter containing sections 3700 to 3706, inclusive) purports to declare that the warden of a prison is above the law and his acts beyond cognizance of the courts. Neither does any provision of law purport to authorize the execution of an insane person or a pregnant woman, or to suspend, in contravention of the Constitutions of the United States and of the State of California, the issuance of writs of habeas corpus or the inherent power of the court, or a justice thereof, in such cases to stay execution.

The constitutional provisions safeguarding the writ of *habeas corpus ad subjiciendum* are wise. The right to that writ was hard won by our ancestors. It gained formal recognition as the vehicle for inquiring into the lawfulness of the restraint of a person detained in another's custody upon passage of the Petition of Right (16 Chas. I, ch. 10, § 8) and the subsequent passage in 1679 of the Habeas Corpus Act (31 Chas. II, ch. 2). It should not be stricken down in whole or whittled away in part by any decision of this court. To hold it inapplicable in the case of prisoners under sentence of death who are insane, or who are pregnant, would mean that, conceivably, a warden, knowing full well that a prisoner was a lunatic, completely bereft of reason, unknowing the act for which he was sentenced or even that he was to be punished, could proceed with the execution. Likewise, such a warden, knowing that a female under death sentence was about to be delivered of child, could proceed with the execution of the convicted prisoner and, as an incident thereof, of the unborn infant. And, the writ of habeas corpus being suspended in such cases, no court or judge could stay the execution. (See majority holding in In re Phyle (1947), 30 Cal.2d 838, 850, 186 P.2d 134; see also dissenting opinion, Id., 30 Cal. 2d at page 851 et seq., 186 P.2d at page 142; see concurring and dissenting opinion, Phyle v. Duffy (1949), supra, 34 Cal.2d 144, 163 et seq., 208 P.2d 668; Phyle v. Duffy (1948), 334 U.S. 431 [68 S.Ct. 1131, 92 L.Ed. 1494], concurring opinion of Mr. Justice Frankfurter, at pages 444–445 of 334 U.S., at page 1137 of 68 S.Ct.)

The concept of using mandamus (a superior court civil proceeding carrying with it a right to appeal and ensuing delay) as a substitute for habeas corpus was an unfortunate expedient which had better never have been innovated. (See In re Phyle (1947), supra; Phyle v. Duffy (1948), supra, 334 U.S. 431, 68 S.Ct. 1131; Phyle v. Duffy (1949), supra, 34 Cal.2d 144, 147, 167, 171, 208 P.2d 668.) I am glad to concur in holding that such remedy is inapplicable.

There should be few, if any, unjustified delays attendant upon use of the conventional vehicle, habeas corpus, upon proper showings. This court will not issue such writ upon tardy application or the mere averment of conclusions, or of the ultimate fact, or of general statements of facts. The principles enunciated in In re Swain (1949), 34 Cal.2d 300, 304, 209 P.2d 793, should be strictly applied in all related situations. (See also People v. Shorts (1948), 32 Cal.2d 502, 506, 197 P.2d 330.)

For the reasons, and with the limitations, above stated, I concur in the orders dismissing the appeal, terminating the stay of execution and issuing the remittitur forthwith.

CARTER, Justice (concurring and dissenting).

Because it is and always has been my view that mandamus is not available to determine the sanity of a person under sentence of death and that habeas corpus is the only remedy available to such a person, I concur in the order for the dismissal of the appeal. I dissent from the holding in the majority opinion that there can be no judicial review of the determination of the warden as to the sanity of a person under sentence of death as it is my opinion that habeas corpus is available to review such a determination. See, concurring and dissenting opinion of Mr. Justice Schauer in Phyle v. Duffy, 34 Cal.2d 144, 208 P.2d 668, and my dissent in McCracken v. Teets, 41 Cal. 2d 648, 654, 262 P.2d 561. I agree with the views expressed by Mr. Justice SCHAUER in his concurring opinion in the case at bar with respect to the availability of the writ of habeas corpus in a case such as this, and on the record before us, such remedy should be available to the petitioner here.

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146 Cal.App.2d 30

Myron George SHELDON, a minor, by Mrs. Margaret Sheldon, his guardian ad litem, Plaintiff and Appellant,

v.

CITY OF BURLINGAME, California, a City of the Sixth Class, a Municipal Corporation, Defendant and Respondent.

No. 16947.

District Court of Appeal, First District, Division 1, California.

Nov. 16, 1956.

Rehearing Denied Dec. 14, 1956.

Hearing Denied Jan. 8, 1957.

Proceeding by guardian ad litem on behalf of minor to recover for personal injuries received by minor while riding in a police patrol vehicle being driven by city policeman. The Superior Court, San Mateo County, John P. McMurray, J., entered judgments of nonsuit against minor and he appealed. The District Court of Appeal, Agee, J., pro tem., held that evidence was insufficient to present jury issue as to willful misconduct of policeman who lost control of patrol automobile while driving over dips in city street, but evidence did present jury question as to whether police officer was within scope of his employment in taking minor home late at night, thereby rendering city liable for negligence.

Affirmed in part and reversed in part.

1. Automobiles 🔑244(20)

In action against city for personal injuries sustained by minor while riding in police patrol vehicle being driven by city policeman, evidence was insufficient to present jury issue as to willful misconduct of policeman who lost control of patrol vehicle while driving over dips in city street. West's Ann.Vehicle Code, §§ 400, 402, 403.

2. Automobiles 🔑187

Statute creating a liability of the state and its political subdivisions, acting in a governmental capacity, for negligent operation of motor vehicles is to be strictly construed, and a governmental agency is only responsible thereunder for injuries or damages as a result of negligent operation of any motor vehicle driven by an officer, agent or employee when acting within the scope of his office, agency or employment. West's Ann.Vehicle Code, § 400.

3. Automobiles 🔑245(30)

In action for personal injuries sustained by minor riding in police patrol vehicle being driven by city policeman, evidence presented jury question as to whether policeman in taking minor to his home late at night was acting within scope of his employment and thereby rendering city liable for negligent operation of motor vehicle. West's Ann.Vehicle Code, § 400.

4. Automobiles 🔑181(2)

Where minor was being driven to his home late at night in city patrol vehicle being driven by city policeman, if policeman was acting within scope of his employment in giving a ride to such minor, minor's status was that of a passenger and not of a guest, since minor was a member of a class which officer was paid to transport as a part of his police duties even though there was no direct payment to police officer by minor.

5. Automobiles 🔑245(24, 59)

In action against city for injuries sustained by minor while riding in police patrol vehicle being driven by city policeman, evidence was sufficient to present jury questions as to negligence of policeman who lost control of vehicle while driving it over dips in city street at 35 to 40 miles an hour, and whether such negligence was a proximate cause of minor's injuries.

* * *

Carr, McClellan, Ingersoll & Thompson, Luther M. Carr, Richard C. Amick, Burlingame, for appellant.

Ropers & Majeski, Redwood City, for respondent.

AGEE, Justice pro tem.

This is an appeal from a judgment of nonsuit entered against plaintiff at the completion of his evidence in a personal injury action.

On January 1, 1954, appellant, who was then 19 years of age, was working as a dishwasher in a Burlingame restaurant. About 5:15 a. m., Rudolph Ruhl, a police officer employed by the City of Burlingame and on duty as such, came into the restaurant for coffee. He was driving a police patrol car owned by the city and assigned to him to use in the performance of his police duties. Appellant was due to finish work at 5:30 a. m. and he either asked to be driven or Ruhl offered to drive him home. While on the way, the car struck a tree and appellant was injured.

Appellant then brought this action under the provisions of section 400 of the Vehicle Code, which makes governmental agencies, including municipal corporations, liable for injuries resulting from the negligent operation of a motor vehicle by any employee when acting in the scope of his employment. The officer was originally joined as a defendant but he was later dismissed and the action proceeded to trial against the city alone.

The complaint is in two counts and the nonsuit was granted as to both. The first count is predicated on the theory that appellant was a "guest" and therefore required to prove wilful misconduct by Ruhl in order to recover. Veh.Code, § 403. Respondent contends that the evidence is insufficient to support a finding of wilful misconduct. This requires a discussion of the evidence in the light most favorable to appellant.

After leaving the restaurant, Ruhl drove to the police station, which was 3 or 4 blocks away, where he stopped for a few minutes. From there he proceeded down an alley to Primrose Road, on which he turned north toward appellant's home, which was on Floribunda. He came to "either a complete stop or a hesitation stop" at Burlingame Avenue, which was the first intersection reached. The accident happened 3 blocks farther north, at the intersection of Primrose Road with Bellevue and Douglas Avenues. There were two dips in the pavement at that point. The car was going 35 to 40 miles per hour as it reached the dips. This was much faster than the car had been driven before passing Burlingame Avenue. The car was caused to bounce when it hit the dips. Appellant's head was caused to touch the car's roof when it hit the second dip. Although Ruhl thought his right front tire had blown out, respondent concedes that "we may assume that it was the dips that made him lose control." The car glanced off the curbing on the right hand side and then hit a tree on the opposite or left hand side of Primrose Road. The distance between where the car struck the curbing and the tree is 135 or 140 feet. The front end of the car was badly damaged. Ruhl had driven through this intersection in the same direction hundreds of times and knew that the two dips were there. The dips had not caused him to lose control on any prior occasion. The streets were dry and the car's headlights were lighted.

[1] Wilful misconduct means something different from and more than negligence, however gross. Porter v. Hofman, 12 Cal.2d 445, 448, 85 P.2d 447, "'Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result.'" Meek v. Fowler, 3 Cal.2d 420, 426, 45 P.2d 194, 197. In the instant case

there was no knowledge (express or implied) of the danger involved in driving over the dips at 35 or 40 miles an hour. Ruhl had gone through the intersection hundreds of times before the accident without ever losing control of his car. He had no knowledge of the probability of injury to appellant. There was no conscious failure to act in order to avert injury. There was no wanton or reckless disregard of possible consequences. We conclude that the evidence was insufficient to support a finding of wilful misconduct and that the nonsuit as to the first count was therefore proper.

Respondent also urges that the liability imposed by section 400 of the Vehicle Code, i. e., *"negligent* operation" of a motor vehicle, does not extend to or include liability for wilful misconduct, citing Weber v. Pinyan, 9 Cal.2d 226, 70 P.2d 183, 112 A.L.R. 407. (Emphasis added.) There the Supreme Court held that the imputation of liability to an owner for " 'negligence in the operation' " of his motor vehicle, Vehicle Code, § 402, did not include liability for wilful misconduct. We need not decide this question because of the insufficiency of the evidence as to wilful misconduct.

The second count is based upon negligence. Appellant's position as to this count is that (1) he was a "passenger," not a "guest," and therefore is not required to prove wilful misconduct by the driver; (2) that the "guest statute", Vehicle Code, § 403, is not applicable to an action brought under section 400 of that code. Respondent contends to the contrary and also raises the point that the act of taking appellant home was not within the scope of Ruhl's employment. It is logical to discuss this point first, since it applies to any action brought under section 400.

[2] At common law, the state and its political subdivisions, acting in a governmental capacity, had no liability for the operation of a motor vehicle. See Willoughby v. Zylstra, 5 Cal.App.2d 297, 303, 42 P.2d 685. In 1929, section 1714½ of the Civil Code (now section 400 of the Vehicle Code) was enacted and created such a liability. Its provisions are to be construed strictly and a governmental agency is only responsible thereunder for injury or damage "as the result of the negligent operation of any said motor vehicle by an officer, agent, or employee * * * when acting within the scope of his office, agency or employment; * * *." Respondent correctly states that its liability can only arise if the act of taking appellant home was within the scope of Ruhl's employment. Brindamour v. Murray, 7 Cal.2d 73, 59 P.2d 1009.

[3] The "Rules and Regulations of the Police Department of the City of Burlingame," which had been approved by respondent's city council, provided in part as follows: "It shall be permissible for an officer in a patrol car to pick up some person other than an officer when circumstances indicate that it is proper courtesy and proper police procedure to do so." Respondent's Chief of Police testified that proper courtesy and police procedure make it permissible for a police officer to pick up women or minors late at night on the streets of Burlingame. Whether the circumstances here indicated that proper courtesy made it permissible for Ruhl to pick up appellant is a question of fact upon which reasonable minds could differ. It was late at night and dark. Ruhl was on patrol and his car was equipped with radio which kept him in touch with the police station. The route he took in taking appellant home was entirely within the City of Burlingame. It can be argued that it is good police practice to establish friendly relations with citizens, particularly minors, when it can be done without departing from regular police assignments. A similar situation was presented in Carey v. City of Oakland, 44 Cal.App.2d 503, 112 P.2d 714. There the plaintiff had asked the police officer in charge of a city ambulance to be allowed to accompany a friend, who had been injured and was unconscious, to the hospital. On the way plaintiff was injured. In her subsequent action against the city, the police

officer testified that the understanding with the chief of police was that the officer in charge of the ambulance was to use his own discretion in allowing persons to accompany an injured person in the ambulance. The trial court granted a nonsuit on the grounds that at best plaintiff was a guest and that the police officer had exceeded his authority in permitting her to ride in the ambulance. This was held to be error on both grounds, the court saying, 44 Cal.App.2d at page 510, 112 P.2d at page 718: "With regard to the second issue mentioned by the trial court, the evidence, as it stood at the time the nonsuit was granted, was legally sufficient, in our opinion, to support a finding that it was within the discretionary authority of the officer under the circumstances to allow Mrs. Carey to accompany her injured friend to the hospital." Likewise, we cannot hold in the instant case, as a matter of law, that Ruhl acted outside the scope of his employment or authority. A nonsuit based on this issue would therefore be improper.

[4] Appellant next contends that if Ruhl was transporting him in the patrol car as a part of the latter's duties for which he was employed, then it necessarily follows that appellant's status was that of a passenger and not that of a guest; but that if Ruhl was acting outside the scope of his employment section 400 could not apply and there is no need to consider appellant's status.

The case principally relied upon by appellant is Smith v. Fall River Joint Union High School Dist., 118 Cal.App. 673, 5 P.2d 930. There the plaintiff was a high school student who was injured while riding in a school bus which collided with another motor vehicle. The school district was held liable under the doctrine of respondeat superior. The trial court held that plaintiff was a passenger as a matter of law and refused to instruct the jury on the guest statute. The school district contended that she was a guest because there was no showing that she gave any compensation for the ride or that she or any of her relatives were taxpayers who contributed to the support of the district. The court said, 118 Cal.App. at pages 678–679, 5 P.2d at page 932: "It is admitted here that the driver was compensated for the transportation of respondent, but it is insisted by appellant that such compensation must be paid directly by the student, instead of by the high school district. Otherwise the student is a guest. We are not prepared to place such a narrow construction upon the statute. *If the driver is paid to transport a certain class of passengers, then each member of that class is thereby removed from the category of guest,* although actual payment of the fare is not made by the individual passenger. This is particularly true where, as here, the law does not provide for or permit of the payment directly by the student. * * * We hold, therefore, that according to the undisputed evidence adduced in this case, respondent was not a guest under the provisions of the California Vehicle Act and the trial court was correct in refusing to instruct the jury in the manner requested by appellant." (Emphasis added.)

The applicability of the Smith case is apparent. In the instant case, Ruhl was compensated by the respondent to perform the duties of a police officer, among which was the transportation in patrol cars of persons who, under the regulations and in the officer's discretion, were entitled thereto. If the trier of fact holds that the act of taking appellant home was a proper exercise of Ruhl's discretion as a police officer, then appellant thereby qualified as a member of a class which Ruhl was paid to transport as a part of his police duties. Just as in the Smith case, there is no provision in the law for the payment for such transportation by the rider. It is true that the class of persons in the Smith case was limited to high school students in the school district, whereas the class in the instant case would be those residents of the respondent city who, in a police officer's discretion, were eligible to be picked up in a patrol car. This makes no difference in principle. We conclude that under the undisputed circumstances of this case, the appellant was a passenger and not a guest as a matter of law, provided the trier of fact finds that

Ruhl was acting in the scope of his employment when transporting appellant to his home. If the finding is to the contrary, as already pointed out, appellant cannot recover against the city.

It is doubtful if a situation could arise in which the "guest statute" would be applicable to an action under section 400. When a public employee is driving a public vehicle and transporting a person in it in the performance of his official duties it is difficult to conceive of him as a "host" or a rider as a "guest" within the purpose and intent of the "guest statute." Thus it is very doubtful if the guest law is ever applicable to an action under section 400. In any event, we need not go beyond the instant situation.

[5] The evidence was sufficient to support a finding that Ruhl was negligent and that his negligence was a proximate cause of appellant's injuries.

The judgment of nonsuit is affirmed as to the first count and reversed as to the second count. Appellant is to recover his costs on appeal.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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145 Cal.App.2d 657

HART'S DRIVE-IN CORP., a corporation, Plaintiff and Appellant,

v.

STATE BOARD OF EQUALIZATION, Defendant and Respondent.

Civ. 8843.

District Court of Appeal, Third District, California.

Nov. 7, 1956.

Rehearing Denied Nov. 30, 1956.

Hearing Denied Jan. 4, 1957.

Action to recover sales tax paid by "drive-in" establishment on sales of food. The Superior Court, Sacramento County, Malcolm C. Glenn, J., denied requested relief and taxpayer appealed. The District Court of Appeal, McMurray, J. pro tem., held that evidence supported findings that taxpayer was serving meals and furnishing food from trays, within statute excepting food thus furnished from sales tax exemption.

Judgment affirmed.

Licenses 🔑34

In action to recover sales taxes paid by "drive-in" establishment on sales of food, evidence supported findings that taxpayer was serving meals and furnishing food from trays, within statute excepting food thus furnished from sales tax exemption. West's Ann.Rev. & Tax.Code, § 6359.

* * *

Gilford G. Rowland, Sacramento, Adrian A. Kragen, Berkeley, for appellant.

Edmund G. Brown, Atty. Gen., by Irving H. Perluss, Asst. Atty. Gen., for respondent.

McMURRAY, Justice pro tem.

This is an appeal from a judgment denying recovery of sales taxes paid. Appellant operates an establishment in Sacramento where hamburgers, cheeseburgers, french fried potatoes, milkshakes and soft drinks are sold to the public. The customers do not enter the building where the food is prepared, but place and receive their orders through one of four windows or ports. There is no car or other service except that an employee keeps the grounds clear of litter. Surrounding the building in which the food is prepared and dispensed there is a parking area sufficient to accommodate approximately sixty automobiles. There are two rest rooms, two drinking fountains, two cigarette vending machines and receptacles in which to place rubbish. There are loud speakers through which music is transmitted, which is played during the day and until 10 o'clock in the evening. The customers may consume what they purchase either on or off the premises, but there are no tables, chairs or counters. Many sit in their automobiles while eating and drinking. The sandwiches are wrapped in wax paper, the french fried potatoes are put in bags, and paper containers or cartons are used for holding the beverages. According to the customer's preference, an order is placed in a paper bag or on a cardboard tray which is not returned after use.

Respondent imposed, and appellant paid, a sales tax from the receipts of its business. This action was brought to recover the taxes so paid on the ground that its sales are of "food products" which are exempt from taxation. Rev. and Tax.Code, Sec. 6359. Respondent contends that appellant's operations constitute the serving of "meals" and the preparing and serving of food for consumption "from trays" and therefore are not "food products" within the meaning of Section 6359 of the Revenue and Taxation Code, which in material part provides:

> "'Food products' also do not include meals served on or off the premises of the retailer or drinks or foods furnished, prepared, or served for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer."

The applicability of this statutory exception is the only issue raised on the present appeal. Appellant maintains that the food it sells does not constitute a "meal", citing Treasure Island Catering Co. v. State Board of Equalization, 19 Cal.2d 181, 185–187, 120 P.2d 1, and that it is not "served" within the meaning of the code section. It is appellant's position that its operations are no more the serving of meals than are the sales of box lunches or other food by restaurants and delicatessens upon which respondent admits no tax is imposed if the purchased food is not consumed on the premises but taken out. Appellant emphasizes that no services are rendered by waitresses or employees other than handing the customer his order on a cardboard tray or in a paper bag. Appellant also contends that cardboard trays on which, if the customer prefers, the order is placed instead of in a paper bag are not such "trays" as are referred to in the statute. He claims the cardboard trays, which are not reused, lack the "permanency" of the other enumerated items of "tableware", such as "glasses" and "dishes". Treasure Island Catering Co. v. State Board of Equalization, supra, 19 Cal.2d at page 188, 120 P.2d 1. Respondent maintains, and the trial court found, that appellant is serving meals and also furnishing food from trays. Respondent points out that food sold by appellant is of greater variety and more substantial than the hot dogs or hamburgers considered in the Treasure Island case. Respondent also maintains that the parking area and accommodations furnished by appellant are an inducement to the public to buy and eat "meals" which are "served" by appellant. As was said in Sandelin v. Collins, 1 Cal.2d 147, 156, 33 P.2d 1009, 1013, 93 A.L.R. 956, cited in Treasure Island Catering Co. v. State Board of Equalization, supra:

> "* * * Under our modern system of living a sandwich served in good faith as a meal would constitute a meal as contemplated by law."

And in that decision the court also said that the question whether within the import of the statute a sandwich constituted a question of fact, that a general rule of law could not be laid down in all cases with reference to a question so intricately connected with and controlled by individual tastes and conditions of diet and circumstances. The trial court here further found that the trays upon which appellant furnished food to its customers were trays within the contemplation of the statute. Appellant has advanced a substantial amount of semantic argument as to the meaning of "trays", as to the meaning of a "meal" was in each instance primarily "meals", and as to what constitutes "service" by the retailer of food. We think, however, that the matters from which the appeal is here taken were matters within the fact-finding power of the trial court and that it is unnecessary to attempt to define as a matter of law what is a tray or what is a meal.

The judgment appealed from is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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146 Cal.App.2d 129

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Francis M. MOLARIUS and Amaro Peter Pitta, Defendants and Appellants.
Cr. 2679.

District Court of Appeal, Third District, California.
Nov. 19, 1956.

Rehearing Denied Dec. 3, 1956.
Hearing Denied Dec. 12, 1956.

Prosecution on charges of having unlawfully transported codeine and of having illegally used or been addicted to the use of narcotics. The Superior Court, Lassen County, Ben V. Curler, J., entered judgments of conviction, and both defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that where there was no evidence that arresting officers had reasonable grounds to believe that defendants were in the illegal possession of narcotics at time of search of their automobile, and it appeared that the charge of vagrancy and holding of defendants under traffic violation charge without releasing them on citation and agreement to appear were subterfuges to detain them in jail while the automobile was searched, receiving in evidence the narcotics found in the automobile when searched was improper.

Reversed.

1. Arrest 🔑71

Where search of automobile in which defendants were traveling at time of their arrest bore no relation to traffic violation nor to vagrancy charges upon which defendants were booked, search was not justified as incidental to the arrest therefor. West's Ann.Vehicle Code, § 541.

2. Criminal Law 🔑395

Where search of automobile in which defendants were traveling bore no relation to traffic violation nor to vagrancy charges upon which defendants were booked, question as to whether narcotics discovered in automobile as result of the search were improperly admitted in subsequent prosecution on charges of unlawfully transporting and using narcotics as having been obtained by illegal search depended on whether there was any reasonable cause for the search. West's Ann.Health & Safety Code, §§ 11500, 11721; West's Ann.Vehicle Code, § 541.

3. Criminal Law 🔑395

Where there was no evidence that arresting officers had reasonable grounds to believe that defendants were in illegal possession of narcotics at time of search of their automobile, and it appeared that the charge of vagrancy and holding of defendant under traffic violation charge without releasing them on citation and agreement to appear were subterfuges to detain them in jail while automobile was searched, narcotics found in the automobile as result of the search should not have been admitted over defendants' objection in subsequent prosecution on charges of unlawfully transporting and using narcotics. West's Ann. Health & Safety Code, §§ 11500, 11721; West's Ann.Vehicle Code, § 541.

* * *

Harold L. Abbott, Susanville, for appellant Molarius.

Hardin Barry, Susanville, and Raymond A. Ferrario, Oakland, Harpham & Holt, Albany, of counsel, for appellant Pitta.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellants were jointly tried and convicted by a jury of having unlawfully transported codeine in violation of Section 11500 of the Health and Safety Code and of having illegally used or been addicted to the use of narcotics in violation of Section 11721 of the same code. They appeal from the judgments entered upon the verdicts upon the ground that the evidence upon which they were convicted was obtained by an illegal search of the automobile in which they were riding and which was owned and being operated by appellant Molarius at the time of their arrest. Appellant Pitta also appeals from the order denying his motion for a new trial.

The search of which appellants complain was made after they were arrested for having made a "U" turn in violation of Section 541 of the Vehicle Code. Although one of the arresting officers testified that the arrest was also made because appellants had burglarious tools in their possession, he admitted that appellants were not advised that this was a cause of their arrest but were informed that they were being taken to jail because of the traffic violation. Moreover, there is no evidence that the arresting officers believed, or had any reason to believe, that the tools, which were lying loose on the back floor of the car, were possessed by appellants "with intent feloniously to break or enter into any building" in violation of Section 466 of the Penal Code, and there is nothing in the record to show that appellants were charged with illegal possession of burglarious tools.

[1, 2] The search, which, as stated above, was of an automobile in which appellants were traveling at the time of their arrest, was made without a warrant. Obviously, the search bore no relation to the traffic violation nor to the vagrancy charges upon which appellants were booked and, therefore, was not justified as incidental to the arrest therefor. People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57. Consequently, the determinative question on this appeal is whether there was any reasonable cause for the search. People v. Brown, 45 Cal.2d 640, 643–645, 290 P.2d 528; People v. Blodgett, supra. We have concluded that there was not.

[3] The record shows that at about 5:30 o'clock on the morning of October 16, 1955 the appellants engaged a room at the De Forest Motel in Susanville, the appellant Pitta registering therefor under an assumed name and falsely identifying Molarius as his brother. For a number of hours thereafter Mr. De Forest heard tapping sounds in the room occupied by appellants. At about 2 o'clock the following morning the appellants left the motel and were absent therefrom for approximately two hours. Mr. De Forest reported this to the police because, as he said, there had been recently a number of burglaries in Susanville. The chief of police ascertained that the automobile in which appellants were traveling was registered in the name of Rudy Alvarado who had failed to appear in the Municipal Court in Oakland upon two traffic citations. After receipt of this information a police officer, posing as an electrician, went to the De Forest Motel and observed the appellants who voluntarily admitted him and Mr. De Forest to their room. However, it does not appear that he gained any information indicating that appellants were engaged in any criminal activities or that either might be Rudy Alvarado. Nevertheless, the chief of police instructed his officers to keep appellants under surveillance and to "arrest and hold Rudy Alvarado, if it was him in the car, or if there were any narcotics in the car." He testified that he did so because he had received a report from the State Bureau of Criminal Identification and Investigation that Rudy Alvarado and his car were wanted for violation of narcotic laws. However, the teletype reports to which the chief referred and which were introduced in evidence show that, although Rudy Alvarado had been convicted of the unlawful use or of being addicted to the unlawful use of narcotics, there were not then any "holds" on him or the vehicle. Such past offense of Rudy Alvarado did not war-

rant the search made in the instant case. People v. Sanders, 46 Cal.2d 247, 294 P.2d 10. Moreover, the evidence establishes that a month prior to the time in question Rudy Alvarado had sold the automobile involved to appellant Molarius, who testified that at the time of his arrest he informed the officers that the certificate of ownership and insurance policy covering the automobile were in the glove compartment. An examination of such documents would have prima facie established a satisfactory explanation of appellant Molarius' possession of the automobile formerly owned by Rudy Alvarado. Such explanation would be wholly consistent with his innocence and would afford no basis for suspecting the presence of narcotics in the vehicle. People v. Gale, 46 Cal.2d 253, 294 P.2d 13. The arresting officers did not testify that they entertained such suspicion or that any reason had been assigned for their orders to "watch the car". There is no evidence that the arresting officers had reasonable grounds to believe the appellants were in the illegal possession of narcotics. Therefore, the search of the vehicle cannot be justified upon such a belief. Neither does the evidence uphold appellants' arrest as vagrants. The arrest was made in downtown Susanvillle at about 10:30 p. m. The appellants had just left a restaurant where they had eaten. There was nothing suspicious about appellants' actions at that time. People v. Simon, 45 Cal.2d 645, 650–651, 290 P.2d 531. It is clear that the charge of vagrancy and the holding of appellants under the traffic violation charge without releasing them on citation and agreement to appear, were subterfuges to detain them in jail while the automobile was searched. The ruling of the court receiving in evidence the narcotics found in the car when searched is without substantial support, and the court should not, over objection, have admitted the narcotics in evidence. Since the judgments must be reversed for such error, it is unnecessary to consider appellant Pitta's contention that there was no evidence to support his conviction of having illegally transported the contraband which was found in the vehicle in which he was a passenger.

The judgments are reversed.

PEEK and SCHOTTKY, JJ., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

Eleanor Louise CRAFT, Plaintiff and Respondent,

v.

Josh Coleman CRAFT, Defendant and Appellant.*

Civ. 5282.

District Court of Appeal, Fourth District, California.

Nov. 19, 1956.

Rehearing Denied Dec. 10, 1956.

Hearing Granted Jan. 16, 1957.

Proceeding upon request of former wife to modify interlocutory and final divorce judgments, which had provided for one dollar per month alimony, to increase alimony for her support and maintenance. The Superior Court of San Bernardino County, Carl B. Hilliard, J., entered certain orders and husband appealed. The District Court of Appeal, Mussell, J., held that though, in absence of request for alimony in divorce complaint, court erred in ordering husband to pay one dollar per month alimony to wife in entering default interlocutory divorce, interlocutory judgment was not void on its face, and where more than six months elapsed after entry of decree before husband made motion to modify it by striking alimony provision, court had lost jurisdiction to act under Code of Civil Procedure, and that under circumstances increase in alimony to $25 per week was not abuse of discretion.

Orders affirmed.

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* Opinion vacated 316 P.2d 345.

1. Divorce 🔑243

Where wife's divorce complaint sought award of community property but did not request alimony, trial court erred in awarding wife alimony of $1 per month in entering interlocutory divorce decree upon agreed default.

2. Divorce 🔑245(3)

Though, in absence of request for alimony in divorce complaint, court erred in ordering husband to pay $1 per month alimony to wife in entering default interlocutory decree, interlocutory judgment was not void on its face, and where more than six months elapsed after entry of decree before husband made motion to modify it by striking alimony provision, court had lost jurisdiction to act under Code of Civil Procedure. West's Ann.Code Civ.Proc., § 473.

3. Divorce 🔑236

That wife had stipulated to waive payment of alimony, upon husband's stipulation that wife should receive community property and that he should default in divorce action, did not preclude court from entering provision in interlocutory divorce decree by which husband was required to pay $1 per month alimony, in view of discretion of court in reference to entry of alimony orders. West's Ann.Civ.Code, § 139.

4. Divorce 🔑245(1)

The court possesses power to modify alimony order because of changed circumstances. West's Ann.Civ.Code, § 139.

5. Divorce 🔑235

The propriety of alimony order rests largely in discretion of trial court. West's Ann.Civ.Code, § 139.

6. Divorce 🔑245(1)

Rule that propriety of alimony order rests largely in discretion of trial court is subject to exception where provisions for payment of alimony are integral and inseparable part of division of property, and are therefore inseparable part for consideration of property settlement; in such cases, alimony provision may not be modified. West's Ann.Civ.Code, § 139.

7. Divorce 🔑236

Even if stipulation by which wife would receive community property and no alimony and husband would default in divorce action were construed as constituting property settlement agreement, court had jurisdiction to determine whether it was equitable and should be enforced, and to award alimony to wife upon entry of interlocutory divorce decree in her favor. West's Ann.Civ.Code, § 139.

8. Divorce 🔑235, 240(2)

The amount of support that husband must pay wife is within discretion of trial court in divorce case, and court in making award must consider circumstances of parties, needs of wife, and ability of husband to pay. West's Ann.Civ.Code, § 139.

9. Divorce 🔑245(3)

In proceeding upon request of former wife to modify interlocutory and final divorce judgments, which had contained provision for $1 per month alimony, to increase alimony for her support and maintenance, findings supported award of $25 per week which, under circumstances, was not abuse of discretion.

10. Divorce 🔑182

The Superior Court has power to compel husband to pay wife's attorney's fees and costs on appeal, and to enforce compliance with such an order.

11. Divorce 🔑182

Application to District Court of Appeal for attorney's fees and costs, on appeal by husband from order increasing alimony, would be denied, since such application should properly have been made to trial court.

◆

C. E. Crowley, Ontario, for appellant.

Robert G. Beloud, Ontario, for respondent.

MUSSELL, Justice.

This is an action for divorce. The complaint states a cause of action based on cruelty and contains allegations that the parties own as community property a residence in San Bernardino county, household furniture and a 1950 Nash automobile; that plaintiff has no money or means with which to pay attorney's fees or costs of suit; that the parties lived together approximately seven and one-half years and that there are no children the issue of the marriage. The prayer is for dissolution of the marriage and award of the community property to plaintiff, attorney's fees and costs, and such "other and further relief as to the court may seem meet and proper in the premises." There was no request for alimony.

Defendant was personally served with summons and complaint and entered into a written stipulation with plaintiff wherein he waived time to appear in the action, agreed that the matter might be heard on the default calendar, and waived notice of trial and findings of fact and conclusions of law. It was further stipulated that the community property be awarded to plaintiff, that an order be made awarding plaintiff attorney's fees and costs of suit, and it was further stipulated by plaintiff that she waived payment of alimony by the defendant. This stipulation was signed and acknowledged by plaintiff and defendant before a notary public and filed in the action.

On February 15, 1954, the cause was heard by the court as a default matter and an interlocutory decree of divorce was granted to plaintiff. This decree awarded the community property to plaintiff, allowed her attorney's fees and costs and further provided as follows:

> "It is further ordered, adjudged and decreed that plaintiff is entitled to payment for alimony by defendant to plaintiff, which until the further order of the Court, shall be $1.00 per month beginning March 1, 1954."

On February 16, 1955, the defendant filed an affidavit for final judgment of divorce in which he stated, inter alia, that since the granting of the interlocutory decree "all the requirements therein have been fully complied with on the part of the moving party herein, and he is not in default in any thereof; and no motion to set aside or annul said interlocutory judgment or suit brought therefor is pending and undetermined, and no appeal has been taken or is pending therefrom, and said judgment has become final." On February 16, 1955, the court granted the final decree of divorce in which it was ordered, among other things, that:

> "It is further ordered and decreed that if said interlocutory judgment, or any modification thereof, makes any provision for alimony or the custody or support of children or the disposition of community property, said provisions, or modification thereof if made, be and the same are hereby made binding on the parties affected thereby the same as if herein set forth in full."

On September 30, 1955, plaintiff obtained an order of court requiring the defendant to appear and show cause why the interlocutory and final judgments should not be modified so as to require the defendant to pay plaintiff a reasonable sum as alimony for her support and maintenance. This order was supported by plaintiff's affidavit showing changed circumstances, plaintiff's inability to support herself, and the financial ability of the defendant to contribute to her support. By direction of the court, the matter of taking proof and reporting conclusions of fact relative to the order to show cause was heard before a court commissioner, who, on October 14, 1955, after a hearing, recommended that the interlocutory and final judgments be modified to provide that defendant pay plaintiff $25 per week for her support, together with attorney's fees and costs, and the commissioner found that the defendant had the ability to pay the sums recommended. On October 14, 1955, the court entered an order in accordance with the recommendation of the commissioner. On October 28, 1955, defendant filed his motion for an order striking from the interlocutory decree the portion thereof which ordered defendant to pay $1 per month alimony, and further that the recommendation of the commissioner be set aside. This motion was made on the grounds that the court was without jurisdiction to make the order for alimony after plaintiff had stipulated to waive the payment thereof. On the same day plaintiff filed a motion for additional attorney's fees. The trial court denied defendant's motion to modify the interlocutory decree by striking therefrom the provision as to alimony, granted plaintiff's motion for attorney's fees and overruled defendant's objections to the findings and recommendations of the court commissioner. Defendant appeals from these orders and from the order of the court entered on October 14, 1955, providing for the payment of $25 per week for the plaintiff's support and maintenance.

[1] Appellant contends that the trial court exceeded its jurisdiction in ordering the payment of alimony by defendant and that the order therefor incorporated in the interlocutory decree is void. There is no prayer for alimony in the complaint herein and no answer was filed. It was error, therefore, to order the defendant to pay a designated sum per month. Eddy v. Eddy, 64 Cal.App.2d 672, 149 P.2d 187; Darsie v. Darsie, 49 Cal.App.2d 491, 122 P.2d 64. However, in Parker v. Parker, 203 Cal. 787, 792, 266 P. 283, 285, the court, in discussing the effect of granting relief in excess of that demanded in the complaint, stated:

> "None of the cases relied upon go to the length of holding that the granting of relief in excess of that demanded by the complaint renders the judgment void on its face. They do, however, uniformly hold that the granting of such excessive relief is erroneous, from which relief may be granted under section 473 of the Code of Civil Procedure or which may be corrected by appeal, either by a reversal or by a modification of the judgment, neither of which courses was pursued by the defendant in this case. It was held by this court in Cohen v. Cohen, 150 Cal. 99, 88 P. 267, 11 Ann.Cas. 520, which case has not been overruled or criticized so far as we are advised, that a judgment by default for alimony in a divorce action under a prayer for general relief, but where no alimony was specifically demanded, was not void and was not subject to a collateral attack such as is here attempted to be made See Harlan v. Harlan, 154 Cal. 341, 98 P. 32; Stone v. Stone, 58 Cal.App. 415, 208 P. 993." See also Burtnett v. King, 33 Cal.2d 805, 810, 205 P.2d 657, 12 A.L.R.2d 333; 28 Cal.Jur.2d, Judgments, Sec. 37.

[2] In the instant case no relief was sought under the provisions of section 473 of the Code of Civil Procedure within the time prescribed therein and no appeal was taken from the interlocutory or final judgments of divorce. The interlocutory judgment was not void on its face and more than six months elapsed after the entry of the interlocutory decree before the defendant made his motion to modify it. The court lost jurisdiction to act under section 473 of the Code of Civil Procedure. Castagnoli v. Castagnoli, 124 Cal.App.2d 39, 41, 268 P.2d 37; Bowman v. Bowman, 29 Cal.2d 808, 813, 178 P.2d 751, 170 A.L.R. 246.

[3–9] Appellant argues that the provision in the interlocutory decree for the payment of alimony was void because plaintiff had stipulated to waive such payment. This contention is without merit. In Baucus v. Riveroll, 95 Cal.App. 224, 225, 272 P. 760, it is held that an order of a court disregarding a stipulation entered into between the parties to an action is discretionary, and that such order may be disturbed only when it clearly appears that the order was the result of an abuse of discretion. And in Smith v. Superior Court, 89 Cal.App. 177, 190, 264 P. 573, it is held that agreements between spouses relative to alimony or fixing by and between themselves the amount which the court may allow are subject to the power of the court under section 139 of the Civil Code to modify or wholly reject, as provided in said section. See also 16 Cal.Jur.2d, Divorce and Separation, Sec. 216, p. 509. In Triest v. Triest, 67 Cal.App.2d 320, 322, 154 P.2d 2, it is stated that the law is well settled that the court possesses power to modify an alimony order because of changed circumstances, Civ.Code, § 139, and that the propriety of such an order rests largely in the discretion of the trial court. This general rule is subject to an exception where the provisions for the payment of alimony are an integral and inseparable part of the division of property and are therefore an inseparable part for the consideration of the property settlement. In such cases the alimony provision may not be modified. Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988. In the instant case there was no such property settlement agreement. Even if the stipulation involved be construed as constituting a property settlement agreement, the trial court had jurisdiction to determine whether it was equitable and should be enforced, and to award alimony. Smith v. Smith, 40 Cal.2d 461, 464, 254 P.2d 1. The amount of support that the husband must pay is within the discretion of the trial court and the court in making the award must consider the circumstances of the parties, the needs of the wife and the ability of the husband to pay. Bowman v. Bowman, supra, 29 Cal.2d 808, 811, 178 P.2d 751. In the instant case a hearing was had and findings made which support the orders of the court and no abuse of discretion appears.

[10] Appellant filed a motion in this court for a stay of proceedings and for attorney's fees and costs on appeal. On May 8, 1956, this court denied the motion to stay the proceedings and continued the hearing on the motion for attorney's fees, to be decided with the merits. The Superior Court has power to compel the husband to pay plaintiff's attorney's fees and costs on appeal and enforce compliance with such an order. Larkin v. Larkin, 71 Cal. 330, 12 P. 227. And in Painter v. Estate of Painter, 78 Cal. 625, 628, 21 P. 433, the court held that the Superior Court was the proper court to fix and allow attorney's fees on appeal.

[11] The application for attorney's fees and costs on appeal should have been made to the trial court and is therefore denied. The orders appealed from are affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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146 Cal.App.2d 64

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Earl HUNTER, Defendant and Appellant.

Cr. 5712.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1956.

Defendant was convicted of violating the Health and Safety Code through a sale of narcotics. The Superior Court, Los Angeles County, John G. Barnes, J., entered judgment, and defendant appealed. The District Court of Appeal, Ashburn, J., held that giving of instruction which pertained to character of witness and which contained phrase "or by evidence affecting his character for truth, honesty or integrity," was not error, in view of evidence of defendant's prior conviction of two felonies and even though such evidence was separately mentioned in the instruction.

Attempted appeal dismissed, and judgment affirmed.

1. Criminal Law 🔑768(1)

In prosecution for violation of Health and Safety Code through sale of narcotics, evidence was not sufficient to require giving of a cautionary instruction such as is required in rape and sex perversion cases. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law 🔑776(2)

In prosecution for sale of narcotics, giving of instruction which pertained to character of witness and which contained phrase "or by evidence affecting his character for truth, honesty or integrity," was not error, in view of evidence of defendant's prior conviction of two felonies and even though such evidence was separately mentioned in the instruction.

3. Criminal Law 🔑814(18), 1172(2)

In criminal proceeding, giving of instruction that witness could be impeached also by evidence that at other times he had made statements inconsistent with his present testimony as to any matter material to the cause on trial was not appropriate, in view of fact that no evidence of inconsistent statements had been received, but it was not misleading or prejudicial and could not have effected a miscarriage of justice in view of fact that defendant was manifestly guilty.

4. Criminal Law 🔑822(1)

To determine correctness of charge, its different parts must be considered in their relations to and with each other and in light of the instructions as a whole, and, therefore, error cannot be predicated upon an isolated phrase, sentence, or excerpt taken from the instructions given, and question whether jury has been correctly instructed is not to be determined from a consideration of part of an instruction or one particular instruction but from the entire charge of the court.

5. Criminal Law 🔑768(1)

In prosecution for sale of narcotics, giving of instruction that, in arriving at verdict, jury should not discuss or consider subject of penalty or punishment since that was matter which lay with court or other governmental agencies and was not in any way to affect their decision as to defendant's innocence or guilt was not error and did not carry the suggestion that defendant should be found guilty, especially in view of other instructions given.

6. Criminal Law 🔑720(7)

In prosecution for sale of narcotics, deputy district attorney's reference, in course of his argument, to defendant as one who "has been a County peddler here" did not constitute misconduct in view of fact that that was essentially the charge upon which defendant was being tried and that the evidence was ample to prove it.

Cary G. Branch, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant appeals from "the sentence and judgment" herein. He was convicted of violation of § 11500, Health & Safety Code, through a sale of narcotics. The jury also found to be true a charge of two prior felony convictions which defendant had denied.

Appellant does not claim insufficiency of evidence but complains of the instructions and alleged misconduct of the deputy district attorney. The facts are simple. On February 28, 1956, at about 9:45 p. m., officer David M. Means, Jr. of the Narcotics Squad of the Los Angeles City Police, conversed with an unknown man outside the Twentieth Century Cafe. They entered together. The stranger pointed at defendant who was standing near the back of the room. Means, in plain clothes, approached defendant who said, "give me the bread," which in narcotics parlance means, "give me the money." Means handed him two $5 bills and two $1 bills, whereupon defendant turned and started toward the rear of the cafe while counting the money. He shortly returned and handed Means a small white paper "bindle" or package of heroin. Means, accepting the same, said, "You aren't going to burn me?" which, when translated, means "You aren't going to give me something other than narcotics." Defendant said, "I don't deal that way." Means left, took the heroin with him and preserved it as evidence. In the course of some 15 to 20 minutes he met officer Gutierrez, with whom he was working. He described defendant to Gutierrez in such manner that the latter was able to identify him when he saw defendant a little later that same evening. Means also told Gutierrez what had happened in the cafe between him and defendant and that he had paid him $12; this hearsay was brought out by defense counsel on cross-examination. Gutierrez then went to the cafe, saw defendant, asked him to identify himself and this the defendant did. About a week later Officer Means saw defendant in front of the Golden State Hotel and tried to buy a narcotic from him—asked if he had any "stuff"—and was told, "No, but I will have some in about ten minutes." Means did not wait but made a purchase from another suspect. Defendant on the witness stand denied all the salient portions of Means' and Gutierrez' testimony. However, he admitted the two previous felony convictions, one a robbery and burglary, the other a manslaughter. The jurors believed the officers rather than the defendant.

[1] Appellant argues first that the court should have given upon its own motion a cautionary instruction such as is required in rape and sex perversion cases. It has been held that such an instruction is not requisite in a murder case. People v. McCracken, 39 Cal.2d 336, 349, 246 P.2d 913, or a prosecution for contributing to delinquency of a minor, People v. Deibert, 117 Cal.App.2d 410, 425, 256 P.2d 355; People v. Reznick, 75 Cal.App.2d 832, 839, 171 P.2d 952, or a forgery case, People v. Robinson, 102 Cal.App.2d 800, 807, 228 P.2d 583. The requirement of such an instruction has not been extended beyond the sex cases and there is nothing about the instant cause to suggest the necessity or propriety of such an instruction.

[2] Appellant argues that there was error in giving an instruction designated as Caljic instruction 52 Alternate. The pertinent paragraph thereof is set forth in the margin.[1] The phrase, "or by evidence affecting his character for truth, honesty or integrity," of which appellant complains, certainly was not harmful although no testimony of bad reputation had been introduced. The conviction of two felonies was enough to fill this measure and the fact that such evidence was separately mentioned in the instruction does not spell prejudice.

[3, 4] Appellant also complains of this language: "A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial." This language was not necessary, indeed not appropriate, because no such evidence of inconsistent statements had been received, but it cannot be said that it was misleading or prejudicial. "Error cannot be predicated upon an isolated phrase, sentence or excerpt taken from the instructions given by the trial judge since, in order to determine the correctness of the charge to the jury, its different parts must be considered in their relations to and with each other and in the light of the instructions as a whole and whether a jury has been correctly instructed is not to be determined from a consid-

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[1] "The character of the witnesses, as shown by the evidence, should be taken into consideration for the purpose of determining their credibility, whether or not they have spoken the truth. The jury may scrutinize the manner of witnesses while on the stand, and may consider their relation to the case, if any, and also their degree of intelligence. A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies; his interest in the case, if any, or his bias or prejudice, if any, for or against any of the parties; by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or by contradictory evidence. A witness may be impeached also by evidence that at other times he has made statements inconsistent with his present testimony as to any matter material to the cause on trial; and a witness may be impeached also by proof that he has been convicted of a felony."

eration of a part of an instruction or one particular instruction but from the entire charge of the court. People v. Monteverde, 111 Cal.App.2d 156, 244 P.2d 447." Fricke on California Criminal Procedure, Fourth Edition, p. 318. See also, to the same effect, 24 Cal.Jur. § 113, pp. 859–860. If there were any error in this instruction it could not be said to have effected a miscarriage of justice to this defendant who is manifestly guilty.

[5] Complaint is made of the following instruction: "In arriving at a verdict in this case, you shall not discuss or consider the subject of penalty or punishment, as that is a matter which lies with the court and other governmental agencies, and must not in any way affect your decision as to the innocence or guilt of the defendant." There is no error here. This is the type of case in which the matter of penalty is not appropriate for the jury's consideration because they have no part in fixing the same. People v. Ramos, 3 Cal.2d 269, 272–273, 44 P.2d 301; People v. Bruno, 49 Cal.App. 372, 376, 193 P. 511; 8 Cal.Jur. § 411, p. 380. This instruction does not carry the suggestion that defendant should be found guilty, as counsel argues. Moreover, it is to be read in conjunction with the instructions set forth in the margin.[2]

[6] The charge of misconduct on the part of the deputy district attorney is unfounded. In the course of his argument he referred to defendant as one who "has been a County peddler here." Essentially that was the charge upon which he was being tried. The evidence was ample to prove it, and there was no impropriety in asserting the fact in the argument to the jury.

The attempted appeal from the sentence is dismissed. People v. Nelson, 126 Cal.App.2d 453, 272 P.2d 536; People v. Millum, 42 Cal.2d 524, 525, 267 P.2d 1039.

The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

146 Cal.App.2d 124

**The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Everett Lawrence HUBBARD, alias E. J. Bradley, Defendant and Appellant.
Cr. 2638.**

District Court of Appeal, Third District,
California.
Nov. 19, 1956.

Prosecution for incest. The Superior Court, Mendocino County, Hale McCowen, J., entered judgment and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that there was no error in conduct of the trial.

Judgment affirmed.

1. Criminal Law 🔑1119(2)

In prosecution for incest, record disclosed defendant was not denied an opportunity to present evidence of a material nature.

2. Indictment and Information 🔑176

Failure of proof introduced in prosecution for incest to show the exact dates alleged in the pleadings to be the dates upon which the charged acts took place, was not a variance between pleadings and proof as such proof was not necessary.

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[2] "If in these instructions any rule, direction or idea be stated in varying ways, no emphasis thereon is intended by me, and none must be inferred by you. For that reason, you are not to single out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all the instructions as a whole, and are to regard each in the light of all the others."

"A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the State the burden of proving him guilty beyond a reasonable doubt."

3. Criminal Law ⚷713

In prosecution for incest, argument of district attorney to jury that the phrase "on or about" in pleading charging that the four acts of incest had taken place on or about certain dates, meant within a reasonable period of time one way or another from the stated dates, was not error, where court charged jury that they are not permitted to deliver a verdict of guilty unless they could find that defendant committed specific offenses on or about specific dates.

4. Criminal Law ⚷1169(1, 9)

In prosecution for incest, record disclosed that there were not so many hearsay statements and conclusionary statements by witnesses as to amount to a denial of fair trial to defendant.

◆

David N. Dale, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and G. A. Strader, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

Appellant was convicted after a trial by jury of four counts of incest. He appeals from the judgment entered. He also purports to appeal from an order denying his motion for a new trial. The record discloses that no such motion was made. Therefore, the purported appeal therefrom is hereby dismissed.

Count One of the information accused appellant of incest with his daughter Alice on or about September 28, 1953, and Count Four charged him with a similar act with Alice on or about September 1, 1953. Count Two accused him of a similar act with his daughter Carolyn on or about September 22, 1953, and Count Three accused him of a similar act with Carolyn on or about September 10, 1953. At the time the acts were alleged to have occurred Carolyn was 20, Alice was 16.

On October 16, 1953 appellant entered a plea of not guilty on all four counts. His trial was set for December 7, 1953. He was released on bail. He failed to appear on the trial date, and his bail was forfeited. On March 18, 1955 he was apprehended and committed to jail to await trial. On March 25, 1955 he appeared in court and was informed of his legal rights. He waived counsel. Trial was set for May 2, with the jury to be selected on April 22. When the court convened for the purpose of selecting a jury, appellant was again advised of his legal rights and informed that he might give a list of the names and addresses of any persons he might desire to have subpoenaed as witnesses to the clerk. Thereafter, the case was called for trial as set. Appellant was not represented by counsel and acted in his own behalf. He was convicted as stated, and judgment was pronounced that he be confined for the term prescribed by law on each of the four counts, and that the four sentences were to run consecutively. Counsel was appointed by this court to represent appellant on his appeal and has filed briefs in support of various contentions advanced.

Alice lived with appellant and her stepmother at Willits in Mendocino County. She testified that she had sexual intercourse with her father over a course of several years and until he was charged with incest; that she had sexual intercourse with her father on September 28, 1953, which was the day her father was arrested and which was one of the days counted upon by the People in the accusation; and that she had engaged in a similar act about a month previously, which would be about September 1, 1953, as charged. Carolyn testified that she came to live with her father and stepmother in January of 1953 and that her father commenced having relations with her about four months after she arrived. She also said she had sexual intercourse with him about a week before she made the complaint against him, that is, about September 22, 1953; and about September 10, 1953. Both girls testified that they were made to watch while their father had intercourse with the other, and that these acts occurred during the Easter vacation while their stepmother was away. The stepmother testified that appellant often slept with Alice. Appellant took the stand in his own behalf and did not expressly by his testimony deny that he committed the acts with which he was charged.

Appellant makes four assignments of error: (1) that he was denied an opportunity to present evidence of a material nature; (2) that he was misled in his defense by the allegations in the various counts as to the exact date upon which he was charged with having performed acts of intercourse with his daughters; (3) that he was prejudiced by remarks made to the jury by the district attorney in his argument; and (4) that a perusal of the entire transcript of oral proceedings shows that the trial was productive of many hearsay statements and many conclusionary statements by witnesses, and that on the whole he did not have a fair trial.

[1] One count charged that appellant had performed an act of intercourse with Carolyn on or about September 10, 1953. The appellant testified that on the 9th he and Carolyn left Willits and stayed that night with appellant's mother; that they spent the night of the 10th at the Hotel Dalt in San Francisco; that one Helen Burg accompanied the two on that trip. He said he would have liked to have had Helen Burg brought to the trial and to have presented the registration records of the Hotel Dalt. He argues that such evidence would have impeached the credibility of the prosecution witnesses and substantiated his defense. Carolyn had testified that the act charged on or about September 10th had occurred in Willits. There were other matters which he argues he ought to have been entitled to present, and that he had not been furnished with fair opportunity to do so. It appears that an attorney was appointed to represent him at some time prior to the trial, and that this attorney engaged in the work of preparing a defense, having several consultations with appellant; that appellant became distrustful of him and succeeded in having him withdraw from the case, after which he proceeded alone. He discussed these matters while on the stand in his own defense. He said he came to distrust his attorney because he found that his wife could tell him things that he and his attorney had talked about in their conferences, and he seemed to think that this necessarily involved a breach of ethics on the part of the attorney. He also said he did not trust the sheriff to serve subpoenas and concluded by asserting his mistrust of the trial judge as a reason why he did not speak of his distrust of the sheriff in the matter of subpoena service. A similar situation was discussed in People v. Lamb, 133 Cal. App.2d 179, 185, 283 P.2d 727, 731, in the following language:

> "* * * Litigants who are ignorant of both law and procedure and are, consequently, of little value to the courts in clarifying issues presented by the pleadings, are real impediments to the proper administration of justice. Having lost confidence in themselves they trust no one else. They should be advised that a court cannot pin gold medals on their lapels merely because they obstruct procedure or belatedly plead for time to do, or have done, such menial tasks as having their witnesses subpoenaed. Of course, any person accused of crime has the right to defend himself but that right does not entitle him to abuse the patience of courts or to infringe upon the rights of others."

We have examined the entire record with care, and it is our view that this assignment of error finds no support therein.

[2] Appellant claims to have been misled in his defense by variance between the pleadings and the proof. It is true that the exact dates upon which the charged acts were alleged to have taken place were not proved with complete exactitude. However, such proof was not necessary. The proof made brought the offenses so close

to the exact dates charged as to meet the requirements of correspondence between pleading and proof. If appellant was misled, it was simply one more risk which he undertook when he refused counsel. Counsel would not have been misled. There is no merit in this assignment.

[3] In his argument the district attorney told the jury that, though the pleading had charged the four acts had taken place on or about certain dates, the phrase "on or about" meant within a reasonable period of time one way or another from the stated dates; and that if they believed that the acts occurred within such limits as to exact time, the prosecution had made out its case. The court charged the jury as follows: "You are not permitted to deliver a verdict of guilty on Count One, unless you find that he committed the specific offense with Alice June Hubbard on or about September 28, 1953, as charged in said Count One, * * *" Similar instructions were given as to the other counts. The appellant argues: "Nowhere did the court define the term 'on or about' any more particularly than the instruction mentioned above, which left its meaning for the jury to decide." We think there was no conflict such as would in any wise confuse the jury between the statement of the district attorney and the instruction of the court, and we think that in the absence of a request for a more specific definition of the term "on or about" the court was not obliged to instruct further than it did. We think the jury understood the court's instruction properly and were convinced that the proof had established the charged acts occurred and that they occurred so closely to the dates alleged as to establish identity between the acts charged and the acts proved. There is no merit in this contention.

[4] Finally, appellant contends that the record shows so many hearsay and conclusionary statements by witnesses as to amount to the denial of a fair trial. It is easy enough to excuse appellant, ignorant as he appeared to be of legal procedure and of the rules of evidence, for not making objections to any hearsay testimony or conclusions given or stated by witnesses. But once again, he assumed the risk that some statements of that nature might come into the case and a cursory reading of his own testimony shows that he was persistent himself in arguing his case as he testified; in attempting to fill the record of his testimony with hearsay; and even in debating conclusionary statements and his right to make them with the trial judge, who endeavored persistently and patiently throughout to protect his rights and yet to have the case go forward to its conclusion notwithstanding the inconvenience of having to try a defendant who had insisted upon defending himself. The assignment of error is not borne out by the record. Incidentally, it may further be said that a reading of the record shows that many times the trial court, where opportunity to do so was given, struck out or prevented the introduction of evidence of hearsay and conclusionary statements. The record also shows that on some occasions the district attorney himself moved that such statements emanating from a witness and nonresponsive to a direct question be stricken. We have examined the record and have concluded therefrom that a fair trial was afforded to appellant, that his guilt was clearly proved, and that there is no error in the record.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

146 Cal.App.2d 82

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Frank MARKOS, Defendant and Appellant.
Cr. 5632.

District Court of Appeal, Second District, Division 3, California.
Nov. 16, 1956.

Prosecution on charge of issuing checks without sufficient funds and with two prior convictions of the same offense. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., entered a judgment of conviction, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence was sufficient to support the conviction.

Affirmed.

1. False Pretenses ⚷39

In prosecution for issuing checks without sufficient funds, an intent to defraud is a fact which may be inferred from the acts or admissions of the accused, or from the surrounding circumstances. West's Ann.Pen.Code, § 476a.

2. Criminal Law ⚷1144(13)

Evidence must be viewed in light most favorable to prosecution on appeal from conviction.

3. False Pretenses ⚷49(3)

Evidence supported conviction of issuing checks without sufficient funds. West's Ann.Pen.Code, § 476a.

4. Criminal Law ⚷594(1), 1151

Trial court's power to grant a continuance because of absence of a material witness is discretionary, and its determination will not be reversed on appeal unless there has been a clear abuse of discretion. West's Ann.Pen.Code, § 1050.

5. Criminal Law ⚷614(3)

Where defendant had over three months from date of preliminary hearing to get alleged material witness who lived in New York to come to California or could have taken his deposition and failed to do so, and he had the benefit of several continuances, trial court did not abuse its discretion in refusing a further postponement. West's Ann.Pen.Code, §§ 1050, 1349 et seq.

Gladys Towles Root and Eugene V. McPherson, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Frank F. Markos was charged with four violations of Penal Code Section 476a (issuing a check without sufficient funds) and with two prior convictions of the same offense. He pleaded not guilty and denied the former convictions. Trial was to the court. The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. The court found him guilty on each count and found the prior convictions to be true. He appeals from the judgment. Defendant contends that the evidence was insufficient to sustain the judgment and that the court erred in denying him a continuance to secure the attendance of a material witness for the defense.

There was evidence of the following facts: Defendant was one of the owners of the Ferris Charles Exploration Company, which was formed in late April or early May, 1955. Its business was to locate uranium and other precious minerals. Defendant maintained a checking account in the name of Charles Exploration Company at the Inglewood Branch of the Bank of America. The authorized drawer was Ferris Charles, a name used by defendant. The account was closed by the bank on May 27, 1955, after it had been attached. The balance prior to the attachment was $6.14. Defendant made no arrangements for credit with the bank and there was no subsequent deposit to the account. The bank's policy is to send written notice to a depositor if his account is closed due to an attachment.

Arthur Ayvazian, a grocery clerk, cashed for defendant a $125 check of the Charles Exploration Company, dated May 30, 1955. The check was signed "Ferris Charles" and drawn on the above mentioned bank. Stanley Slago, a waiter at a restaurant, cashed for defendant a $100 check of the Charles Exploration Company, dated June 9, 1955, signed and drawn as above. Stanley Price cashed for defendant a $100 check of the Charles Exploration Company, dated June 9, 1955, likewise signed and drawn as above. George Waidner accepted from defendant a check of the Charles Exploration Company in the amount of $304.58, dated June 18, 1955, also signed and drawn as above. The check was in payment for a scintillator used in prospecting for uranium. The four checks were dishonored by defendant's bank.

Defendant testified that he had agreed with the Otay Agricultural Corporation to run tests for mineral content on land owned by it in San Diego County. He was in continuous telephone contact with the corporation's president, Stephen Birch, who was in New York. Markos worked for Birch until about June 28, 1955. During May and the early part of June, Birch was to deposit $350 per day for sixteen days into defendant's bank account for work Markos had already done. Birch told him over the telephone that the money had been deposited. Markos assumed that it had been. He never received a statement from the bank and thought the money was there. He admitted drawing the checks. He stated that he talked to Birch about a dozen times after his arrest, asking Birch to come to California to straighten the matter up, and Birch told him he would come to California after January 1st to close up the corporation's books for the year and that he would settle with defendant at that time.

On cross-examination Markos admitted telling the police when he was arrested that he had no idea how much money he had in the bank. Robert Leonard, an employe of defendant, testified that he overheard a telephone conversation between defendant and a man he understood to be Birch in the early part of May, 1955, during which Birch stated that some money would be deposited to defendant's account.

Hugh E. Brown, a police officer for the City of Los Angeles, testified on behalf of defendant. He stated that he was one of the investigating officers in the case and that he talked with Markos at the time of his arrest on August 5, 1955. Defendant asked to make a long distance telephone call to an unidentified person whose name "would be brought out at the proper time" who was supposed to have made deposits to his account, but had failed to do so. Markos told Brown that he wanted to find out why the deposits were not made. He admitted to Brown that he did not know how much money he had in the bank when he drew the checks.

[1-3] The first assignment of error to be considered is insufficiency of the evidence to show that Markos intended to defraud the payees of the four checks. This contention is without merit. An intent to defraud is a fact which may be inferred from the acts or admissions of the accused, or from the surrounding circumstances. Viewing the evidence, as we must, in the light most favorable to the prosecution, we believe the court was fully justified in concluding that defendant knew that he lacked the funds with which to pay the checks upon their presentation at the bank.

The checks were drawn within several days to three weeks after defendant's bank account had been closed. The action in which the bank account was attached was against defendant and his company. Their office furniture, papers and files were taken under attachment. Thereafter the checks were cashed. It was the bank's custom to notify its depositors if their accounts were closed by an attachment. Markos admitted to Officer Brown that he did not know how much money he had in the bank. He testified that he was too busy prospecting in San Diego to verify his bank balance. He had made no arrangements for credit with the bank. He did not tell the persons who accepted the checks that his bank balance might be insufficient. Defendant's denials of wrongful intent created only a conflict in the evidence. The circumstantial evidence indicated that defendant knew there was insufficient money in the bank account to cover the checks, that it had been attached and the account closed.

There is no merit in the assignment of error attributed to the court's refusal to grant defendant a continuance in order to obtain Stephen Birch as a defense witness. The preliminary hearing was held on September 14, 1955. Trial was set for November 14, 1955. At that time, defendant moved for a continuance until December 15th so as to secure Birch's presence. The People rested their case on the transcript of the preliminary hearing and the matter was continued until December 13th. It was again postponed to December 20th because defendant's attorney was engaged in another trial. On December 20th, defendant renewed his motion. It was denied and the court proceeded to hear the defense. At the close of the evidence defendant again moved for a continuance and it was again denied.

[4, 5] The court's power to grant a continuance because of the absence of a material witness is discretionary, and its determination will not be reversed on appeal unless there has been a clear abuse of discretion. 12 Cal.Jur.2d 143. Penal Code Section 1050 provides, inter alia, that: "* * * No continuance shall be granted for any longer time than it is affirmatively proved the ends of justice require." The showing in support of defendant's motion was insufficient. No affidavit was filed. Defendant offered to prove, by his own testimony, that Birch would corroborate his own story as to the arrangements made with the Otay Agricultural Corporation for deposits to the bank account. There was no showing of Birch's willingness to appear. Defendant's attorney had made no effort to get in touch with Birch. He had refrained from contacting Birch at defendant's request. Defendant had over three months from the date of the preliminary hearing to get Birch to come to California. He could have taken his deposition, Pen. Code, § 1349 et seq. He had the benefit of several continuances. The court did not abuse its discretion in refusing a further postponement. There are no other assignments of error.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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145 Cal.App.2d 740

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Chester A. CHAPIN, Defendant and Appellant.
Cr. 3206.

District Court of Appeal,
First Appellate District,
Division 1, California.
Nov. 13, 1956.
Hearing Denied Dec. 12, 1956.

Defendant was prosecuted for the crime of grand theft. From judgment of conviction and an order denying a motion for new trial in the Superior Court City and County of San Francisco, Eustace Cullinan, Jr., the defendant appealed. The District Court of Appeal, Bray, J., held that the evidence sustained conviction, that the court properly refused to instruct on the suppression of evidence, that a statement of a witness to the police in defendant's presence was properly admitted and that the alleged misconduct of the prosecutor was not reviewable.

Judgment and order affirmed.

1. Larceny 🔑55

Theft may be proved by circumstantial evidence.

2. Criminal Law 🔑1141(2)

Where defendant claims evidence is not sufficient to sustain conviction, burden is on defendant to demonstrate that there is no evidence of a sufficiently substantial character to support the verdict upon any reasonable hypothesis whatever, and it is not enough that established facts may be reconciled with the innocence of defendant.

3. Larceny 🔑55

Although fact that defendant used money of the same kind as that which was recently stolen ordinarily constitutes but slight evidence of defendant's guilt, if such money was of kind rarely seen in circulation, weight to be attached to such evidence is considerably increased.

4. Larceny 🔑65

Evidence supported conviction of grand theft of currency.

5. Criminal Law 🔑661

In prosecution for grand theft of money, defendant's demand for production of original reports to police of certain officers and original statement made to the police by the owner of the money and persons connected with the hotel where the owner stayed was properly refused.

6. Criminal Law 🔑661

There is no compulsion on prosecution to call any particular witness or to make any particular test so long as there is fairly presented to the court material evidence bearing upon the charge for which defendant is on trial.

7. Criminal Law 🔑788

In prosecution for grand theft of currency, instruction that neither the prosecution nor defense was required to call as its witnesses, persons who were shown to have been present at any of the events involved or who had some knowledge of the matters in question nor to produce as exhibits all documents referred to in the testimony, or the existence of which had been suggested by the evidence, was proper.

8. Criminal Law 🔑788

In prosecution for grand theft, requested instruction that if prosecution had within its power, production of certain evidence and failed to produce, the jury could draw an adverse inference was properly refused as not embodying the meaning of the applicable statutes. West's Ann.Code Civ.Proc. § 2061, subds. 6, 7.

9. Criminal Law 🔑323, 788

In prosecution for grand theft, where trial court properly refused to require prosecution to produce certain police reports and statements, no adverse inference could be drawn from their nonproduction and an instruction dealing therewith requested by defendant was properly refused. West's Ann.Code Civ.Proc. § 2061, subds. 6, 7.

10. Criminal Law 🔑788

The instructions respecting adverse inference to be drawn by the jury in the nonproduction of documents should not be given unless the evidence indicates a wilful suppression of evidence. West's Ann. Code Civ.Proc. § 2061, subds. 6, 7.

11. Criminal Law 🔑673(1)

In prosecution for grand theft, where police took a statement from witness detailing his connection and that of defendant with the owner of money stolen and the statement contained conclusions by the witness as to defendant's motives which were accusatory and defendant's presence at the taking of the statement was voluntary and defendant did not at the time express disagreement with the statement, admitting the statement in evidence was not error where court instructed that the witness's conclusions in the statement were not binding on the defendant.

12. Criminal Law 🔑1119(4)

Where the record before the appellate court did not contain the arguments of either counsel, contentions with respect to alleged misconduct of the prosecutor were not reviewable.

13. Criminal Law 🔑730(1)

Where defendant assigned statement of prosecutor as misconduct and the trial court instructed the jury to disregard it, alleged error if any, was cured.

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James Martin MacInnis, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a jury conviction of the crime of grand theft and from the order denying motion for new trial.

Questions Presented.

1. Sufficiency of evidence.
2. Refusal to instruct on suppression of evidence.
3. Admission of statement of witness to police in defendant's presence.
4. Alleged misconduct of assistant district attorney.

Facts.

Paul Dudley occupied room 707 of the Essex Hotel. In a suitcase in the closet of that room he kept $44,700 in currency, consisting of five $1,000 bills, three $500 bills and the balance in $100 bills. On September 27th, about 1:30 a. m., Dudley left a bar where he had been since the previous afternoon. He was intoxicated. He hailed a cab driven by one Casner. Arriving at the hotel, Dudley discovered that he did not have sufficient money to pay the fare. The hotel clerk refusing to advance him any money, Dudley, Casner and the clerk went to Dudley's room, where Dudley took a $100 bill from his suitcase and paid Casner. Dudley produced a bottle and asked "Where are the girls." Casner suggested that the one Dudley had been with was probably at "Coffee Dan's" and at Dudley's request drove him there. Dudley refused to get out of the cab and paid Casner with a $100 bill, letting him keep the change. Casner then took him back to the hotel. On the way back Casner saw defendant's cab and signalled defendant to follow. Both cabs drove to the basement of a garage. Leaving Dudley in the cab, Casner went over to defendant and said, "I have a fare here who wants to have a little company." Defendant asked if Dudley had any money and Casner told him about the two $100 bills. They then got in the cab with Dudley. Defendant asked Dudley his hotel and room number and if he had a room key. Both drivers drank with Dudley. Casner then drove Dudley back to the hotel with the understanding that if defendant could get a girl he was to bring her to Dudley's room. In Dudley's room Casner noticed the suitcase. It was partly open, exposing ends of the bills. Casner reached into it and pulled out a slip of paper on which "30,000" was written. Dudley was apparently unconscious, so Casner helped himself to three $100 bills. Leaving the room Casner met defendant and told him the whole story and offered to give defendant one of the bills. Defendant refused it but did take $60 in small bills. Defendant asked Casner to contact Dudley and try to get him to come out. Casner phoned the hotel asking for room 707. The clerk told him he did not want to ring the room as he thought Dudley had passed out. At defendant's suggestion Casner told the clerk that he had an appointment with Dudley at 4:30. The clerk reported that he rang the room but there was no answer. Casner and defendant separated and a few minutes later Casner saw defendant's empty cab about a quarter of a block from the Essex Hotel.

About 5 a. m. Robertson, another cab driver, saw defendant and one Patterson in defendant's private car. They motioned for him to stop. They told Robertson they had a millionaire that was on a party. Robertson joined them and they went to the Essex Hotel. Defendant let Robertson and Patterson out at the curb. The latter two registered at the hotel, getting a room on Dudley's floor. Defendant was to see them later and "get on with the ball." About noon Patterson and Robertson got tired of waiting and left the hotel. On the street they saw defendant sitting in his car. He urged them not to leave as the "ball" was about to start. But, at defendant's suggestion, Robertson and Patterson went to the Opera Club in Patterson's car. After a while in came defendant with Dudley, who was intoxicated. Defendant and Dudley left together and then Patterson and Robertson went to the Essex Hotel to meet them. Arriving there they saw a car, apparently defendant's, parked nearby. They went to their room in the hotel and when nothing happened they went home about 3 p. m. Casner saw defendant's car parked near the hotel at about 4 p. m.

About 11:30 p. m. Dudley awoke in his room to find both his suitcase and his typewriter gone. These had been found in the men's lavatory at the end of the hall. The suitcase had been cut open. The money was gone.

Defendant denied that Casner told him about the money in Dudley's room and that he had taken the money or ever been in Dudley's room. He testified that Patterson gave him $3,500 to invest in a Christmas tree venture. Two days later defendant and a Mr. Lafayette left ostensibly for Oregon to purchase Christmas trees. They stopped in Oakland at the home of one Newman. There defendant received a check for $1,000 made out to Ray Scott, the name he used in the tree negotiations. Defendant took Newman's automobile, transferring to it a tool box and a tire, in which he admitted he had concealed $18,000. Lafayette and defendant arrived in Truckee a little past midnight. As it was too early to contact the man from whom defendant planned to buy trees, he suggested they go on to Reno, have breakfast and return later in the day. At Reno, after breakfast and driving around town, Lafayette gave defendant $10 to bet for him. Later defendant gave Lafayette two $100 bills to gamble with, telling him to make small bets only. Again, defendant gave him seven $100 bills. Lafayette noticed that defendant had a $1,000 bill. Before leaving the gambling hall defendant took the money Lafayette had and turned it into the cashier for safekeeping. Next morning they went to another gambling place. Defendant gave Lafayette some small bills to be changed into $50. About 10:30 defendant presented certain oily bills to the cashier. They later returned and defendant cashed some more oily bills. A special officer standing nearby, thinking that the bills might be counterfeit, took defendant's name and address. The officer noticed that there were three $500 bills and some smaller ones, all of which defendant changed to $50's. Defendant said that he had spilled oil on them when they were stored in the trunk. They did not gamble at this place. They then went to another gambling club. Here defendant slipped into Lafayette's pocket about $4,300 wrapped in a napkin. Defendant said he was seeking a check from the cashier because he was warned he was going to be robbed. He stated that he did not turn in the money he had put in Lafayette's pocket because it contained the $3,500 he had received from Patterson, and he was afraid it might be counterfeit.

Defendant was then arrested. He told the police that he had arrived in Reno with $7,000, and that the rest was winnings. Of the $7,000 he said about $4,000 had been accumulated by him since the first of the year and that the balance, "approximately $4,500," was probably money that the police were investigating at the time, but he was not at liberty to disclose from where it had come. He also told the police that he knew there was not as much money involved in the theft as they asserted there was, that he could not disclose who was involved in the theft, but that if when they got back to San Francisco he was freed, "he could probably find out or recover the rest of the money through those people that were involved." He further said that if he was unable to find the money, he would disclose who were the people involved in the case.

1. Sufficiency of the Evidence.

[1,2] Defendant points out that the evidence was circumstantial,[1] and claims that it was as consistent with defendant's inno-

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[1] Theft may be proved by circumstantial evidence. People v. Kross, 112 Cal.App.2d 602, 610, 247 P.2d 44.

cence as with his guilt, and was not sufficient to support a conviction. "When his appeal is on the ground that the evidence is not sufficient to sustain the finding of the jury, the burden is on appellant to demonstrate that there is no evidence of a sufficiently substantial character to support the verdict upon any reasonable hypothesis whatever. It is not enough that the established facts and circumstances may be reconciled with the innocence of the accused. Before a reversal may be had, the facts must disclose no reasonable basis for any inference other than appellant's innocence." People v. Hatton, 114 Cal.App.2d 195, 196, 249 P.2d 901, 902.

Defendant relies upon the following circumstances in support of his contention. No one saw defendant in Dudley's room; there was no exclusiveness of opportunity in defendant for the perpetration of the theft as Casner admittedly took some money from the suitcase and Patterson had a room on the same floor as Dudley and had possession of money which defendant contends might have been Dudley's.[2] Robertson and Patterson both were in Dudley's company.

From the time when Casner told defendant about the money in Dudley's room defendant was much interested in Dudley. At about 4 a. m. he had Casner endeavor to get Dudley to come out. Shortly after 4:30 Casner saw defendant's car parked near the Essex Hotel. About 5 a. m. defendant let Robertson and Patterson out at the Essex Hotel and was to contact Dudley. About noon Dudley was seated in his car in front of the hotel. A little later defendant brought Dudley into the Opera Bar. Although he testified he just happened to meet Dudley on the street and went searching from bar to bar to meet Patterson and Robertson, Robertson testified he had previously told them to go to the Opera Bar as the party was about to start. Defendant left with Dudley, and Robertson saw defendant's car parked near the Essex Hotel. Casner saw it there at about 4 p. m. Defendant claimed that at this hour he was in Rodeo with one Cotter, a realtor, who corroborated him, basing his recollection of the day on a notation in his day book. The book failed to show comparable notations of any other appointments. This alibi was further weakened by the fact that the same evening he and Patterson arrived at the Newman home together. To make it appear that defendant was not with Patterson that afternoon or evening, defendant denied coming to the Newman home with Patterson, but claimed to have been driven in his truck by an employee who left immediately, and that Patterson did not arrive until 15 minutes later. Defendant claims he did not enter the Essex Hotel after bringing Dudley there from the Opera Bar, yet his car was seen parked near the hotel shortly after he returned Dudley to his hotel.

While others had an opportunity to take Dudley's money, all of the circumstances taken together show that it was defendant who actually did take it. The many statements made by defendant contrary to those of other witnesses, the actions of defendant at Reno in getting rid of the bills which he had, and his explanation of his having the money, fully justify a finding that he had taken Dudley's money. The evidence is reasonably subject to the conclusion that defendant's trip to Reno was for the purpose of changing Dudley's bills for others of smaller or different amounts. He claims he was going to contact Newman in Truckee concerning Christmas tree stumpage; yet he did not plan to leave for Truckee until 8 p. m. He was going to stop on the way and negotiate for a sale of his motel. It obviously would be impossible to arrive in Truckee at a reasonable hour to contact Newman. He drove through Truckee without stopping and without attempting to contact Newman. Defendant instructed Lafayette to convert the $100 bills which he gave him into $80 in chips and $20 in silver. Defendant did not use the chips for gambling, only the silver. Defendant had his companion change money into $50 bills, and deposited $13,600 in one club, receiving a check therefor. At the Nevada club he only changed bills, some of $500 denomination. He told two different stories about the oil on the bills, one being that he spilled oil on them in the trunk. The trunk was shown to have no evidence of oil in it. After a police officer seemed interested in oily bills, defendant surreptitiously put some $4300, wrapped in a paper napkin, in his companion's pocket.

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[2] Patterson evidently fled the community immediately after Dudley's loss. He was arrested by federal authorities and convicted of counterfeiting.

He admitted that part of the money he had at Reno was some of the money stolen from Dudley, and offered no explanation of how he got it, although at the trial he claimed Patterson gave it to him to invest in Christmas trees. Patterson at the time was driving relief for defendant, because Patterson needed money. Patterson was then buying defendant's automobile, but he did not pay for it. Later defendant swore out a complaint for Patterson for failure to pay for the car. Defendant when shown a picture of Dudley by the police denied knowing him. His explanation at the trial was that it was held too far away by the Reno police for him to see it clearly. It actually was shown him at close range, not by the Reno police, but by the San Francisco police. At the trial he claimed he told the Reno police that he arrived there with $14,000, not $7,000, as they testified. He denied telling that he had won any money, and testified that he did not know if he had or had not won any money. Defendant denied presenting a $500 bill at the Nevada club.

His explanation on the stand of the source of the money found on him is subject to considerable question. $9,000 he claims was from the sale of Christmas trees the previous year. This money he kept in a company safe and a strong box at his home. Defendant had no bank account and his credit was poor. $3,000 he claimed was two months' profit of a small hotel at Rodeo illegally operated. $500 came from his wife's strong box.

[3] While, of course, it is impossible to identify currency (unless the numbers are known), the similarity in the size of the bills in the possession of defendant with those of the victim, particularly large bills which generally are not carried, is significant. "* * * although the fact that defendant used 'money of the same kind as that which was recently stolen' ordinarily would constitute but slight evidence of the guilt of defendant, nevertheless, if such money was of a kind 'rarely seen in circulation,' the weight to be attached to such evidence is considerably increased * * *." People v. McClain, 115 Cal.App. 505, 509, 1 P.2d 1085, 1087.

[4] In People v. Thompson, 120 Cal.App.2d 359, 363, 260 P.2d 1019, 1020, the court said concerning similarity in moneys: "* * * the question of the identity of the property stolen was one of fact for the jury to be considered with all the other evidence." The jury could well conclude that the three $1,000 bills and the three $500 bills were part of the stolen property. It must be remembered in this behalf that defendant admitted that some of the money was part of that stolen. Thus we have opportunity to commit the crime, proof of possession of stolen property (and in such case "'slight corroborative evidence of other inculpatory circumstances'" tending to show his guilt will support a conviction (People v. Wissenfeld, 36 Cal.2d 758, 763, 227 P.2d 833, 836)), fantastic stories contradicted by the facts ("The giving by the defendant of false testimony may well have been regarded by the jury as in itself indicative of a consciousness of guilt" (People v. Crotty, 70 Cal.App. 515, 518, 233 P. 395, 396)), and defendant's own contradictory stories. There was ample evidence to support the conviction.

2. Refused Instruction.

[5-7] During the trial defendant demanded the production of the original reports to the police of certain policemen and the original statements made to the police by Dudley, Casner and certain persons connected with the Essex Hotel. The court

properly refused to order them produced. See People v. Wilkins, 135 Cal.App.2d 371, 287 P.2d 555. No complaint is made of this ruling. With that background, however, defendant contends that the giving of a certain instruction and the refusal to give one offered by defendant constituted prejudicial error. The court instructed: "Neither the prosecution nor the defense is required to call as witnesses all persons who are shown to have been present at any of the events involved in the evidence or who may appear to have some knowledge of the matters in question in this trial; nor is the prosecution or defense required to produce as exhibits all objects or documents that have been referred to in the testimony, or the existence of which may have been suggested by the evidence." This type of instruction has been held proper. People v. Reingold, 87 Cal.App.2d 382, 408, 197 P.2d 175. As said in People v. Tuthill, 31 Cal.2d 92, 98, 187 P.2d 16, 19: "There is no compulsion on the prosecution to call any particular witness or to make any particular tests so long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial. People v. Larrios, 220 Cal. 236, 251, 30 P.2d 404; People v. Simpson, 66 Cal.App.2d 319, 329, 152 P.2d 339." See also People v. Parry, 105 Cal.App.2d 319, 322, 232 P.2d 899; In re Horowitz, 33 Cal.2d 534, 540, 203 P.2d 513. The latest approval of the instruction appears in People v. Watson, July, 1956, 46 Cal.2d 818, 299 P.2d 243, 250: "The instruction that neither side was required to produce all witnesses who might be able to testify to that particular fact has a practical premise, for otherwise there would be a repetitious recital of testimony which would prolong the trial beyond reasonable limits. Under the circumstances, it would seem that defendant's remedy would have been to have called the witnesses on his own behalf if he believed their testimony would have aided his cause. See People v. Powell, 83 Cal.App. 62, 67–68, 256 P. 561."

[8] Defendant offered the following instruction: "In view of the greater duty which our law imposes upon the prosecution for the production of evidence, a further rule of law must be explained: If the prosecution has within its power the production of certain evidence and fails without explanation to produce such evidence, you are entitled to draw an inference that such evidence, if it had been produced, would have been adverse, or inconsistent with, the theory of the prosecution." The court refused the instruction. Defendant apparently had in mind section 2061, Code of Civil Procedure, subdivisions 6 and 7: "6. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and, therefore,

"7. That if weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

[9, 10] However, it should be pointed out that this proposed instruction does not embody the meaning of those subdivisions. The section requires in order that adverse inferences may be drawn that the evidence not produced be stronger and more satisfactory than that which was produced. The proposed instruction has no such requirement. Under it the evidence which is not produced could be weaker and less satisfactory than that which was produced and yet the jury is told to draw an inference from its nonproduction that an adverse inference should be drawn. A literal reading of the instruction would, in effect, require in a criminal case a calling by the prosecution of all the witnesses shown to have some knowledge of the matters in question, and the production of all evidence in anywise bearing on the case, a requirement which the above cited cases hold to be unnecessary. The form of the instruction makes it completely in conflict with the foregoing instruction. But a reason more important than the improper form

of the instruction justified the court in refusing the instruction. The defendant offered the instruction to cover the failure of the prosecution to produce the police reports and statements taken of other persons during the police investigation of the crime, notes of a police inspector, to call the hotel clerk, the prostitute with whom Dudley spent some time, a woman in the Essex Hotel who occupied the room next to Dudley's and Patterson, then in the custody of the federal authorities in Los Angeles. As to the records, statements and notes—the ruling of the trial court refusing to require their production being proper as we have shown, no adverse inference could be drawn from their nonproduction. The witnesses who were not called come within the rule of the cases above cited. See also People v. Brown, 71 Cal.App. 181, 188, 235 P. 72, where the court held proper the refusal to give an instruction offered by the defendant in the language of section 2061, subdivision 7, Code of Civil Procedure. The offered instruction was based upon the failure of the prosecution to call certain persons who were present as the guests of the prosecuting witness at the time when the jewelry which was later stolen was exhibited. In People v. Hightower, 40 Cal.App.2d 102, 107, 104 P.2d 378, the rejection of an instruction based upon subdivisions 6 and 7 of section 2061, Code of Civil Procedure, was held not to be error. (The facts to meet which the instruction was offered do not appear.) In People v. Cuff, 122 Cal. 589, 55 P. 407 (cited with approval in the Hightower case, supra, and in People v. Charles, 9 Cal.App. 338, 340, 99 P. 383) the court held that it was erroneous to give an instruction based upon subdivisions 6 and 7, section 2061, Code of Civil Procedure, offered by the prosecution, for the reason, 122 Cal. at page 591, 55 P. at page 408: "Indeed, as to subdivisions 4, 6, and 7 of the section, upon the trial of criminal cases it were best they should not be noticed, for, as generally applied, they trench upon the constitutional rights of the defendant in depriving him of a verdict rendered by jurors who should be the sole and exclusive judges of the weight and effect of evidence. The danger lurking in these subdivisions of the section is found in the fact that they attempt to deal with the weight and effect of evidence,—matters for the jury, and not matters for legislative action." While this statement may be too broad,[3] this instruction should not be given unless the evidence indicates a wilful suppression of evidence. See People v. Torterice, 66 Cal.App. 115, 124, 225 P. 760, 764, where the court held that the refusal to give an instruction to the effect that "'* * * the unexplained failure to call and examine as a witness a person who has peculiar knowledge of material facts * * *'" raised an unfavorable inference but if error was not prejudicial because of the improbability that the witness' testimony would actually have been unfavorable.

In People v. Reid, 193 Cal. 491, 225 P. 859, relied upon by defendant, certain letters written by the defendant to a fellow prisoner were admitted in evidence. Their date and the date of their receipt was not shown as the fellow prisoner was not called. In holding that it was not necessarily incumbent upon the prosecution to call the fellow prisoner as the failure to do so merely went to the weight of the evidence, the court added, 193 Cal. at page 495, 225 P. at page 860: "Of course, the defense would have been entitled to an instruction to the jury, and doubtless one would have been given had it been requested, to the effect that in weighing this evidence the jury should be guided by the provisions of section 2061 of the Code of Civil Procedure, which provides that—'If weaker and less satisfactory evidence is offered, when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.'" The Reid case is distinguishable from ours for several reasons: The court there was discussing the production of weaker evidence than was available to the prosecution. Here there is no such situation. Defendant's desire to see the police records and statements is not based upon a claim that they contain stronger evidence than that produced, but upon a hope that he might find something in them contradictory to the evidence produced. As to the witnesses not called, there is nothing to indicate that their evidence would have contributed anything to the case. Moreover, all of the witnesses mentioned were available to him. He could have called them, even the witness Patterson, who was in federal custody. The same process open to the prosecution for the production of a federal prisoner is open to the defense. See People v. Torterice, supra, 66 Cal.App. 115, 124, 225 P. 760, and People v. Brown, supra, 71 Cal.App. 181, 188, 235 P. 72, holding that an instruction of the type offered here is properly refused if based upon the prosecution's failure to call a witness available to the defendant. "The facts testified to by these witnesses tended to establish the guilt rather than the innocence of appellant, and the District Attorney was under no duty to use them as witnesses if their testimony was not needed to make out a case for the People. The fact that they made some statements which were favorable to appellant does not change the situation, especially where they were available and were called as witnesses for the defendant." People v. Simpson, 66 Cal.App.2d 319, 329, 152 P.2d 339, 344; see also People v. Watson, supra, 46 Cal.2d 818, 299 P.2d 243.

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[3] Section 2061, Code of Civil Procedure, provides that "on all proper occasions" the jury are to be instructed on the points set forth in that section. Thus, the real test of whether an instruction in proper form under any subdivision of that section should be given is whether the circumstances of the case constitute a proper occasion for the giving of it. As herein pointed out, we do not believe that the circumstances here called for such an instruction.

Moreover, the instruction suggested in the Reid case is completely different from the one offered here, and points up the vice of the offered instruction. The Reid case instruction deals with the failure to produce "'stronger and more satisfactory'" evidence, whereas the instruction in our case deals with nonproduction of any evidence, including that of equal value with that produced and merely cumulative, and that of weaker and less value. See Gibson v. Kennedy Extension Gold Min. Co., 172 Cal. 294, 305, 156 P. 56, where the plaintiff testified to the happening of an accident but did not call an eyewitness thereto. The court held that such failure was not a case to which subdivision 7 of section 2061, Code of Civil Procedure, could be applied for the reason that the plaintiff in testifying "was giving evidence which was not in a legal sense 'weaker' than that of any other eyewitness." 172 Cal. at page 305, 156 P. at page 61.

People v. Ruef, 14 Cal.App. 576, 612, 114 P. 48, 54, does not help defendant. There the defendant offered an instruction to the effect that the failure of the prosecution to call three ex-supervisors raised a presumption that their testimony would have been adverse to the prosecution. The reviewing court held that such instruction was properly refused. The trial court did give an instruction, not of the kind requested by defendant here but in the exact language of section 2061, subdivisions 5 and 6. The defendant objected thereto, but the reviewing court held, 14 Cal.App. at page 612, 114 P. at page 69: "The defendant by his request, having invoked the principles of law stated in the sections, and cited the sections as authority, and asked the court to instruct in regard to them, cannot now complain because it was not a proper occasion for giving such instructions." In our case, the occasion was not a proper one, and the offered instruction was also improper.

3. Statement of Casner.

[11] On October 4, 1954, the police took a statement from Casner detailing his connection and that of defendant with Dudley. Defendant was present at the taking of the testimony. He was asked if he would stay and listen to Casner's statement and was not required to remain if he did not wish to. His remaining was voluntary. In the statement Casner told approximately the same story concerning defendant's relationship

with Dudley and the money that he related at the trial. The statement, of course, was accusatory of defendant. At its end defendant was asked if he had heard the statement and he said he had. He was then asked: "Q. Is this a true statement as far as Dave has related it? A. As well as I could say. Q. As well as you recall it is a true statement? A. Yes. Q. Is there anything in this statement that you would like to change or add to? A. No, not at this time." In the statement there were certain conclusions by Casner as to defendant's motives. Instead of asking the court to require their elimination, defendant waited until they were read to the jury. Then a colloquy ensued between the court and counsel in which the court offered to strike the conclusions if defendant desired. Defendant then asked that the jury be instructed that Casner's conclusions were not binding on defendant. This the court did and instructed the jury to disregard the specific portions of the statement. Although a better method would have been to call these objectionable parts of the statement to the court's attention out of the presence of the jury and have them deleted, their presence did not make the rest of the statement inadmissible. Defendant, relying on People v. Simmons, 28 Cal.2d 699, 172 P.2d 18, contends that the statement as a whole was inadmissible. However, the situation here was different from that in the Simmons case. With the exceptions in which Casner gave his opinions of defendant's motives (three in number) the statement was a narrative of Casner's connection with the Dudley affair and with defendant. Defendant's presence at the taking of the statement was voluntary and his replies to the questions as to the accuracy of the statement were likewise voluntary. In the Simmons case the defendant refused to reply to the statement read to him. In People v. Spencer, 78 Cal.App.2d 652, 178 P.2d 520, the defendant first refused to reply to a question concerning the accuracy of a codefendant's statement to police officers and then denied it. In People v. Bob, 29 Cal.2d 321, 175 P.2d 12, the defendant likewise denied the codefendant's statement. In People v. Spencer, supra, 78 Cal.App.2d at page 655, 178 P.2d at page 521, the court said: "In the case of People v. Simmons, 28 Cal.2d 699, 712, 172 P.2d 18, the Supreme Court held that accusatory statements of the character here involved are plain hearsay, and may properly be admitted only as admissions, under the well-known exception to the hearsay rule. That if such statements are denied then there is no admission and the statements cannot properly find their way into the record. If the accused admits the truth of such statements then, of course, they may be admitted into evidence." It further stated, 78 Cal.App.2d at page 656, 178 P.2d at page 522: "Whatever may be the rule in other jurisdictions, it is now firmly established in California that the admissibility of evidence of the character with which we are here concerned depends upon whether the occasion and the circumstances were such as to afford the accused person an opportunity to act or speak, and whether the accusatory statement was one made upon such occasion and under circumstances that would naturally call for some action or reply. Each case must, therefore, be determined upon the facts and circumstances therein presented." "Defendant's responses to accusatory statements may find their way into the record only under the admission exception to the hearsay rule. If the accused person expressly admits the truth of the accusatory statement, both the statement and answer may be admitted. If the accused person expressly denies the accusatory statement, there is no admission. If the accused makes an evasive or equivocal reply which is not directly responsive to the accusatory statement, or remains silent, it has been held that under certain circumstances both the accusatory statement and the response are admissible. In any event, when the accusatory statement is admitted, it is not admitted as proof of the facts asserted in the statement. Such statements are admitted only to show the reaction of the accused." People v. Davis, 43 Cal.2d 661, 670, 276 P.2d 801, 805. Applying the above test here, the statements and defendant's comments on it were admissible.

4. Alleged Misconduct.

[12, 13] On motion for new trial defense counsel filed an affidavit charging the assistant district attorney with making in his argument to the jury a certain statement concerning one of his reasons for not producing the original police report demanded by defendant, which statement defendant contends was prejudicial misconduct. Unfortunately, the record before us does not contain the arguments of either counsel. As said in People v. Best, 43 Cal.App.2d 100, 105, 110 P.2d 504, 507, "Since there is in the record neither argument of the district attorney nor assignment of error by appellant, we are in no position to determine that any prejudicial error occurred." Moreover, defendant states that when defendant assigned the statement as misconduct the trial court instructed the jury to disregard it. We see no reason why the error was not cured. See People v. Caetano, 29 Cal.2d 616, 619, 177 P.2d 1; People v. McCracken, 39 Cal.2d 336, 349, 246 P.2d 913.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

145 Cal.App.2d 767

PEOPLE of the State of California, Petitioner,

v.

MUNICIPAL COURT OF OXNARD-PORT HUENEME JUDICIAL DISTRICT, VENTURA COUNTY, California, Respondent.

Civ. 21974.

District Court of Appeal, Second District, Division 1, California.

Nov. 13, 1956.

Hearing Denied Jan. 8, 1957.

Proceeding on petition for writ of mandate to compel court to comply with requirement of probation statutes with respect to defendant for whom court suspended sentence given on a misdemeanor conviction. The District Court of Appeal, Fourt, J., held that suspension of sentence operated as an order of probation and statutes requiring the fingerprinting, supervision, etc., as well as the furnishing to probationer of a written order listing conditions of probation are mandatory and must be followed.

Peremptory writ issued as prayed.

1. Criminal Law 🔑1001

An order suspending sentence is nothing more or less than the granting of probation.

2. Criminal Law 🔑982

Word "probation" by its very name implies that the probationer must fulfill certain conditions to be entitled to the reward. West's Ann.Pen.Code, § 1203.1.

See publication Words and Phrases, for other judicial constructions and definitions of "Probation".

3. Criminal Law 🔑1001

Where judge granted person convicted of a misdemeanor summary probation with no statement as to the term, the term of probation must, of necessity be implied. West's Ann.Pen.Code, § 1203.1.

4. Criminal Law 🔑1001

Where judge granted person convicted of misdemeanor summary probation without stating person responsible for probationer, it was judge's duty to direct that probationer be fingerprinted. West's Ann.Pen.Code, § 1203.1.

5. Criminal Law 🔑982

Granting of summary probation in misdemeanor cases does not dispense with the reporting and supervision of probationer. West's Ann.Pen.Code, §§ 1203.1, 1203.12, 1203b, 1215.

6. Criminal Law 🔑1001

Where court in a misdemeanor case summarily granted probation without referring case to probation officer, court was, in absence of any other direction, place to which probationer should report and such court had responsibility of supervision of probationer. West's Ann.Pen.Code, §§ 1203.1, 1203.12, 1203b, 1215.

7. Criminal Law ⚷982

Where probation is summarily granted to person convicted of misdemeanor without other directions, probation papers including a written statement of terms and conditions of probation should be furnished by the judge. West's Ann.Pen.Code, §§ 1203.4, 1203.12.

8. Criminal Law ⚷982

Where court summarily grants probation to person convicted of misdemeanor, probation papers furnished to probationer by court should contain information about probationer's right and privilege as required by statute, advise him that he is on probation, specify terms, and that he should not engage in criminal practices or become abandoned to improper associates. West's Ann.Pen.Code, §§ 1203.4, 1203.12.

9. Criminal Law ⚷982

Statutes requiring performance of certain acts in connection with granting of probation, such as ordering that probationer's fingerprints be taken and furnishing him with probation papers, are mandatory. West's Ann.Pen.Code, §§ 1203, 1203.1, 1203a, 1203b, 1203.12, 1215.

10. Statutes ⚷227

Test of whether or not a statute is mandatory is, where to construe as directory would render it ineffective and meaningless it should not receive that construction.

11. Statutes ⚷227

The word "shall" used in a statute does not always import that its provisions are mandatory although in most cases it does.

See publication Words and Phrases, for other judicial constructions and definitions of "Shall".

* * *

Edmund G. Brown, Atty. Gen., William E. James, Dep. Atty. Gen., Roy A. Gustafson, Dist. Atty., Ventura County, Ventura, for petitioner.

FOURT, Justice.

The petitioner seeks a writ of mandate to direct and compel the respondent, the Municipal Court of Oxnard-Port Hueneme Judicial District, Ventura County, to:

> "1. Direct the Chief of Police at the police department in the City of Oxnard, State of California, to take and preserve the fingerprints of defendant Albino Ramos Lozano.
>
> "2. Require that the defendant report either to the court or to the probation officer at such times during the period of probation as specified by the court.
>
> "3. Furnish defendant with probation papers stating:
>
> a. the length of probation.
>
> b. the terms and conditions of probation.
>
> c. the person to whom, and the times at which, defendant is to report during the probationary period.
>
> d. the right of defendant, upon completion of probation, to have the conviction set aside and the complaint dismissed."

The facts are substantially as follows: Albino Ramos Lozano was, on August 1, 1956, convicted in the respondent court of the crime of violation of section 647, subdivision 11 of the Penal Code (common drunk). On the same date, at the time of pronouncement of judgment, the court said, "Sixty days in the Oxnard City Jail, all of which sentence is suspended." The judgment and order were entered in the docket. The petitioner's attorney, the District Attorney of Ventura County, thereupon moved the court to direct the taking of the defendant's fingerprints, to require that the defendant report either to the court or the probation officer, and to furnish the defendant with probation papers, all as heretofore set forth. The motion was denied.

Reduced to simple terms, the question is whether the court, when granting summary probation in misdemeanor cases, has the duty, and should be compelled by writ of mandate to carry out such duty, to direct the fingerprints of the defendant to be taken and preserved, to require that the defendant report either to the court or the probation officer during the period of probation at such times as the court may specify, and to furnish the defendant with probation papers setting forth the length, terms and conditions of probation.

The pertinent parts of Penal Code sections 1203, 1203.1, 1203a and 1203b are set forth in the footnote herein.[1]

Section 1203b was adopted in 1941. Prior to that time, under the provisions of section 1203 of the Penal Code, a court with jurisdiction to grant probation could deny probation summarily, but it could not grant it without a prior reference to, and a report from a probation officer. The 1941 legislature changed this procedure in misdemeanor cases. The section was adopted as an urgency measure and the following reasons were assigned for the enactment of the section. Stats.1941, Chap. 24, page 445.

"At the present time when a defendant in a criminal case in an inferior court seeks probation, the law requires that in every case his application be referred to the probation officer for investigation and report, notwithstanding the fact that in view of all the circumstances and evidence in many cases the court may already be satisfied that the granting of probation is justified. Under the present law until the probation officer's report is made to the court the defendant is frequently held in custody, in some cases for many days. This procedure has resulted in unnecessarily delaying the action of the courts, in unnecessary confinement of a defendant and in great and unnecessary expense in connection with investigations by the probation officer. It is necessary that the congestion now existing be relieved immediately in order that such unnecessary delays be avoided. It is therefore necessary that this act take effect immediately." St.1941, p. 445, § 2.

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[1] "§ 1203. * * * If the court shall determine that there are circumstances in mitigation of punishment prescribed by law, or that the ends of justice would be subserved by granting probation to the defendant, the *court shall have power* in its discretion *to place the defendant on probation as hereinafter provided;* * * *." (Emphasis added.)

"§ 1203.1. * * * The court, or judge thereof, *in the order granting probation* and as a condition thereof *may imprison* the defendant in the county jail for a period not exceeding the maximum time fixed by law in the instant case; provided, however, that where the maximum possible term of such sentence is three years or less, then such period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over three years; may fine the defendant in such sum not to exceed the maximum fine provided by law in such case; or may in connection with granting probation, impose either imprisonment in county jail, or fine, or both, or neither; may provide for reparation in proper cases; and may require bonds for the faithful observance and performance of any or all of the conditions of probation.

* * * * *

"* * * In counties and cities and counties in which there are facilities for taking fingerprints, *such marks of identification of each probationer must be taken* and a record thereof kept and preserved." (Emphasis added.)

"§ 1203a. * * * In all counties and cities and counties the courts therein, having jurisdiction to impose punishment in misdemeanor cases, shall have the power to refer cases, demand reports and to do and require all things necessary to carry out the purposes of Section 1203 of this code insofar as they are in their nature applicable to misdemeanors. Any such court shall have power to suspend the imposing or the execution of the sentence, and to make and enforce the terms of probation for a period not to exceed three years; provided, that when the maximum sentence provided by law exceeds three years imprisonment, the period during which sentence may be suspended and terms of probation enforced may be for a longer period than three years, but in such instance, not to exceed the maximum time for which sentence of imprisonment might be pronounced."

"§ 1203b. * * * All courts shall have power to grant probation summarily in misdemeanor cases without referring such cases to the probation officer; *provided, however, that unless otherwise ordered by the court persons granted probation summarily shall report only to the court and the probation officer shall not be responsible in any way for supervising or accounting for such persons.*" (Emphasis added.)

In 1951, the legislature amended section 1203b by adding that part which follows the semi-colon, and is underscored in the footnote herein. Thus, the legislature created two methods or plans of granting probation. Prior to the amendments there was no distinction between the two.

[1] An order suspending sentence is nothing more nor less than the granting of probation. People v. Cravens, 115 Cal.App.2d 201, 251 P.2d 717; United States Fidelity & Guaranty Co. v. Justice Court, 99 Cal.App.2d 683, 222 P.2d 292; Oster v. Municipal Court, 45 Cal.2d 134, 287 P.2d 755; People v. Williams, 93 Cal.App.2d 777, 209 P.2d 949; People v. Sidwell, 27 Cal.2d 121, 162 P.2d 913; In re Clark, 70 Cal.App. 643, 234 P. 109. An order suspending sentence is in legal effect "the equivalent of a formal order placing the defendant on probation." In re Herron, 217 Cal. 400, 404, 19 P.2d 4, 6.

The judge of a court may ordinarily do one of two things at the time a defendant appears for the pronouncement of judgment. The defendant can be sentenced, People v. Williams, supra, or, he can be granted probation (unless barred by statute). See footnote, section 1203, Penal Code.

The purpose of probation generally is appropriately set forth in People v. Johnson, 134 Cal.App.2d 140, at pages 143–144, 285 P.2d 74, at page 76: "The granting of probation, aside from being an act of clemency extended to one who has committed a crime, is also in substance and effect a bargain made by the People, through their legislature and courts, with the malefactor. The Penal Code, sections 1203 et seq., dealing with the subject of probation, provide in effect that in granting probation the People of the State, speaking through their courts, may say to one who has committed a crime, 'If you will comply with these requirements you shall be entitled to this reward.' The purpose and hope are, of course, that through this act of clemancy, the probationer may become reinstated as a law abiding member of society. Removal of the blemish of a criminal record is the reward held out through the provisions of Penal Code, section 1203.4, as an additional inducement. The obvious purpose is to secure law compliance through an attempt at helpful cooperation rather than by coercion or punishment. The law does not require positive proof of total and permanent reformation or rehabilitation as a condition to surrender of the right to impose judgment and sentence, for there could be no such proof. Neither People v. Majado, 22 Cal.App.2d 323, 70 P.2d 1015, nor In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644, cases cited by respondent, lays down any such requirement. The theory seems to be that if one with a reasonably satisfactory background commits a crime, the experience of apprehension and processing through court, together with the restrictions imposed through probation upon unlawful or intemperate conduct, may effect a greater degree of reformation than jail or prison confinement, and a showing that the terms of probation have been complied with would support a hope, at least, that reformation had been accomplished."

[2] Probation is obviously granted by an order. Section 1203.1, Penal Code, provides in part, "* * * in the order granting probation * * *." The word "probation" by its very name implies that the probationer must fulfill certain conditions to be entitled to the reward. Webster's New International Dictionary, 2d Ed., p. 1971, defines the word: "The method of treating a delinquent, convicted of an offense, whereby he is not imprisoned but is released on a suspended sentence under supervision and upon specific conditions; * * *."

As to the term of probation, section 1203.1, Penal Code, see footnote.

[3] In the case before us the judge made no statement as to the term, and therefore whatever the term is must, of necessity be implied. At the time when

the statutes limited the length of the probationary period to the maximum sentence which could be given, appellate courts stated that when the trial judge was silent as to the term, it must be implied that the term is the longest for which probation is possible. In re Giannini, 18 Cal.App. 166, 122 P. 831; In re Herron, supra; People v. Wallach, 8 Cal.App.2d 129, 47 P.2d 1071.

In People v. Rye, 140 Cal.App.2d Supp. 962, 296 P.2d 126, 128, the court held that the probationary period, when the judge is silent on the matter, is equivalent to the maximum sentence which could be given, and not the maximum possible term of probation. In the Rye case the defendant was found guilty of a misdemeanor and sentenced to pay a fine of $10.00, and in case the fine was not paid forthwith the defendant was to be imprisoned in jail for one day for each $5.00 of the fine not paid until the fine was satisfied in full and thereafter the judge ordered "'sentence is hereby suspended.'" The appeal in the Rye case was "'from the order suspending the execution of the judgment.'" The appellant contended that the order either placed the defendant upon probation or was void and if it was an order for probation then the order was nevertheless erroneous. The court held, among other things, that the order in effect was to place the defendant on probation. There was no motion made in the Rye case, as there was in the instant case, that the defendant's fingerprints be taken and he be furnished with probation papers, etc.

Petitioner here contends that the statutory provisions are mandatory, and therefore the judge is required to follow his order granting probation with further acts, that is:

1. To direct that the probationer be fingerprinted.

2. To direct the probationer to report either to the court or to the probation officer.

3. To furnish defendant with probation papers stating:

a. the length of probation;

b. the terms and conditions of probation;

c. the person to whom, and the times at which, defendant is to report during the probationary period;

d. the right of defendant, upon completion of probation, to have the conviction set aside and the complaint dismissed.

[4] *Fingerprinting.* See Penal Code, section 1203.1, footnote. The question arises, who is to perform the task directed? Quite obviously, from the statute, fingerprints are to be taken where "there are facilities for taking fingerprints", that is, a sheriff's office or police department. But equally obvious is the fact that the person responsible for the probationer, either the judge or the probation officer, must see that this act is performed. In the instant case it is the judge's duty, since no probation officer is involved.

[5, 6] *Reporting and Supervision.* The general probation law contained in Penal Code, section 1203.1 provides as to every probationer that "the court shall place the defendant or probationer in and under the charge of the probation officer of the court, for the period or term fixed for probation; * * *." Similarly, section 1215 of the Penal Code provides that where "the court has suspended sentence, or where, after imposing sentence, the court has suspended the execution thereof * * *, the defendant * * * must forthwith be placed under the care and supervision of the probation officer of the court * *." In misdemeanor cases, probation can be summarily granted, that is, "without referring such cases to the probation officer." Penal Code, § 1203b. Reporting and supervision are not, however, dispensed with. The only difference is that "unless otherwise ordered by the court persons granted probation summarily *shall* report only to the court and the probation officer shall not be responsible in any way for supervising or accounting for such persons." Penal Code, § 1203b. (Emphasis added.) Thus whether probation is summarily granted or not, every probationer must be under the

supervision of either a judge or a probation officer and the probationer must be ordered to report to his supervisor.

[7] *Probation papers.* Penal Code section 1203.12 provides in part: "The probation officer shall furnish to each person who has been released on probation, and committed to his care, a written statement of the terms and conditions of his probation unless such a statement has been furnished by the court * * *." Penal Code, section 1203.4 provides: "The probationer shall be informed of this right and privilege [to have his conviction set aside] in his probation papers."

When probation is summarily granted, the papers should be furnished by the judge. To say that they need not be furnished by anyone is to deprive a defendant who is granted summary probation of a valuable right.

[8] What should these papers contain in a case such as this? At the very least, they should contain the information about the defendant's right and privilege required by the statute. More than that, however, they should advise him that he is on probation, that the term is for six months, that the conditions are that he shall not engage in criminal practices or become abandoned to improper associates.

It has been suggested that since everyone is presumed to know the law, the probationer knows when the judge suspends sentence that he is on probation and knows the length and terms of probation. That this is an unrealistic presumption is shown by the fact that even judges do not always realize that suspending a sentence is the grant of probation. See In re Cohen, 198 Cal. 221, 228, 244 P. 359; People v. Cravens, supra, 115 Cal.App.2d 201, 251 P.2d 717; People v. Rickson, 112 Cal.App.2d 475, 246 P.2d 700. In any event, the legislative intent not to indulge in that presumption is clear. The statutes provide that upon the successful completion of probation, defendant can "clear the record". The presumption of knowledge of the law would lead to the conclusion that he knows of this right. But the legislature was not content with that. It said he "shall be informed of this right and privilege in his probation papers." In view of this provision, it is only reasonable to infer that the probation papers should also specify his status as a probationer and the length and terms of probation.

Any other conclusion would result in gross injustice to the defendant. He would leave the courtroom after a "suspended sentence" without the slightest actual knowledge that he is a probationer for a certain period with certain conditions and without knowledge of his rights and privileges to "clear the record". Certainly the legislature cannot have intended that result.

[9–11] In our opinion, the acts required are mandatory. "It is true that 'shall,' used in a statute, does not always import that its provisions are mandatory, *although in most cases it does* * * *." Francis v. Superior Court, 3 Cal.2d 19, 29, 43 P.2d 300, 305 (Emphasis added.) The test is this: "If to construe it as directory would render it ineffective and meaningless it should not receive that construction." Carter v. Seaboard Finance Co., 33 Cal.2d 564, 573, 203 P.2d 758, 764; see, also, Pulcifer v. Alameda County, 29 Cal.2d 258, 175 P.2d 1. Thus, a statute was held to be mandatory where "to construe this provision of the section as directory merely would be to defeat the very purpose of its enactment." Francis v. Superior Court, supra, 3 Cal.2d at page 29, 43 P.2d at page 305. "* * * [I]t appears that if public policy is in favor of the imperative meaning, the words referred to will be held mandatory." Pleasant Grove Union School Dist. v. Algeo, 61 Cal.App. 660, 662, 215 P. 726, 727. "In construing a statute matters of substance are to be construed as mandatory." People ex rel. Del Valle v. Butler, 20 Cal.App. 379, 384, 129 P. 600, 602.

In many cases the mere use of "shall" or "must" has settled the matter without further discussion. In Board of Supervisors of Los Angeles County v. Simpson, 36 Cal.

2d 671, at pages 675–676, 227 P.2d 14, at page 17, the court said: "As pointed out above, the district attorney *must* or *shall* bring an action to abate a public nuisance when so directed by the board of supervisors. * * * 'Shall' is mandatory, Govt.Code, § 14, and certainly 'must' is also." In National Automobile & Casualty Ins. Co. v. Garrison, 76 Cal.App.2d 415, at page 417, 173 P.2d 67, at page 68, the court said: "'Shall' means 'must' (Vol. 2, Webster's New Inter. Dict. (1939), p. 2300), while 'may' means 'to have power' (Webster's New Inter. Dict. (1939), p. 1517)." In Thomas v. Driscoll, 42 Cal.App 2d 23, at page 27, 108 P.2d 43, at page 48, the court said: "Also, the use of the imperative auxiliary 'shall' signified a command. 57 Cor.Jur. 548."

The provisions relating to probation are found in chapter 1 of Title 8 of the Penal Code, consisting of sections 1191 through 1207. The appellate courts have repeatedly held that when mandatory language is used in those sections, the court has no discretion to ignore it but must comply therewith.

Section 1191 is interpreted in People v. Gilbreth, 33 Cal.App. 23, 164 P. 18. Section 1192 is interpreted in People v. Paraskevopolis, 42 Cal.App. 325, 183 P. 585. Section 1193 is interpreted in In re Levi, 39 Cal.2d 41, 244 P.2d 403. Section 1200 is interpreted in People v. Hawthorne, 63 Cal.App.2d 262, 146 P.2d 517. Section 1202 is interpreted in In re Rothrock, 14 Cal. 2d 34, 92 P.2d 634.

Section 1203 provides that "in every felony case in which the defendant is eligible for probation, before any judgment is pronounced, and whether or not an application for probation has been made, the court must immediately refer the matter to the probation officer to investigate and to report to the court * * *." In People v. Gotto, 138 Cal.App.2d 165, 291 P.2d 41, the court held this provision mandatory. It said, 138 Cal.App.2d at page 168, 291 P.2d at page 42: "In cases in which a defendant is eligible for probation the court before rendering judgment must refer the matter to the probation officer whether or not an application for probation is made. * * * In a case in which the defendant is eligible for probation, if the court renders judgment without a reference to the probation officer, the judgment will be reversed, not for a new trial, but for the purpose of proceedings in accordance with statutory procedure."

The second paragraph of section 1203 provides that probation "shall not be granted" in certain cases. This language has been held to be mandatory in many cases. In In re Sheffield, 18 Cal.App.2d 177, 63 P. 2d 829, the trial court suspended the sentence of a person convicted of assault with a deadly weapon. The appellate court said, 18 Cal.App.2d at page 178, 63 P.2d at page 830: "The trial court was without jurisdiction to grant probation to the defendant upon her plea of guilty to the offense charged."

Section 1203.1 requires, among other things, "the court *shall* place the defendant or probationer in and under the charge of the probation officer of the court * *." In In re Giannini, supra, 18 Cal.App. 166, at page 169, 122 P. 831, at page 832, it is stated that the court, because of this language has "a *duty* imposed by law upon it, namely, to place the party in charge of a probation officer." (Emphasis added.) Similarly, in In re Herron, supra, 217 Cal. 400, at page 404, 19 P.2d 4, at page 6, it was noted that "the trial court *should have* formally directed that respondent be placed under the control and supervision of the probation officer * * *." (Emphasis added.) In both of those cases, the courts held that failure to perform this duty did not invalidate the probation orders. But these cases were collateral attacks on the orders, not mandamus proceedings. It seems clear that in proper proceedings those courts would have enforced the duty which they specifically recognized.

Section 1203.1 is modified, as to summary probation granted in a misdemeanor case, by section 1203b. In effect, the judge is told by section 1203b: "If you grant probation summarily, then, unless you otherwise order, the defendant is to report to *you* and *you* are to do the supervising." The judge could, by explicit order, require the defendant to report to the probation officer. There is no indication, however, that the judge can completely dispense with the reporting and supervising. If the statute were so construed, the heart of the probation system (supervision for rehabilitation) would be gone.

In the case of People v. Johnson, supra, 134 Cal.App.2d 140, at page 144, 285 P.2d 74, at page 76, the court said: "It is true that the word 'shall' when appearing in a statute is not necessarily mandatory, and may be construed as directory or permissive, depending upon the intent of the legislature. [Citing cases.] But it is also true that '"When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted."' [Citing cases.] It is our interpretation of Penal Code, section 1203.4 that the word 'shall' as used therein was intended by the legislature to be mandatory, and if, upon the evidence and the record, a court finds that the defendant (to use the exact language of the section) 'has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof', said defendant is entitled as a matter of right to the benefits prescribed in said section. It was apparently intended that where a defendant has performed the requirements laid down in terms of probation the court should have no discretion but to carry out its part of the bargain with said defendant, even though it might appear at the time of application for said benefits that complete and permanent reformation or rehabilitation has not been accomplished."

The word "shall" is mandatory in the first sentence of section 1203.4, and it would appear entirely inconsistent to hold that it is merely directory in the second sentence which sets forth: The probationer shall be informed of this right and privilege in his probation papers.

The legislature did not use such words as "may", "might", "should", or "ought", nor any other equivocal words or phrases in the section in question. In common and ordinary usage "shall" has a compulsory or mandatory meaning. In this sense "shall" is inconsistent with and excludes the idea of discretion and operates to impose a duty —particularly if public policy is in favor of this meaning, or when addressed to public officials or where public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless an intent to the contrary appears; but the context ought to be very strongly persuasive before it is softened into a mere permission.

Let a peremptory writ of mandate issue as prayed.

WHITE, P. J., and DORAN, J., concur.

145 Cal.App.2d 761

Lou NOVA, Plaintiff and Respondent,

v.

Vincent X. FLAHERTY and Hearst Publishing Company, Inc., a corporation, Defendants and Appellants.

Civ. 21509.

District Court of Appeal, Second District, Division 1, California.

Nov. 13, 1956.

Rehearing Denied Dec. 10, 1956.

Hearing Denied Jan. 8, 1957.

Libel action by prize fighter against sports writer and newspaper publisher for publishing that prize fighter's appearance in ring was cowardly. The Superior Court, Los Angeles County, Newcomb Condee, J., entered judgment for prize fighter, and sports writer and publisher appealed. The District Court of Appeal, Fourt, J., held that where instructions given with reference to affirmative defense of truth conflicted and it was impossible to tell which instruction or instructions jury adopted in reaching verdict, giving of conflicting instructions was prejudicial to sports writer and publisher.

Judgment reversed.

1. Trial ⊂⇒194(14)

In libel action by prize fighter against sports writer and newspaper publisher for publishing that prize fighter's appearance in ring was cowardly, by instructing that publication was libelous as matter of law court improperly took from jury question whether gist or sting of publication was true.

2. Appeal and Error ⊂⇒1064(1)

In libel action by prize fighter against sports writer and newspaper publisher where instructions given with reference to affirmative defense of truth conflicted and it was impossible to tell which instruction or instructions jury adopted in reaching verdict, giving of conflicting instructions was prejudicial to sports writer and publisher.

3. Libel and Slander ⊂⇒101(1)

In libel action by prize fighter against sports writer and newspaper publisher as to issue of exemplary damages, burden of proving malice was upon prize fighter and could not shift to sports writer and publisher. West's Ann.Civ.Code, § 48a, subds. 2, 4(d).

4. Appeal and Error ⊂⇒1064(1)
Libel and Slander ⊂⇒124(8)

In libel action by prize fighter against sports writer and newspaper publisher, it was prejudicial error for court to instruct jury on issue of exemplary damages that malice might be inferred from language of publication. West's Ann.Civ.Code, § 48a subds. 2, 4(d).

Lawler, Felix & Hall, A. Laurence Mitchell, John M. Hall, Los Angeles, for appellants.

Vaughan, Brandlin & Baggot, Thomas G. Baggot, Los Angeles, for respondent.

FOURT, Justice.

The defendants Vincent X. Flaherty, sports writer, and Hearst Publishing Company, are here appealing from a judgment entered on a verdict in plaintiff's favor in the latter's action for libel. After a five-day trial the jury returned a verdict of $25,000 general damages against both defendants, $2,000 special damages, $500 punitive damages against defendant Flaherty and $7,500 against the Hearst Publishing Company.

On May 14, 1953, Joe Walcott fought "Rocky" Marciano at Chicago for the heavyweight boxing championship of the world. Walcott was knocked down and counted out in the first round.

On May 17, 1953, the Los Angeles Examiner published defendant Flaherty's account of the Marciano-Walcott fight which critically commented on Walcott's failure to get to his feet from a sitting position before the count of ten. Therein he also wrote the following concerning plaintiff Nova's fight with Joe Louis on September 29, 1941, twelve years previously:

"Less creditable were the cowardly appearances against Louis of Max Baer and Lou Nova * * *.

"Nova was like a frightened, screaming child at vaccination time. He didn't throw a punch, but got hit by only one and seemed happy about the whole defeat. They lugged his carcass and towed it in abject disgrace toward his corner. He smiled bravely in the safety of his dressing room, wiping out the manliness of every victory he had ever won."

Defendants' answer admitted the publication, but denied malice and pleaded "That the gist and sting of the words * * * were * * * true", and also that they "were * * * fair comment and criticism by a newspaper sports writer concerning a subject of interest to a large body of the public * * * voluntarily solicited when he * * * sought public acceptance as a professional entertainer."

[1] Appellants contend that the jury was erroneously instructed. In an instruction given at the plaintiff's request, the jury was told, "You are instructed that the publication heretofore read to you is *libelous as a matter of law.*" (Emphasis added.)

The very next instruction given at the plaintiff's request set forth that—"Libel is * * * 'A *false* and unprivileged publication * * *.'" (Emphasis added.)

In other instructions the jury was told that, "* * * words published * * * in order to be libelous, must possess two characteristics: First, they must be untrue; * * *"; also that, "* * * since the publication is libelous as a matter of law, * * *"; and, "From the publication of matter which is libelous as a matter of law * * *."

It is apparent that the jury was told in essence that the words complained of were *false as a matter of law.* Further, they were told, in substance, that nothing can be a libel unless it is false. Appellants aptly put it in their brief, "So to say that words are libel as a matter of law is the equivalent of saying that they are false as a matter of law."

The plaintiff in this case alleged that the "words and publication were, and are false", which allegations defendants denied, and further set up in an affirmative defense that the gist and sting of the words alleged to have been printed and published of and concerning the plaintiff were and are true. It at once becomes evident that the court took from the jury the right to determine whether the gist or sting of the publication was true. As said by the Texas Supreme Court, in Caller Times Pub. Co. v. Chandler, 134 Tex. 1, 130 S.W.2d 853, 855: "The instruction of the trial court that certain of the published statements complained of were libelous was tantamount to an instruction that there was no evidence to establish the truth of such statements, as well as an instruction that libel had been established as a matter of law."

There was substantial evidence produced by the defendants of the truth of the words and that the performance by the plaintiff in his fight with Joe Louis was cravenous. Joe Louis himself testified that during the fight, "He [Nova] acted frightened * * * during the entire fight." "It seemed he was scared * * * during the entire fight"; that during the fight Nova "landed some light punches but * * * none that I felt at all * * *"; and that "it turned out to be one of the easiest fights of my career, because to me he seemed really frightened and he didn't want to throw a punch * * *."

Gene Tunney, former world's heavyweight boxing champion, testified that he witnessed the Louis-Nova fight from a ringside seat; that Nova was "obviously without confidence"; that Nova had "a pallid expression when he came into the ring"; that Louis "stalked him [Nova] from pillar to post * * * and there was no action whatever because he [Nova] kept backing away"; that "I would say that God knows he was timid and slightly cowardly for a man who was looking to win the Heavyweight Championship of the World"; that during the entire fight Nova did not land any punches; that "it was really a pathetic situation * * *"; "Nova not only gave the appearance of being frightened, he was frightened, * * *. He started running from pillar to post, backing all over the place * * *"; that Nova "was not boxing" but was "pursuing safety"; and that Nova "had no more interest in giving a skillful exhibition of boxing that a deer has at the first crack of a rifle in the woods; he [Nova] wanted safety."

[2] Other instructions were given with reference to the affirmative defense of truth. However, at best such other instructions could only bring about a conflict. The point was material and it is now impossible to tell which instruction or instructions the jury adopted in reaching their verdict. In our opinion, the giving of the conflicting instructions was extremely prejudicial to the defendants.

[3, 4] Further, the jury was instructed that it might infer malice "* * * from * * * the language of the publication * * *." Civil Code, § 48a(2), as amended in 1945, sets forth, among other things, "* * * actual malice shall not be inferred or presumed from the publication or broadcast."

The jury was further instructed that: "If you find that the defendants have failed to prove either of their affirmative defenses of truth or fair comment, then in that event since the publication is libelous as a matter of law, the law implies malice on the part of the defendants. This means that if you find the circumstances just stated to you to exist, then the defendants have the burden of proving a lack of malice on their part." The malice referred to throughout the instructions was "actual malice" defined in Civil Code, section 48a(4) (d), sometimes called malice in fact or express malice, and the jury was so told.

On the issue of exemplary damages, the law does not imply malice on the part of a defendant from any failure on his part to prove truth or fair comment. The court in Davis v. Hearst, 160 Cal. 143, 179, 116 P. 530, 546, said, "The truth is that malice in fact is never presumed, but is always to be proved, and the utmost limit of the law is reached when it is declared that by proof of the unprivileged character of a publication, libelous *per* se, the jury may infer the existence of this malice." As to the issue of exemplary damages, the burden of proving malice was upon the plaintiff and could not shift to the defendants. Davis v. Hearst, supra; Ross v. Sweeters, 119 Cal. App. 716, 724, 7 P.2d 334. For the court to instruct the jury that "malice" meant what the code now defines as "actual malice", and then to instruct that malice might be implied was, in our opinion, prejudicial error to the defendants.

The defendants contend further, with considerable force and persuasion, that "In writing the words complained of defendant Flaherty not only drew from his own recollection of what he had observed at ringside at the Louis-Nova fight and what Povich, another Washington sports writer, had told defendant Flaherty he had observed in Nova's dressing room after the fight, but he also had in mind when writing the words complained of certain very stringent criticisms of Nova's conduct during his fight with Louis published in Eastern city newspapers by other sports columnists after such fight * * *. Although hearsay, they were properly admitted on the issue of malice, i. e., as matters which defendant Flaherty had in mind when writing the words complained of."

For example, Bill Corum, in the N. Y. Journal American of September 30, 1941, had published: "Whatever Nova's destiny is, it is not pugilism * * * the fight was pretty much a mistake from beginning to end, on account of it came so close to being no fight at all * * *. But we wouldn't be doing our job as a reporter if we didn't point out that the Californian's [Nova's] showing was so miserably bad as to be ridiculous * * * confidence had sifted out of him [Nova] before he entered the ring * * *. To be wholly truthful, I never have seen a fellow who was supposed to be a top-rank fighter, whose aim was so bad and whose judgment of distance was so poor. He threw punches at Louis which positively wound up traveling in a direction completely opposite from the one in which the alert and sharp title-holder [Louis] was going at the moment * * * I tell you only the truth when I tell you that at times, he actually was punching out with both hands at the same time like an infuriated lady shopper at a bargain counter * * * Louis * * * made Lou [Nova] do practically as he willed * * *. The trouble, it seemed to me, was that Nova was practically frightened stiff * * *."

Dave Egan, in the Boston Daily Record of October 1, 1941, had published: "A fraud of epic proportions was perpetrated on the American public the other night * * *. Nova, possessor of a cosmetic punch, an anemic stance, and several left feet, is the worst excuse for a fighter who has come stumbling along since Johnny Paycheck came out of Omaha to die of fright. He is a spectacular bum who licked, in his entire lifetime, a frayed carbon-copy of the old Max Baer, and nobody else * * *. Nova is so bad, so smelly, so much of a fakir that the Colonel * * * finally picked himself a winner. His [Nova's] challenge for the title—if such it may be called—consisted of retreating in hot haste for the entire six rounds, and throwing up hasty barricades of frightened arms as he fled around the ring. His left jabs were always short by a few inches, his rights were always short by a few feet, and that was the tip-off that the humpty-dumpty heavyweight was afraid to step in there and throw a punch. He [Nova] looked and acted like a fugitive from the remnant counter * * *. Nova wore the harried look of a hunted man from the moment he entered the ring, and his punches combined all the more dynamic qualities of peach-fuzz, eiderdown, and custard pudding."

Dan Parker, of the New York Mirror of October 1, 1941, had published:

"For a fellow who talked such an intellectual fight Lou [Nova] gave a kindergarten performance * * *. If what he demonstrated against Louis was the cosmic punch, I'll take the Sissy's Special—a swift slap on the wrist * * *. All Lou [Nova] showed against the champion was timidity, two left feet, a disposition to go right hand crazy and an utter lack of appreciation for Referee Arthur Donovan's humane action in saving his life by stopping the fight. Save for that one minute of action in the sixth, the fight was such an utter stinker that for the first time since the Twentieth Century Club started filming championship bouts, it is going to scrap the movies. The opinion is that it would do boxing in general and the Twentieth Century Club in particular great harm to exhibit them * * *. For a fighter trying to win the title, Lou [Nova] was putting up a strange performance. He back-tracked in his clumsy way, wouldn't lead and was using his two hands as if the right didn't know what the left was doing * * *. As I was saying, what Lou [Nova] needs to discover is which foot is his right one and how to throw a left jab. But on second thought, why should he, when that Hindu Hokum yields him a purse of over $70,000?"

Austen Lake, in the Boston Evening American of October 1, 1941, had published: "* * * Because we pugilistic professors saw him [Louis] asphyxiate what Monday we had cautiously called 'destiny's darling' and Tuesday termed a 'class 2–B bum' who upset our pre-watch scholarship by failing to land a solid punch in six rounds * * *."

Jimmy Powers, in the New York Daily News of October 1, 1941, had published: "* * * I got the impression that Hogi man [Nova] was frightened to death * * * Louis looked like a boxing teacher in there with one of our sub-novice Golden Glovers."

Flaherty testified that he had read the articles above mentioned at or about the time they appeared, and he could have carried in his mind the thoughts expressed by other writers when he wrote the paragraphs now sued upon. The sentiments expressed could support Flaherty's good faith.

Appellants also contend that it was error to refuse to give certain instructions requested by the defendants, that the jury's award was excessive and that under the pleadings and proof any award of special damages was erroneous. From what we have heretofore stated, the cause must be reversed and therefore no useful purpose would be served in extending this opinion.

Judgment reversed.

WHITE, P. J., and DORAN, J., concur.

Hearing denied; CARTER, J., dissenting.

146 Cal.App.2d Supp. 875

R. M. HACKER CO., Inc., etc., Plaintiff and Respondent,

v.

HOLLYMOUNT BOWL, etc., et al., Defendants and Appellants.

C. A. 9146.

Appellate Department, Superior Court,
Los Angeles County, California.

Oct. 31, 1956.

Rehearing Denied Nov. 5, 1956.

Action to foreclose mechanic's lien. The Municipal Court of the Los Angeles Judicial District, Parks Stillwell, J., rendered a judgment of foreclosure and defendants appealed. The Appellate Department of the Superior Court, Patrosso, Acting P. J., held that failure to file notice of pendency of the action within 90 days after filing claim of lien barred the right to foreclose.

Reversed and remanded with directions.

1. Mechanics' Liens 🔑268

Failure to file notice of pendency of action to foreclose mechanic's lien within 90 days after filing claim of lien, as required by statute, barred the right to enforce the lien though action itself was filed within 90 days. West's Ann.Code Civ. Proc., § 1198.1.

2. Mechanics' Liens 🔑268

Under statute providing for expiration of mechanic's lien after 90 days unless action to enforce it has been commenced and notice of pendency of such proceedings filed "as provided in section 409," quoted phrase was intended only to identify the notice of pendency referred to, and did not authorize filing of notice of pendency any time after filing of complaint. West's Ann. Code Civ.Proc., §§ 409, 1198.1.

On Petition for Rehearing

3. Appeal and Error 🔑835(2)

Where mechanic's lien foreclosure action was presented by both parties in trial court and on appeal as involving only question of whether notice of pendency of action was to be filed within 90 days, whether failure to file such notice should have been specially pleaded as a defense could not be raised for the first time on petition for rehearing.

Harold B. Pool, Los Angeles, for appellants.

Herb Wiener, Los Angeles, for respondent.

PATROSSO, Acting Presiding Judge.

[1] This action is one to foreclose a mechanic's lien, wherein a judgment of foreclosure was entered from which the defendants appeal. The instant action was filed within 90 days after the filing of the claim of lien, but a notice of pendency of said action was not filed until more than 90 days after the filing of the lien. The question presented is whether such failure to file notice of pendency of the action within the period stated operates to bar the right to enforce the lien. We have concluded that the question must be answered in the affirmative and accordingly are reversing the judgment.

Section 1198.1 of the Code of Civil Procedure, insofar as material here, reads as follows: "No lien provided for in this chapter binds any property for a longer period than 90 days after the same has been filed *except as hereinafter provided,* unless within that time, proceedings to enforce the same be commenced in a proper court *and a notice of pendency of such proceedings be filed as provided in Section 409.* * * *"

The foregoing language was formerly found in section 1190, except for the portions thereof which we have italicized and which were added by an amendment adopted in 1953. The exception therein mentioned is not of moment here.

We find it difficult to believe that the language of the provision quoted above presents any great problem of interpretation. Its grammatical meaning is clear and we find nothing therein to suggest that we should ignore it in order to give effect to its true intent and meaning. [23 Cal.Jur., p. 732, sec. 110.] What the statute plainly says is that no such lien "binds any property" for a longer period than 90 days after the filing of the same unless, *within that period,* (1) a suit to enforce the same is filed in a proper court and (2) a notice of pendency of the action is filed. The words "unless within that time" are equally applicable both to the requirement of filing an action and the filing of a notice of pendency thereof. This, we believe, is made unmistakably plain when regard is had to the obvious purpose of the enactment which was to limit the time within which a mechanic's lien shall be enforceable. As originally enacted, the claimant might preserve his right to enforce the lien beyond the ninety day period by commencing a suit to foreclose the same within that time in a proper court, but by the 1953 amendment an additional condition was added, namely, the filing, within the same period, of a notice of the pendency of the action. If the legislature did not intend that the ninety day period of limitation should apply to the filing of the notice of the pendency of the action, the provision would appear to be wholly unrelated to the purpose of the section, which, as noted, was solely that of placing a time limit upon the enforceability of a mechanic's lien.

[2] Plaintiff contends that a different construction is required by reason of the concluding words in the sentence: "as provided in Section 409." It argues that, because section 409, which authorizes the filing of a notice of pendency of action in an action affecting the title or right of possession of real property, provides that such notice may be filed at any time after the filing of the complaint, we must conclude that the legislature did not, by the language of 1198.1, intend to require the filing of such a notice within the 90 day period. To this there is a ready answer. Section 409 is a general section applicable to all classes of actions affecting the title or right of possession of real property and is permissive merely; it in no way affects the maintenance of such actions. Section 1198.1, on the other hand, is not only a special statute dealing with actions for the foreclosure of mechanic's liens, but mandatory in its terms and prescribing a condition to the maintenance thereof. Section 1198.1 is therefore controlling with respect to the particular class of actions to which it relates—the foreclosure of mechanic's liens. Moreover it appears only reasonable to conclude that by the reference in section 1198.1 to section 409, the legislature intended no more than to identify the "notice of pendency of such proceedings", the filing of which is thereby required within the 90 day period, as being the same notice as that referred to in section 409.

Inasmuch as it is conceded that the appealing defendants are not personally liable and no personal judgment was rendered against them, there is no occasion for a new trial.

The judgment is reversed and the cause remanded to the trial court with directions to enter judgment in favor of defendants.

KAUFFMAN, J., concurs.

Order Denying Rehearing

Before PATROSSO, Acting P. J., and KAUFFMAN, J.

BY THE COURT.

The petition of respondent for a rehearing after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hearby denied.

Memo

[3] Both in the trial court and here the case was presented by both parties as

involving only one question, namely, whether a proper construction of C.C.P. § 1198.1 required not only the filing of an action to foreclose a mechanic's lien within 90 days after the filing of the lien, but also the filing of a notice of the pendency of the action within the same period. It is therefore too late for plaintiff to undertake to raise for the first time in its petition for rehearing the question as to whether such failure should have been specially pleaded as a defense in defendants' answer. Pasadena Ice Co. v. Reeder, 1929, 206 Cal. 697, 705, 275 P. 944, 276 P. 995; A. F. Estabrook Co. v. Industrial Acc. Comm., 1918, 177 Cal. 767, 771, 177 P. 848.

47 Cal.2d 380

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles LINSON, Defendant and Appellant.

Cr. 5908.

Supreme Court of California.
In Bank.
Nov. 27, 1956.

Prosecution for second degree burglary. The Superior Court of Los Angeles County, Edwin L. Jefferson, J., entered judgment of conviction and defendant appealed. The Supreme Court, Carter, J., held that evidence was sufficient to identify defendant as one committing the theft and sustained the conviction, and that argument of district attorney that defendant had been identified by a member of his own race was not prejudicial.

Affirmed.

1. Burglary ⚷41(1)

Evidence was sufficient to support jury conclusion that defendant was the one guilty of theft of the articles and sustained conviction for second degree burglary.

2. Criminal Law ⚷1171(1)

In prosecution for second degree burglary, argument of prosecuting district attorney that defendant had been identified by a member of his own race was not prejudicial.

Ellery E. Cuff, Public Defender, Los Angeles, under appointment by the Supreme Court, and Richard B. Goethals, Deputy Public Defender, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant Charles Linson appeals, after a trial by jury, from a judgment of conviction of second degree burglary, and from an order denying his motion for a new trial. Defendant's application for augmentation of the record to include the closing argument of the district attorney was granted by this court.

On Saturday, August 20, 1955, at about 5:15 p. m., Mrs. Fuller, an employee of the Volunteers of America, closed and locked the doors of the building housing that establishment which was located at 50th and Central Avenue in the city of Los Angeles. She testified that there was a front door, an inner door leading into a small back room, and a door leading from the back room into a sort of parking lot in the rear. The parking lot was enclosed by a solid metal fence which had a metal gate which opened onto 50th Street. On Monday morning when Mrs. Fuller returned to work she found that the back door, and the door opening into the main shop from the small back room, had been tampered with, and broken into, and that an electric fan, three clocks, a hot plate, a bicycle, and about $40 in money were missing.

A gas station owner whose business was located directly across the street from the Volunteers of America building testified that on Saturday, August 20th, he saw the defendant who was driving a green panel truck in the immediate vicinity of the shop from about 3:30 or 4:00 p. m. until between 5:00 and 6:00 p. m.; that defendant had his truck parked in three different places, but between 5:00 and 6:00 p. m. had it parked by the gate of the parking lot in the rear of the Volunteers of America building; that he saw him go in and out of the gate three or four times; that he telephoned the owner of a beauty shop situated on the same parking lot and told her what he had seen; that he saw the defendant drive his panel truck away. Mrs. Bush, the owner of the beauty shop, testified that after the telephone call, she wrote down the license number of the panel truck; that she saw the defendant come out of the back door of the Volunteers of America building with a fan and a hot plate in his hands; that he took the articles to, and put them, in the truck; that she gave the truck license number to a police officer; that all of this took place sometime between 5:00 and 6:00 p. m.; that she had seen the truck and the defendant in the immediate vicinity from around two or three that afternoon until between 5:00 and 6:00 p. m.; that she did not see the defendant leave in his truck. A police officer testified that he found defendant by tracing the license number given him by Mrs. Bush; that defendant denied having been in the vicinity of 50th and Central on Saturday, August 20th. A Mr. Gare testified that defendant had been at his used car lot between 4:00 and 5:00 p. m., Saturday, August 20th.

On the witness stand defendant testified that he had been at a hardware store at 50th and Central at around 2:30 p. m., Saturday, August 20th; that about 3:00 p. m. he went home; that he then went to Mr. Gare's used car lot, and from there to his niece's home; that he didn't know the license number of his car; that he did not break and enter the Volunteers of America building and take the missing articles. Defendant admitted five prior felony convictions.

Defendant contends that the evidence is insufficient to sustain the judgment; and that the district attorney committed prejudicial misconduct in his closing argument to the jury.

[1] There appears to be no merit to defendant's contention that the evidence is insufficient to sustain the judgment. He was seen, and identified by two witnesses, one of whom saw him coming out of the back door of the Volunteers of America building with two of the missing articles in his hands. Mrs. Fuller testified that she had closed and locked all doors to the building at about five-fifteen in the afternoon of Saturday, August 20th; that she had not given defendant permission to enter or to take the articles. From this evidence, the jury could, and did, draw the conclusion that defendant was the one guilty of the theft of the articles.

[2] Defendant argues that the district attorney was guilty of using "prejudice" in that he argued defendant's prior convictions to the jury. He also argues that his race was used against him in that the district attorney "was guilty of misconduct by his remarks to the jury in his closing argument that this was not a case where the *white* man made the identification, but the identification was made by the *Negro,* one of his own kind, this misconduct comes within the rule of People v. Simon, 80 Cal.App. 675 [252 P. 758, 759]." (Emphasis that of the defendant.) The Simon case is not at all like the one under consideration. There, the defendant, who was of the Jewish race, was charged with wilfully burning insured property with intent to defraud the insurers. The district attorney there argued that "There has, of course, grown up a suspicion in this country with reference to fires whenever a Jew has anything to do with it. * * *" There were several other references to Jews having burned insured buildings in order to collect the insurance. The portion of the district attorney's argument of which defendant complains reads as follows: "I would also call this to your attention, and maybe this is my own particular brand of mountain folklore, but I am always more convinced if I have persons of a particular race identify their own kind. I don't know whether it is true or not that a member of the negro race is more apt to identify, and with more certainty, a fellow member of his race than not, but here you do have that case where Mr. Holloway identifies a member of his race, and I think the defendant, in good conscience, would admit he has some distinctive features. The other lady identifies him positively." In the case at bar, the jury saw the defendant and the witnesses and if they were of the Negro race that fact must have been obvious with reference thereto. It does not appear, however, how this statement could have prejudiced defendant.

The judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

Dorothy A. ANDERSON, Plaintiff and Respondent,

v.

Maudie O. MART, as Administratrix of the Estate of William E. Anderson, also known as William Everett Anderson, Deceased, Defendant and Appellant.

S.F. 19535.

Supreme Court of California.
In Bank.
Nov. 16, 1956.

Hearing Denied Dec. 12, 1956.

Action by divorced wife against divorced husband's estate for present value, based upon her life expectancy, of support provision of property settlement agreement entered into prior to divorce. The Superior Court, Contra Costa County, Homer W. Patterson, J., entered judgment for divorced wife, and husband's administratrix appealed. The Supreme Court, Traynor, J., held that where property settlement agreement provided that husband would pay certain amount per month to wife for support of wife and child, and that agreement was full and complete settlement of property rights of parties, and that agreement could be modified only by mutual consent, and that each was thereby released from all claims and demands of other, including that for support, provisions for support were integral and inseparable part of property settlement agreement, and obligation could be enforced by remarried wife against estate of deceased former husband.

Judgment reversed with directions.

Carter, J., and Schauer and Shenk, JJ., dissented in part.

Opinion, Cal.App., 294 P.2d 977, vacated.

1. Executors and Administrators 🔑202(1)

Where, prior to institution of divorce action by wife, parties executed property settlement agreement providing, inter alia, that husband would pay certain amount per month to wife for support of wife and child, and that agreement was full and complete settlement of property rights of parties, and that agreement could be modified only by mutual consent, and that each was thereby released from all claims and demands of other, including that for support, provisions for support were integral and inseparable part of property settlement agreement, and support obligation could be enforced by remarried wife against estate of deceased former husband. West's Ann.Civ.Code, § 139.

2. Executors and Administrators 🔑202(1)
Husband and Wife 🔑279(4)

Where other provisions of property settlement agreement established that provision for monthly payments was inseparable part of agreement and not provision for alimony, and at time agreement was executed statute provided that such payments did not terminate on death of husband unless agreement so provided, failure of agreement to provide for termination of payments on death of husband and provision that payments were to be subject to approval of court, did not compel conclusion that provision for monthly payments was for alimony, within rule that alimony obligation terminates on death of husband. West's Ann.Civ.Code, § 139.

3. Executors and Administrators 🔑202(1)
Husband and Wife 🔑279(4)

That property settlement agreement provided that monthly payments to wife were subject to approval of court did not establish that they were alimony, and hence terminable on death of husband, where provision for court approval was appropriate in view of fact that support was for minor child as well as wife.

4. Executors and Administrators 🔑202(1)
Husband and Wife 🔑279(4)

Provisions of property settlement agreement, that each waived right to share in estate of other, either under will or by succession, or by family allowance, or otherwise, and that neither would thereafter contract any debt or liability against property or estate of other, did not establish that monthly support payments would terminate on death of husband, where neither provision referred to obligations created by agreement, which wife sought to enforce against estate of deceased former husband.

5. Judgment 🔑252(2)

Primary purpose of statutory provision that relief granted to plaintiff, if there be no answer, cannot exceed that which he shall have demanded in complaint, but that in any other case court may grant him any relief consistent with case made by complaint and embraced within issues, is to insure adequate notice to defendant of demands made upon him. West's Ann.Code Civ.Proc., § 580.

6. Divorce 🔑236, 297

Where divorce complaint disclosed that wife was seeking support provided for her and child in property settlement agreement, and husband, who defaulted after answer, had adequate notice that award sought was that provided for in agreement, court had power to approve property settlement agreement and incorporate it in its decree. West's Ann.Code Civ.Proc., § 580.

7. Divorce 🔑255

If wife, who had been awarded support in divorce decree in accord with provision for support in property settlement agreement, had attempted to secure benefits of alimony decree by attacking jurisdiction of court to make support award pursuant to agreement, she would have been estopped from attacking decree which she had procured.

8. Executors and Administrators 🔑202(1)

Where wife, who had been awarded support in divorce decree in accord with provision for support in property settlement agreement, never received larger payments than agreement provided, and never attempted to secure benefits of alimony award by seeking increase in amount of payments, wife could enforce support provision of property settlement agreement as contract obligation against estate of deceased former husband, even though support provision of agreement had not been merged into divorce decree.

9. Divorce 🔑255

Where certain amount per month award for support of wife and child in divorce decree was enforceable against the estate of deceased husband because based on settlement agreement, but decree did not allocate amount of award attributable to child's support, trial court, in action against estate of deceased husband could determine question of allocation.

10. Divorce 🔑310

Executors and Administrators 🔑202(1)

Where certain amount per month award for support of wife and child in divorce decree was enforceable against estate of deceased husband because based on settlement agreement, that part of obligation attributable to support of child would be terminated on his reaching majority, and wife, in action against estate, would be entitled to present value of that amount per month for period of child's minority plus present value of amount attributable to wife's support for remainder of her life expectancy.

Johnson & Harmon and Robert H. Johnson, San Francisco, for appellant.

Pasquinelli, O'Connor & Panelli and Timothy A. O'Connor, San Jose, for respondent.

TRAYNOR, Justice.

On March 12, 1948, plaintiff Dorothy A. Anderson and decedent William E. Anderson executed a property settlement agreement. On June 22, 1948, plaintiff filed an action against decedent for divorce. In her complaint she alleged jurisdictional facts, extreme cruelty, her fitness for child custody, and that she "does not have sufficient money, means or property with which to support and maintain herself and the minor child of the parties hereto, and that the sum of $60 per month is a reasonable and necessary sum to be allowed said plaintiff as and for the support and maintenance of said plaintiff and the minor child of the parties hereto." She alleged that "there is no community property * * *, a property settlement having been entered into by and between the parties." She prayed for a dissolution of the marriage, for custody of the child, and that "the defendant be required to pay to plaintiff the sum of $60 per month as and for the support and maintenance of said plaintiff and the minor child" and "for such other and further relief as the court deems meet and proper." There was no request that the court approve the agreement or incorporate it in its decree.

The decedent filed an answer in *propria personna* admitting all allegations except the allegation of extreme cruelty and the allegations with respect to support. He made no further appearance in the action, and it was tried as a default action.

On July 26, 1948, an interlocutory decree was entered granting the divorce, awarding custody of the child to plaintiff, and ordering decedent to "pay to plaintiff the sum of $60 per month as and for the support and maintenance of said plaintiff and the minor child. * * *" It also decreed that the property settlement agreement "be, and the same is hereby approved and ratified, and the terms thereof are incorporated herein with the same force and effect as if set forth in full herein." Decedent did not appeal, and on October 11, 1949, a final decree of divorce was entered, incorporating the terms of the interlocutory decree. Decedent remarried, and his widow, Maudie O. Mart, who remarried after his death, is the administratrix herein.

On September 24, 1951, plaintiff and her attorney signed and delivered to decedent a stipulation entitled in the court and cause and providing that the interlocutory and final decrees "may be modified so as to provide that the defendant pay to plaintiff the sum of Fifty Dollars ($50) a month as and for the support and maintenance of plaintiff and the minor child of the parties hereto, and that the above-entitled court may cause to be made and entered herein its order so modifying said decrees." The stipulation was not filed, and the decrees were not modified, but thereafter decedent paid plaintiff only $50 per month. On April 5, 1952, decedent died. Plaintiff presented to the administratrix of his estate a claim for $60 per month for her life expectancy. The claim was rejected, and plaintiff brought this action.

The trial court found that the estate was indebted to plaintiff on the property settlement agreement and that the agreement was incorporated in and made a part of the decree in the divorce action and that the provision for support therein was an inseparable part of an integrated property settlement agreement and therefore entered judgment for plaintiff for $14,190 to be paid out of the funds of the estate in due course of administration. That sum was fixed by the court as the present value of $50 per month for plaintiff's life expectancy. Defendant administratrix appeals.

In their agreement plaintiff and decedent provided:

"Whereas, there is one (1) child the issue of said marriage of the parties hereto * * *; and,

"Whereas, the parties hereto desire to avoid expense, delay, inconvenience, and litigation with respect to the settlement of their property rights and obligations; * * *

"Now, Therefore, in consideration of the premises, and in consideration of the mutual promises and undertakings hereinafter set forth, and intending to be legally bound, the parties hereto do mutually agree and promise as follows:

"First: That * * * each party is hereby released and absolved from any and all claims and demands of the other, including all claims of either party upon the other party for support and maintenance as husband and wife, or otherwise, it being understood that this instrument is intended to settle the rights of the parties hereto in all respects, except as hereinafter provided. * * *

"Second: That any and all property acquired by either party from and after the date hereof shall be the sole and separate property of the party acquiring the same; and each party does hereby grant to the other party all such future acquisitions of property as the sole and separate property of the party acquiring the same.

"Third: That each party shall have the immediate right to dispose of or bequeath by Will his or her interests in and to any and all property belonging to him or her from and after the date hereof, and said right shall extend to all of the aforesaid future acquisitions of property as well as to all property set over to either party under this agreement.

"Fourth: That each party does hereby waive and quitclaim any right to share in the estate of the other party, either under a Will or by the laws of succession, or by family allowance, or otherwise.

"Fifth: That each party does hereby accept the provisions herein made for him or for her in full satisfaction of his or her right to the community property of the parties, or other property acquired after marriage by either party, and in full satisfaction of his or her right, if any, to alimony or support and maintenance. Neither party shall at any time hereafter contract any debt, charge, or liability against the property or estate of the other party, and, in the event either party shall do so, he or she will save the other party harmless and free from loss occasioned by such act."

Provisions were then made for the division of the property. Bank deposits amounting to $5,726.87 and United States War Savings bonds having an approximate maturity value of $2,500 were divided equally; decedent received the better of two automobiles and a vacant lot, appraised in his estate at $600; and plaintiff received the home, sold later for $6,000, and furnishings.

Paragraph 15 provided: "It is understood and recognized by the parties hereto that they can control the custody of the minor child of the parties hereto only to the extent that their agreement coincides with the order which any Court of competent jurisdiction may make for the best interest of said child. Subject to such recognized premise of law, the parties hereto agree that the Wife shall have the care, custody and control of the minor child, with reasonable right of visitation vested in Husband."

Paragraph 16 provided: "Subject to approval by any Court of competent jurisdiction, Husband agrees to pay to Wife the sum of Sixty ($60) Dollars per month as and for the support and maintenance of Wife and the minor child of the parties hereto, commencing forthwith and continuing in a like sum each and every month thereafter."

Paragraph 18 provided in part: "* * * this agreement is intended to be, and is, a full, final and complete settlement of the property rights of the parties hereto and of all claims which either party has or might claim to have had against the other, were it not for this agreement. * * *"

Paragraph 19 provided: "This agreement can be modified, cancelled, or rescinded only by a written agreement for that purpose, executed by the parties hereto. * * *"

[1] In Messenger v. Messenger, 46 Cal. 2d 619, 297 P.2d 988, 993, we held that when "the parties have clearly expressed their 'purpose of fixing and adjusting their personal and property rights,' have provided that the provision for alimony is 'for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature,' and the wife has waived 'all right to future maintenance and support * * *, except as herein otherwise expressly provided,' the conclusion is inescapable that they have made the provisions for support and maintenance an integral and inseparable part of their property settlement agreement. With such conclusive evidence of integration, the provisions for support and maintenance or alimony would be subject to modification only if the parties expressly so provided." It is abundantly clear from the second whereas clause, the now therefore clause, and the first, fifth, and eighteenth

paragraphs quoted above, that the agreement in the present case falls squarely within the foregoing rule.

[2] Defendant contends, however, that the failure of the agreement to provide for the termination of the payments on the death of decedent or remarriage of plaintiff and the provision that the payments were to be subject to the approval of the court, compel the conclusion that the provision for monthly payments was for alimony. Accordingly, she concludes that it could be modified by the court and that the obligation it imposed terminated on decedent's death. If it appeared from other provisions that separable alimony payments were intended, the omission of termination dates could be explained, as defendant contends, on the theory that the payments would terminate on the death of decedent. See, Miller v. Superior Court, 9 Cal.2d 733, 737, 72 P.2d 868; Roberts v. Higgins, 122 Cal.App. 170, 171, 9 P.2d 517, or remarriage of plaintiff. See, Civil Code, § 139. The other provisions of the agreement establish, however, that the provision for monthly payments was an inseparable part of the property settlement and not a provision for alimony, and at the time the agreement was executed * such payments did not terminate on the death of the husband or the remarriage of the wife unless the agreement so provided. Parker v. Parker, 193 Cal. 478, 480–481, 225 P. 447; Lane v. Bradley, 124 Cal.App.2d 661, 665, 268 P.2d 1092; Anthony v. Anthony, 94 Cal.App.2d 507, 511, 211 P.2d 331; Hamilton v. Hamilton, 94 Cal.App.2d 293, 300, 210 P.2d 750; In re Estate of Mesmer, 94 Cal.App. 97, 103, 270 P. 732; see, Miller v. Superior Court, supra, 9 Cal.2d 733, 737, 72 P.2d 868; Pearman v. Pearman, 104 Cal.App.2d 250, 255, 231 P.2d 101; Gosnell v. Webb, 66 Cal.App.2d 518, 521, 152 P.2d 463. Under these circumstances the failure so to provide clearly indicates that the payments should not so terminate and fortifies the conclusion that a separable provision for alimony was not intended.

[3] The contention that the provision that the payments were to be subject to the approval of the court establishes that they were alimony is likewise without merit. Thus the parties had expressly recognized that any agreement affecting the interests of their child was subject to the approval of the court, and since the monthly payments were to be made for the support of both plaintiff and the child, it was appropriate that a provision for court approval should be included. The fact that the parties recognized that they could not by their agreement control the court's power to make orders for the support of their child in no way conflicts with their clearly expressed intention that as between themselves their agreement should be final and conclusive. See, Puckett v. Puckett, 21 Cal.2d 833, 839, 842–843, 136 P.2d 1. That this was their understanding is further indicated by the fact that when a modification was desired by decedent and agreed to by plaintiff, it was negotiated pursuant to paragraph 19, which provided that the agreement could only be modified "by a written agreement for that purpose."

[4] It is contended that the provision in the fourth paragraph that "each party does hereby waive and quitclaim any right to share in the estate of the other party, either under a Will or by the laws of succession, or by family allowance, *or otherwise*," and the provision of the fifth paragraph that "Neither party shall at any time *hereafter* contract any debt, charge, or liability against the property or *estate* of the other party, and, in the event either party shall do so, he or she will save the other

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* In 1951 section 139 was amended to provide in part that "Except as otherwise agreed by the parties in writing, the obligation of any party in any decree, judgment or order for the support and maintenance of the other party shall terminate upon the death of the obligor or upon the remarriage of the other party." Since the agreement in this case was executed, and the decree entered, in 1948, the effect of the 1951 amendment on the interpretation of similar agreements and decrees made after its enactment is not before us.

party harmless and free from loss occasioned by such act" establish that the payments were to terminate on decedent's death. (Emphasis added.) It is obvious that the quoted provision of the fifth paragraph is irrelevant in this respect since it refers to any debt, charge, or liability to be contracted hereafter and not to the obligations assumed in the agreement itself. It is an obligation assumed in the agreement itself that plaintiff is now seeking to enforce. It is also obvious that the fourth paragraph refers only to any rights to share in the estate not otherwise provided for in the agreement. It is similar in its broad language to the provisions of the second and third paragraphs in which each of the parties waived all rights in any of the property assigned to the other and any property to be thereafter acquired by the other. Taken together these provisions make clear that neither party should have any rights in the property or the estate of the other growing out of the marital relationship. The agreement was executed to settle and dispose of those rights in exchange for those provided in the agreement, and manifestly the agreement would be self-stultifying if the mutual relinquishment of marital rights was so broad as to prevent the enforcement of the contractual obligations given in consideration therefor. Accordingly, since it is clear that none of these provisions was intended to prevent plaintiff from enforcing her rights under the agreement and since paragraph four makes no distinction between rights accruing before or after decedent's death, it has no bearing on the applicability of the rule that payments agreed to as an inseparable part of a property settlement do not terminate on the death of the husband.

Defendant contends that the pleadings in the divorce action did not put the property settlement agreement in issue and that since plaintiff did not pray for any relief with respect to property, the court had no power to approve the property settlement agreement and incorporate it into its decree. See, Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333.

Code of Civil Procedure section 580 provides: "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the Court may grant him any relief consistent with the case made by the complaint and embraced within the issue." If under the pleadings, the allegation of plaintiff's need for an award of $60 per month for the child's and her support and her prayer therefor may reasonably be interpreted as made pursuant to the provisions of the property settlement agreement, the court, in basing its award on the agreement of the parties, did not grant relief in excess of that demanded in the complaint or inconsistent with the case made by the complaint and embraced within the issue.

[5, 6] The primary purpose of section 580 is to insure adequate notice to the defendant of the demands made upon him. Burtnett v. King, supra, 33 Cal.2d 805, 811, 205 P.2d 657; Pacific Mut. Life Ins. Co. of California v. McConnell, 44 Cal.2d 715, 727, 285 P.2d 636. In the present case it is clear that decedent was given adequate notice that the award sought was that provided for in the agreement. In her complaint plaintiff alleged that there was no community property "a property settlement agreement having been entered into by and between the parties." Decedent admitted this allegation, and he was aware of the terms of the agreement. He knew that it provided for the payment of $60 per month for the support of plaintiff and the child subject to the approval of the court. The complaint contained no allegation attacking the validity of the agreement, cf., Smith v. Smith, 40 Cal.2d 461, 464, 254 P.2d 1, and plaintiff prayed for an order for the payment of precisely the sums agreed to therein. Under these circumstances, the reasonable interpretation of the complaint is that plaintiff was not abandoning the contract, but was seeking the support provided therein. The agreement contemplated court approval of the provision for support, and in her allegations that the payments sought were necessary and reasonable, plaintiff set forth her grounds for having the court approve them.

[7, 8] Moreover, the pleadings and the findings in this action would support the judgment on the ground that decedent was liable under the terms of the contract itself even if the support provision of the agreement was not merged into the divorce decree. At the trial plaintiff sought and secured a decree awarding her support pursuant to her agreement. She has never received larger payments than the agreement provided, and she has never attempted to secure the benefits of an alimony award by seeking an increase in the amount of the payments. Had she attempted to secure the benefits of an alimony decree by attacking the jurisdiction of the court to make the support award pursuant to the agreement, she would have been estopped to attack the decree she procured. Whitlow v. Superior Court, 87 Cal.App.2d 175, 185, 196 P.2d 590; In re Estate of Smith, 86 Cal.App.2d 456, 470, 195 P.2d 842; Seymour v. Seymour, 18 Cal.App.2d 481, 483–484, 64 P.2d 168; see, 1 Witkin, California Procedure, 412–413. Since plaintiff did not secure, and under the divorce decree could not secure, anything to which she was not entitled under her agreement, defendant could raise no valid objection to its enforcement as a contract obligation.

[9, 10] The trial court fixed the amount of the judgment as the present value of $50 per month for plaintiff's life expectancy of approximately 24 years. The payments were ordered, however, for the support of both plaintiff and the minor child. Although the amount of the payments cannot be reduced during the minority of the child, Puckett v. Puckett, supra, 21 Cal.2d 833, 843, 136 P.2d 1, the obligation to pay the amount thereof attributable to the child's support terminates on his reaching his majority, and when the decree is silent on the question of allocation, the trial court may determine the allocation in subsequent proceedings. Hopkins v. Hopkins, 46 Cal.2d 313, 294 P.2d 1; Meek v. Meek, 51 Cal.App.2d 492, 495, 497, 125 P.2d 117; Putnam v. Putnam, 51 Cal.App.2d 696, 699, 125 P.2d 525. It should have done so in this case and awarded plaintiff the present value of $50 per month for the period of the child's minority plus the present value of the amount attributable to plaintiff's support for the remainder of her life expectancy.

The judgment is reversed with directions to the trial court to redetermine the amount thereof in accord with this opinion. Each party shall bear her own costs on this appeal.

GIBSON, C. J., and SPENCE and McCOMB, JJ., concur.

CARTER, Justice (concurring and dissenting).

I concur in the result reached by the majority insofar as it holds that the minor child should not receive support from the estate of its deceased father except until it reaches its majority and that the trial court should be directed to determine the amount to be allocated to it out of the total support payments until that time. I dissent from that part of the majority opinion which holds that plaintiff, the first wife of the decedent, is entitled to receive any part of the support provided for from the estate of the decedent.

I am of the opinion that Paragraph Sixteenth of the agreement is, and was intended by the parties, to be severable from the balance of the agreement. Paragraph Sixteenth provides that "Subject to the approval by any Court of competent jurisdiction, Husband agrees to pay to Wife the sum of Sixty ($60.00) Dollars per month as and for the support and maintenance of Wife and the minor child of the parties hereto, commencing forthwith and continuing in a like sum each and every month thereafter." The property settlement division was set forth in preceding paragraphs and provided for an almost equal division of the community property of the parties. The provision for $60 per month was obviously not considered by the parties as equalizing the division of the property and it was made expressly subject to court approval, which the property division had not been. It seems very obvious that this case does not fall within the rule of the Messenger case (Messenger v. Messenger, 46 Cal.2d 619, 297 P.2d 988, where a majority of this court held that the alimony provision was clearly for and in consideration of the permanent and lasting division and settlement of all their property rights of every kind and nature. No such provision is found in the case at bar.

In plaintiff's complaint for divorce she made the following allegations: "That there is no community property the result of said marriage of the parties hereto, a property settlement agreement having been entered into by and between the parties"; and "That plaintiff does not have sufficient money, means or property with which to support and maintain herself and the minor child of the parties hereto, and that the sum of $60 per month is a reasonable and necessary sum to be allowed to said plaintiff as and for the support and maintenance of said plaintiff and said minor child of the parties hereto." In its interlocutory decree of divorce, the trial court, in four separate paragraphs ordered (1) that plaintiff be granted a divorce; (2) that plaintiff have the custody and control of the minor child; (3) that defendant pay to plaintiff "the sum of $60.00 per month *as and for the support and maintenance of said plaintiff and the minor child of the parties hereto,* said payments commencing forthwith and continuing in a like sum on the 23rd day of each and every month thereafter" (emphasis added); (4) that "It Is Further Ordered, Adjudged and Decreed that the Property Settlement Agreement made and entered into between the parties hereto on the 12th day of March, 1948, be, and the same is hereby approved and ratified, and the terms thereof are incorporated herein with the same force and effect as if set forth in full herein." It therefore clearly appears that both the plaintiff and the court considered that the provision for monthly payments was a separate and distinct thing from the property settlement. The original complaint did not pray the court approval of the property settlement agreement and the court specifically so found in the case at bar. The complaint set forth, merely, that there was no community property because it had been theretofore divided between the parties and prayed for, on the ground of need, the sum of $60 per month as support for plaintiff and the minor child.

Paragraph Fourth reads as follows: "*That each party does hereby waive and quitclaim any right to share in the estate of the other party, either under a Will or by the laws of succession, or by family allowance,: or otherwise.*" (Emphasis added.) Paragraph Fifth reads as follows: "That each party does hereby accept the provisions herein made for him or for her in full satisfaction of his or her right to the community property of the parties, or other property acquired after marriage by either party, and in full satisfaction of his or her right, if any, to alimony or support and maintenance. *Neither party shall at any time hereafter contract any debt, charge, or liability against the property or estate of the other party, and, in the event either party shall do so, he or she will save the other party harmless and free from loss occasioned by such act.*" (Emphasis added.)

The provisions of the agreement relating to the division of property were incorporated by reference in paragraph Sixth of the decree and ratified and approved by the court. The provision for the monthly payments for the support and maintenance of the plaintiff and the minor child of the parties was set forth in full in paragraph Fifth of the decree of divorce thus indicating that the court, as well as the parties, intended the provision as something separate and apart from the property settlement provisions of the agreement. This provision was therefore merged in the judgment. Hough v. Hough, 26 Cal.2d 605, 160 P.2d 15. Each party did, by the terms of the agreement, specifically waive any and all right to share in the estate of the other, which provision is inescapable proof that the support payments were not to continue after the death of the one obligated therefor. In the majority opinion it is said that "It is also obvious that the fourth paragraph refers only to any rights to share in the estate *not otherwise provided for in the agreement*." (Emphasis added.) In so holding the majority is writing something into both the agreement and decree contrary to the intentions of the parties and the court. The court treated the support provision as something entirely separate and apart from the agreement. The property of the parties was evenly divided and plaintiff in her complaint alleged that "there is no community property" and prayed for support for herself and the child on the ground of need. It would appear that had she considered the monthly payment provision as part of the community property settlement agreement her complaint would have been differently worded. In Parker v. Parker, 193 Cal. 478, 481, 225 P. 447, 448, it was held that provision for permanent alimony is founded upon the legal obligation which the law imposes upon the husband to support the wife, and "that obligation comes to an end upon the death of either spouse. So regardless of the language used by a court in making a provision in its decree for the payment of alimony, that provision ceases to be effective upon the death of either spouse. But here we have a provision [based upon an agreement to pay the support during the lifetime of the wife] based upon an agreement of the parties, in effect a contract. It is not an award of permanent alimony, but an award of a life annuity give in lieu of a division of the property of the spouses. It rests, not upon the obligation which the law imposes upon a husband to support his wife, but upon the contract of the parties hereto." I have heretofore pointed out that a construction of the agreement as a whole (as we are bound to do) shows clearly that the monthly support payments were intended to be separate from the division of property and were not in lieu thereof; that each party waived any right in the estate of the other; that the court specifically set forth the provision for monthly payments in the decree which is now the sum and substance of the parties' rights. In Roberts v. Higgins, 122 Cal.App. 170, 9 P.2d 517, the court decree awarded support and maintenance to the wife and the appellate court held that alimony terminated on the death of either party. The conclusion appears inescapable that the provision for support insofar as it relates to the plaintiff terminated upon the death of her former husband and that she has no claim against his estate for her support after his death.

So far as the minor child of the parties is concerned a different problem is presented. We held in Taylor v. George, 34 Cal.2d 552, 212 P.2d 505, 507, that "In California the rule is that the obligation of a father to support his minor child which is fixed by divorce decree or property settlement agreement, does not cease upon the father's death, but survives as a charge against his estate. Newman v. Burwell, 216 Cal. 608, 15 P.2d 511; [In re] Estate of Smith, 200 Cal. 654, 254 P. 567; [In re] Estate of Caldwell, 129 Cal.App. 613, 19 P.2d 9." In the Newman case supra, the decree had provided that the father pay a certain sum monthly to plaintiff for the support of the minor child of the parties " 'until further order of court.' " [216 Cal. 608, 15 P.2d 513] This court held that such an obligation continued after the death of the father and during the minority of the child. "And rightfully so, for it is the solemn duty of every father to support his children during their minority, and if he fails to do so, every principle of justice demands that they be thus supported out of his estate." 216 Cal. at pages 612–613, 15 P.2d at page 513.

In view of the conclusion reached by me that the monthly support provision of the agreement and decree was intended by the court and the parties to be severable from the provisions relating to property division in the agreement and not an integrated part thereof, I would reverse the judgment with directions to the trial court to determine what portion of the monthly payment should be allocated for the support of the child and the amount necessary to support him during his minority. It follows from what I have heretofore said that plaintiff is entitled to no part of the decedent's estate and her claim against his estate for her support should be disallowed.

SCHAUER, Justice (dissenting).

I concur in the conclusion and, generally, in the discussion by Mr. Justice CARTER but do not agree that the property settlement agreement was, or could be, effectively incorporated in the decree by a mere reference. (See my concurring opinion in Flynn v. Flynn (1954), 42 Cal.2d 55, 61–62, 265 P.2d 865, and my dissenting opinion in Messenger v. Messenger (1956), 46 Cal.2d 619, 297 P.2d 988.)

In addition to Justice CARTER'S discussion it may be pointed out that the provisions of the document entitled "Property Settlement Agreement," whether considered alone or together with the allegations of plaintiff's complaint for divorce and the terms of the interlocutory and final decrees of divorce, appear to preclude the construction placed upon the agreement by the trial court and the majority of this court. Rather, in my view, the agreement, the complaint for divorce, the divorce decrees, and the conduct of plaintiff and her former husband combine to demonstrate that the monthly payments were intended to be for alimony to the wife and support of the child, and the contrary determination of the trial court herein as to the alimony payments is untenable.

The complaint for divorce alleged "That there is *no community property* the result of said marriage of the parties hereto, *a property settlement agreement having been entered into* * * * That *plaintiff does not have sufficient money, means or property* with which to *support* and maintain herself and the minor child of the parties hereto, and that * * * $60 per month is a reasonable and necessary sum * * * for the *support* and maintenance of said plaintiff and said minor child." (Italics added.) The complaint prayed for $60, per month, for the *support* and maintenance of plaintiff and said minor child." (Italics added.) This is far from being a prayer for an order directing specific performance of a property settlement agreement, and following such prayer, the interlocutory decree ordered the husband to pay $60 a month "for the *support* and maintenance of said plaintiff and the minor child," not as specific performance of a property settlement agreement. (Italics added.)

The above quoted allegations of the complaint for divorce and the order of the interlocutory decree are in accord with the provision of the agreement (paragraph 16) that "Subject to the approval by any Court of competent jurisdiction, Husband agrees to pay to Wife * * * [$60] per month as and for the *support* and maintenance of Wife and the minor child." (Italics added.) The general provisions of paragraphs 1, 5, and 18, quoted in the majority opinion (303 P.2d at pages 541, 542), do not overcome the specific provision of paragraph 16 as to support.

Plaintiff's allegations in the divorce action that "there is no community property * * *, a property settlement agreement having been entered into," and that "plaintiff does not have sufficient money, means or property with which to support * * * herself * * *," are highly persuasive that what plaintiff sought for herself in the divorce action was alimony, as such, not specific enforcement of a property settlement agreement, as to which no issue was raised. If plaintiff were in fact seeking a decree ordering performance of a property settlement agreement she could and should have sought its approval and a decree literally incorporating it in the judgment and ordering defendant to perform its covenants.

The conduct of plaintiff in praying in the divorce action for *support* for herself and the child is consistent only with the view that the payments provided by paragraph 16 of the agreement were, as to plaintiff, for support, that is, alimony. Furthermore, plaintiff's subsequent conduct in "stipulating" to and accepting a reduction in the amount of the payments, although the agreement contained no provision particularly directed to a change of such amount, indicates that plaintiff as well as the former husband considered and treated the payments as alimony and support, subject to court order and not as a part of the division of property.

In these circumstances the rule quoted in the majority opinion (303 P.2d at page 542) from Messenger v. Messenger (1956), supra, 46 Cal.2d 619, 297 P.2d 988, can have no application. Plaintiff wife did not treat the support provision of the agreement here as an "integral and inseparable part" of the property settlement portions of the agreement; she treated it, her former husband treated it, and in accord with their position the trial court in the divorce proceeding treated it, as an agreement for support and alimony in addition to, not as an integral part of, the settlement of their property rights.

From the foregoing conclusion that the payments decreed to the wife are *alimony* and child support, it follows that the obligation to make such payments terminated with the death of the former husband insofar as such payments are alimony, Miller v. Superior Court (1937), 9 Cal.2d 733, 737, 72 P.2d 868; Parker v. Parker (1924), 193 Cal. 478, 481, 225 P. 447; Hamilton v. Hamilton (1949), 94 Cal.App.2d 293, 298, 210 P.2d 750; Roberts v. Higgins (1932), 122 Cal.App. 170, 171, 9 P.2d 517, although the obligation survives during the child's minority insofar as the payments are child support (Taylor v. George (1949), 34 Cal.2d 552, 556, 212 P.2d 505; Newman v. Burwell (1932), 216 Cal. 608, 612, 15 P.2d 511).

I would reverse the judgment with directions consistent with the foregoing views.

SHENK, Justice, concurs.

Hearing denied; SHENK, CARTER and SCHAUER, JJ., dissenting.

146 Cal.App.2d 114

CITY OF SACRAMENTO, a municipal corporation, Plaintiff, Cross-Defendant and Respondent,

v.

Charles T. JENSEN, also known as Charley T. Jensen, and Alice L. Jensen, also known as Alice Jensen, his wife, as joint tenants, Defendants, Cross-Complainants and Appellants.

Civ. 8857.

District Court of Appeal, Third District, California.

Nov. 19, 1956.

Rehearing Denied Dec. 14, 1956.

Hearing Denied Jan. 16, 1957.

Action by city as alleged owner of an easement over a certain street for possession thereof wherein landowners cross complained for a judgment quieting their title to land in question. The Superior Court, Sacramento County, Grover W. Bedeau, J., entered judgment for city and landowners appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding of trial court that street in question had been offered for dedication as a public street and accepted as such by the county and that city succeeded to the easement rights held by county by annexation of the territory embracing street in question.

Judgment affirmed.

1. Dedication 🔑1

A "common law dedication" is a voluntary transfer of an interest in land which partakes both of the nature of a grant and of a gift and is governed by the fundamental principles controlling such transactions.

See publication Words and Phrases, for other judicial constructions and definitions of "Common Law Dedication".

2. Dedication ⚷16(1)

Essential to a common law dedication are an offer by the owner of the land, clearly and unequivocally indicated by his words or acts to dedicate the land to a public use and an acceptance by the public of the offer.

3. Dedication ⚷44

Municipal Corporations ⚷35

In action by city as alleged owner of an easement over a certain street, for possession of the whole of said street, evidence sustained finding that street in question had been offered for dedication as a public street and accepted as such by the county and that city succeeded to the easement rights held by county by annexation of the territory embracing street in question.

4. Estoppel ⚷119

Estoppel is a question of ultimate fact.

5. Dedication ⚷39, 63(2)

Mere fact that public made little or even no use of certain streets dedicated to it did not show abandonment of such streets by the city nor give rise to any support for a claim of estoppel in favor of owners of lands abutting on such street.

◆

Pierce & Brown, Sacramento, for appellants.

Mento, Buchler & Littlefield, Everett M. Glenn, and Thomas O'Hara, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

The City of Sacramento, respondent herein, claiming to be the owner of an easement over certain lands, brought this action against appellants Charles T. Jensen and wife. The city alleged that since May 9, 1927 Blair Avenue, as shown on the official plat of Victory Acres filed in the office of the County Recorder of Sacramento County on April 26, 1927, has been a public highway or street; that originally the easement for public use had been vested in the County of Sacramento, and that by annexation proceedings the territory embracing said avenue had become a part of the respondent city so that the city succeeded to the easement rights theretofore held by the county; that defendants had wrongfully entered upon said avenue and had ousted and ejected the city therefrom and had excluded the public from the public's right to pass and repass over the same. The appellants denied that Blair Avenue was a public street or highway, alleged that they owned the same to the center line thereof exclusive of any right or easement in favor of the public and asked that their title thereto be quieted. Judgment was rendered in favor of the city, and the Jensens appeal.

The court found that a street commonly known as Blair Avenue, as shown on the said official recorded map, since May 9, 1927 and up to February 26, 1953 had been a public street in the County of Sacramento and since said last mentioned date, by valid annexation proceedings, had become a public street in the City of Sacramento; that it was 60 feet in width, running from its easterly terminus on a public highway in said city, westerly to the easterly boundary of the right of way of the Southern Pacific Railroad; that, while said street was a public street, appellants herein had entered upon the same and ousted the public from the southerly 30 feet of said 60 foot street; that said acts were wrongful and unlawful; that the respondent city was the owner of a valid easement for the use of the whole of said street. The court concluded that the city was entitled to possession of the whole of said avenue and entered judgment accordingly.

The record discloses the following facts stated most favorably in support of the judgment appealed from: In the early part of 1927 Joseph L. Steffens, sole owner of approximately 98 acres of land lying westerly of Freeport Boulevard where it passes the Sacramento Municipal Airport, and easterly of the Southern Pacific right of way, caused the area to be surveyed and platted as a subdivision for sale by lots. The subdivision bore the name "Victory Acres" and when the plat thereof had been prepared in accordance with the existing law regulating the subdivision of land for sale by lots, Steffens presented the map to the Board of Supervisors of Sacramento County. The map showed that the area had been divided into 113 lots of varying sizes, and that 8 streets ran westerly from Freeport Boulevard to the western boundary of the area. One street ran north and south, separating the most westerly lots from those lying to the east. One of the streets shown on the plat was Blair Avenue, located about the center of the subdivision. On March 21, 1927, the board of supervisors passed a resolution approving the proposed subdivision map, but stating the following: "With the exception that the Board does *not* accept the roads as public highways and the Clerk of the Board is hereby authorized to make the necessary changes on said map." It appears there was presented to the board at that meeting a letter dated March 14, 1927, from the County Engineer which stated that he had examined the map and found it satisfactory, with the exception that the owners were offering to dedicate roads. The engineer stated that the offer of dedication was not in harmony with a resolution passed previously by the board setting up requirements for acceptance of subdivision dedications, and he, therefore, recommended against accepting the dedications at that time. The proffered map contained on its face a form for its approval and for acceptance of the proffered dedications. Pursuant to the resolution this form on the proposed plat was made to read as follows: "The Board of Supervisors in and for the County of Sacramento, State of California, do hereby approve this map of '*Victory Acres*' and do *not* hereby accept on behalf of the public the dedications herein mentioned and shown." (Last emphasis ours.) Mr. Steffens recorded the plat on April 26, 1927.

At the time the foregoing proceedings were taken the applicable statute law governing the subdivision of any tract of land into lots for the purpose of sale provided that if any such plat offered for dedication any highways the board of supervisors should "indorse thereon which of the highways so offered for dedication" were "accepted on behalf of the public" and further provided that only such highways as had been so accepted and no others should become dedicated to the public use. Stats.1923, Chap. 163, page 380, § 2. It has been held that words of dedication on such a map are to be treated merely as an offer to dedicate and that dedication is not completed until the offer is accepted. Stump v. Cornell Construction Co., 29 Cal.2d 448, 451, 175 P.2d 510. Further, that since the statute required that the offeree either accept or reject an offer of dedication at the time the map was approved, the refusal to accept constituted a rejection of the offer to dedicate. Id., 29 Cal.2d 451, 175 P.2d 510. As the matter stood, therefore, when the map of Victory Acres was recorded the offer to dedicate appearing on the face of the map had been rejected. Notwithstanding such rejection, however, the subdivider recorded the map. This, under the existing law, he had a right to do.

It further appears from this record that on May 9, 1927, following the recordation of the map, the Sacramento County Board of Supervisors adopted a resolution to the effect that the streets appearing on the recorded map, including Blair Avenue, were all accepted for public highways of the County of Sacramento. The resolution went on to state: "In so accepting the same this Board consents to and acquiesces in the dedication of said highways heretofore made by the owners of the property situate within the boundaries of said Victory Acres, and herein reference is hereby especially made to the dedication of said highways upon said official plat of Victory

Acres." At the same meeting the board passed a resolution of intention to improve highways in "Victory Acres" as shown on the official map thereof, including Blair Avenue for its entire length, the work to be done in accordance with plans and specifications adopted by the board and filed in the office of the board's clerk. It was further ordered that the cost of the work be chargeable to and charged upon all of the land in Victory Acres. Appropriate proceedings were taken for the doing of the work, and in September of 1927 the work of improvement was reported as having been completed at a total cost of approximately $14,000 paid by the county. The engineer of the work certified to the board that, pursuant to the contract between the County Surveyor and the contractor, approximately 585 linear feet of galvanized corrugated metal culvert of varying sizes had been furnished and installed, that 2,637 cubic yards of excavation and grading had been done and that 183,636.6 square feet of four-inch cementing gravel pavement had been completed in place. It does not appear from the record that any of these proceedings found their place in the Recorder's Office as recorded information of the acceptance of the streets as public streets or their improvement after acceptance. Neither does there appear to have been any record of a second offer to dedicate, communicated to the board expressly by the subdivider and accepted by the board. However, respondent city contends that the foregoing, which transpired after the rejection of the statutory offer to dedicate, amounted to a common law dedication, with the result that at least after the improvement work had been done at county expense, the streets were public streets, and the easement of the county in said streets thereafter passed to the city under annexation. This contention of the city, we think, must be sustained.

[1, 2] A common law dedication has been described as a voluntary transfer of an interest in land which partakes both of the nature of a grant and of a gift and which is governed by the fundamental principles controlling such transactions. Essential to such a dedication are an offer by the owner of the land, clearly and unequivocally indicated by his words *or acts* to dedicate the land to a public use and an acceptance by the public of the offer. Union Transportation Co. v. Sacramento County, 42 Cal.2d 235, 240, 267 P.2d 10. In 15 California Jurisprudence, 2d, "Dedication", Section 80, Page 387, it is stated:

> "Whether there has been a common-law dedication of land to public use is a question of fact, to be determined by the trier of fact from the circumstances of each particular case."

[3] Applying these rules, we cite the following facts as substantially supporting the finding of the trial court that Blair Avenue is a public street. The owner of the tract who subdivided it for sale announced his intention to effect a statutory dedication by the matter appearing upon the map which he had prepared and which he presented to the board of supervisors. It is true that the supervisors at that time rejected the offer to dedicate. Nevertheless, it appears that they did so because the offer did not comply with certain requisites which they had set up and which were referred to in the letter of the County Engineer, recommending a rejection at that time. Within approximately six weeks the board adopted its resolution of acceptance, and at the same time embarked upon improvements under the Improvement Act of 1911, at county cost initially, but charged upon all of the lots in the subdivision, which presumptively were still owned by the subdivider who prepared and presented the map. It is scarcely to be supposed that the subdivider was not in contact with and negotiating with the board of supervisors to obtain an acceptance of a continuing or a renewed offer to dedicate. All of the formal proceedings necessary to charge a public improvement upon his property were gone through with, including publication of the notice of intention as required by statute. Following the letting of the contract

it must be supposed that he was aware of the invasion of his property by the contractor who was doing the extensive work of improving the streets in his subdivision. The record is barren of so much as a suggestion that he did not consent to the doing of the work. This acquiescence may fairly be referred back to the period between the rejection of his offer of statutory dedication and the formal acceptance by the board which followed some six weeks later. From all of the foregoing it is a fair inference that prior to this formal acceptance by the board, the board had received a renewed offer to dedicate upon the conditions imposed by the county. We hold the evidence is amply sufficient to sustain the factual finding of the trial court that Blair Avenue had been offered for dedication as a public street and accepted as such by the county. Therefore, since long before appellants obtained any interest in land in the subdivision, Blair Avenue was a public street.

Appellants claim that the city is estopped to claim an easement. They introduced evidence of the following: Charles Jensen, since 1930, has been engaged in the business of agricultural crop dusting. He originally operated from the Sacramento Municipal Airport. In 1939 he began the purchase of land lying within Victory Acres. He ultimately purchased an "L" shaped tract of land within the subdivision. Ultimately, he bought and still owns a tier of lots lying along the westerly side of the subdivision and extending south from Blair Avenue. There were seven of these lots and they were contiguous. He also purchased a tier of lots, six in number and comprising all of the remaining lots which touched Blair Avenue on the south. He also purchased the lots lying south of the last mentioned tier of lots which bordered Thiery Road. All this property was conveyed to him by lot descriptions referring to the recorded map. Mr. Jensen had been familiar with Victory Acres since 1930. He drove past it almost daily, going to and from his work at the airport, and he had flown over it many times. He introduced in evidence several aerial photographs of the subdivision. These pictures show gray strips along the courses of the streets of the subdivision. His counsel say in their opening brief: "These photos also tell a story as clearly as words could—of an unsuccessful subdivision, landmark of the depression of the 1930's—with its graded but unopened streets and entirely devoid of houses or other buildings." Mr. Jensen described the terrain as follows: "Someone had attempted to grade, drain off areas to outline the road. There was no roads there. There was a proposed area to be used for road that had a drain culvert or drain, graded area to let the water drain off the edge and drain onto the lower areas. * * * The roads went nowhere. * * * There was no evidence of travel excepting for people [who] went rabbit hunting or parked with the intent of going nowhere * * * the area there had been pastured off. It had cattle in it. As far as vehicle travel there was vehicle tracks all over the place, not on the set-up area for proposed roads." Mr. Jensen testified that having seen the graded strips, he made inquiries and obtained information that these were not public roads and that when he purchased he had no knowledge of any dedication. Before he completed his purchase he obtained title insurance. The policies were placed in evidence and they contain the assertion that "The roads shown on the plat of Victory Acres have not been accepted by the Board of Supervisors as public roads". Jensen said that he believed the grading had been done by the subdividers who had offered to dedicate the streets. Mr. Jensen produced evidence that when he purchased, there was not a single building on the tract. He testified that he bought the property to serve as a site from which to carry on crop dusting operations which involved the building of an air strip from and on which his crop dusting planes could take off and land with adjacent hangars, office, warehouse and other buildings; that the area was not suitable for these purposes if it were intersected by streets running through the property he purchased and along the north edge thereof where the city claimed Blair Avenue was situated. He first moved onto the tract in 1939 and built a small building. He also proceeded to grade Blair Avenue from Freeport Boulevard to the point on his property where he was establishing his building. He laid out and improved his air strip on the westerly tier of lots, ending it at the point where Blair Avenue is indicated on the map. He maintained "No trespassing" signs along the route of Blair Avenue, continuously from the latter part of 1939. During the war the United States Army billeted the guards of the airport on property lying westerly of the Southern Pacific right of way and in order to have access to Freeport Boulevard, the government asked and obtained a permit from Mr. Jensen to use the road along Blair Avenue as he had improved it up to the point of his building and his consent to extend that road across the Southern Pacific borrow pit on its right of way and under the trestle upon which the Southern Pacific at that time maintained and still does maintain its tracks. All of this was done. The government improved the road along a 16-foot wide strip, enough for two cars to pass. It erected a stop sign at the point where it went by the northerly end of Jensen's air strip. It carried the roadway it built across the Southern Pacific right of way and under the tracks and to the barracks it maintained westerly of the tracks. After the war it surrendered the road, and since that time Mr. Jensen has continuously maintained it, filling in holes in the pavement, resurfacing it and the like. After he had obtained his property, Mr. Jensen had discussions with an assistant district attorney of the county and with the county engineer. This occurred in 1948. He was inquiring as to whether or not the county claimed any easement along Blair Avenue. These two men went to the Recorder's Office, examined the plat of Victory Acres and noticed the endorsement thereon that the roads had not been accepted. The assistant district attorney advised Mr. Jensen that there was nothing in the records which showed the roads to be public roads and gave it as his opinion that they were not county roads. The County Engineer had conversations with Mr. Jensen to the same general effect as those related between Heinrich and Jensen, and he wrote a letter to Jensen stating the roads were not public roads and that Jensen could fence the property and improve it as he pleased. He also said that at no time that he was county engineer had any work been done on these roads. Thereafter, the area was annexed to the city and the city, because of intensive development of the area west of the railroad right of way, found it desirable to fully improve and completely use Blair Avenue as a connecting street between Freeport Boulevard and the development to the west.

We have already said that a common-law dedication of the streets shown on the map of Victory Acres had occurred long prior to the time when Mr. Jensen became interested in the property within the subdivision. Such a dedication once completed is irrevocable. It is not contended here and could not be that the county or the city has abandoned Blair Avenue. It is stated in County of San Diego v. California Water & Telephone Co., 30 Cal.2d 817, 823, 825, 826, 186 P.2d 124, 128, 175 A.L.R. 747:

> "The cases are apparently uniform to the effect that, if the Legislature has provided a method by which a county or city may abandon or vacate roads, that method is exclusive. * * *
>
> * * * * * *
>
> "It is true that in some 'exceptional cases,' or situation where 'justice and right require it,' a governmental body may be bound by estoppel. * * *
>
> "* * * It is clear, however, that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public."

[4] It is apparent that the factual question of estoppel was the subject of much conflict in the record. True, the county, its board knowing that, despite a refusal to accept dedication, the approved map could be and might be recorded, firmly and finally rejected the original offer of dedication and thereby must have known that the public records might well be construed to that effect. True also, it did not in any way require that the following offer and acceptance should take such form as to be entitled to public record, thus giving constructive notice that despite the original rejection, a subsequent dedication had occurred. True also, and probably in view of the fact that the public was not making any extensive or perhaps any use at all of the streets, never did the county, so far as this record shows, exercise any further active sovereignty over them. Without attempting to state all of the facts appearing in the record from which support might be drawn for a holding of estoppel, the fact remains that the trial court found that estoppel had not occurred. And, therefore, the question is whether or not that finding is supported. Estoppel is a question of ultimate fact. Among those things in the record which support the finding, we may state the following: The title policies with their assertion that the roads had not been accepted by the county and were not public roads were private representations or warranties arising by contract between the companies and Mr. Jensen. For ten years before he purchased the property Mr. Jensen knew that the land appeared to have been subdivided into lots, separated by streets, and that there had been extensive improvements at one time made within the street areas suitable to make the streets fit for public use. When he purchased he took deeds which conveyed lots to him according to the lot descriptions found on the recorded map, and his only claim to now own to the center of the apparent streets is based upon the theory that conveyances of lots bordering on public streets go to the center of the street, subject to the public easements. True, neither Mr. Jensen nor the assistant district attorney nor the county engineer discovered the actual existence in the files of the board of supervisors of the resolution of acceptance and the street improvement proceedings, nevertheless they were within those records and were ultimately discovered prior to the bringing of this suit by the city. Under the circumstances, the court was not bound by Mr. Jensen's testimony that he was a bona fide purchaser in good faith without notice or knowledge of the public easement, and in view of this record the finding of the court to the contrary is sustained.

[5] Appellants contend that in any event the public easement is limited to the 16-foot improved strip down the center of Blair Avenue. The contention cannot be sustained. There is evidence of grading and drainage beyond the limits of the graveled strip, and the user made by the street improvements was a taking of possession and use of the public easement to the full width appearing upon the recorded map. The fact that the public made little or even no use of the streets, did not show abandonment nor give rise to any support for a claim of estoppel in favor of appellants.

The judgment appealed from is affirmed.

PEEK, J., and McMURRAY, J., pro tem., concur.

Hearing denied; SCHAUER, J., dissenting.

146 Cal.App.2d 193

Lillian R. DANDINI, Plaintiff and Respondent,

v.

A. O. DANDINI, Julianna Sesenna, Oreste Sesenna, Rose Cungi Sesenna, Manlio Sesenna, Remillard-Dandini Company, a corporation, et al., Defendants and Appellants.

Civ. 17114.

District Court of Appeal, First District, Division 2, California.

Nov. 21, 1956.

Rehearing Denied Dec. 21, 1956.

Hearing Denied Jan. 16, 1957.

Action by wife to recover community property allegedly fraudulently concealed at time rights of wife and husband were determined in an earlier separate maintenance action. The Superior Court of the City and County of San Francisco, Frank T. Deasy, J., rendered judgment for plaintiff and defendants appealed. The Court of Appeal, Draper, J. pro tem., held that judgment in the separate maintenance action, refusing to set aside the transfer of stock, barred recovery.

Reversed with directions.

1. Judgment 🔑443(1)

When equitable relief from a final judgment is sought, it makes an important difference whether the fraud or mistake is intrinsic or extrinsic to issues involved in case in which judgment was entered.

2. Judgment 🔑444

Even though a judgment is based upon false allegations supported by perjured testimony, such fraud is "intrinsic", and that judgment, when final, will bar relitigation of same issue if the losing party had not been precluded by fraud from participating in the proceeding or fully presenting his case.

See publication Words and Phrases, for other judicial constructions and definitions of "Intrinsic Fraud".

3. Judgment 🔑482

Even though a party does not appear, if he has been given proper notice and has not been prevented from full participation, he cannot attack judgment after time has elapsed for appeal or other direct attack.

4. Judgment 🔑587

Judgment allowing separate maintenance to wife but refusing to set aside husband's transfer of stock to third parties, which wife had alleged was fraudulent and without consideration, barred subsequent action by wife to recover such stock from third parties as constructive trustees on theory that it was community property fraudulently concealed at time of the earlier action.

5. Judgment 🔑443(1)

Evidence which was basis for setting aside husband's transfer of community realty in fraud of wife's right to separate maintenance, but which was merely impeaching as to husband's transfer of stock, did not warrant equitable intervention on ground of extrinsic fraud against prior judgment in separate maintenance action refusing to set aside transfer of stock.

6. Judgment 🔑585(5), 588

Mere afterthought, the fancied value of a changed approach, or fortuitous subsequent discrediting of the integrity of an opposing party or witness, is not enough to warrant exception to the rule of finality of judgments.

Leo R. Friedman, San Francisco, for appellants.

Johnson, Harmon & Henderson, San Francisco, for respondent.

DRAPER, Justice pro tem.

This is an action by plaintiff wife for 253 shares of the stock of Remillard-Dandini Company alleged to be community property fraudulently concealed at the time the property rights of wife and husband were determined in an earlier separate maintenance action. After non-jury trial, plaintiff had judgment determining that the stock is community property of plaintiff and defendant husband, that it is held by the defendants Sesenna (father, mother and two children) as constructive trustees, and awarding all the stock to plaintiff. Money judgment was also ordered against all the individuals defendants. Defendants appeal.

The principal defense is based upon the doctrine of res judicata. It therefore becomes necessary to review some of the many actions which go to make up a saga of litigation already rivalling the fictional case of Jarndyce and Jarndyce.

The Dandinis were married in 1932 and separated in 1938. In 1942 plaintiff commenced an action for separate maintenance. She alleged that the same shares of stock here in issue were community property of her husband and herself, but had been fraudulently transferred to defendants Sesenna, who were joined as defendants in that separate maintenance action. In one cause of action she asserted that husband had become indebted to the Sesennas, and that the transfer of the stock to them was merely as security but that he and the Sesennas had conspired to make the transfer appear absolute. In a second count, she asserted that the transfer was wholly without consideration, was made in the course of a conspiracy to conceal this community from her, and that the Sesennas in fact held the stock solely for the defendant husband. At the trial, there was testimony that Dandini had borrowed money from defendants Sesenna to finance the display of a "hydrosphere" at the San Francisco World Fair in 1939. He gave promissory notes and assigned a half interest in the device to be displayed. The Sesennas filed suit upon the defaulted notes, and their claims were settled by Dandini's transfer to them of the disputed shares of Remillard-Dandini Company.

Plaintiff wife had decree for separate maintenance, but the court found that the transfer of the stock was not fraudulent and was made upon consideration. The prayer to set aside that transfer was therefore denied. She appealed from the latter portion of the judgment, but it was affirmed. Dandini v. Dandini, 82 Cal.App.2d 263, 186 P.2d 41. In that opinion the evidence in the separate maintenance action is fully reviewed. The wholly adversary and contradictory nature of the action and the evidence is pointed up by the statement, 82 Cal.App.2d at page 269, 186 P.2d at page 44, "we cannot say that we would not have arrived at a different conclusion had we sat in judgment in the trial court." But the evidence was held not, as a matter of law, insufficient to sustain the judgment. The trial court had before it the fact that a judgment based upon misappropriation of funds of the corporation had been entered against defendant Dandini in the Superior Court of Alameda County, see 82 Cal.App.2d 263, at page 265, 186 P.2d 41; Remillard Brick Co. v. Dandini, 98 Cal.App.2d 617, 220 P.2d 927, and the decision on appeal noted the fact that defendant Dandini and defendant Julianna Sesenna, after judgment in the separate maintenance action, were married. This marriage was in violation of a restraining order. Dandini v. Dandini, 86 Cal.App.2d 478, 195 P.2d 871.

In 1949, the wife filed an action alleging that her husband had, at the time of the separate maintenance decree, owned several parcels of real property acquired with community funds. He had purchased them in the name of the Montreal Corporation, an instrumentality used by him and the Sesennas (who were defendants in that action also) to effect a fraudulent concealment from his wife of his title to these items of community property. In the separate maintenance action, defendants had testified that the only business dealings had among them were those relating to the hydrosphere. The trial court found in favor of plaintiff, determined the property to be community in character, and awarded it to plaintiff. This judgment was affirmed on appeal. Dandini v. Dandini, 120 Cal.App.2d 211, 260 P.2d 1033, 1036. It was there determined that the fraud so perpetrated upon plaintiff in the separate maintenance action was extrinsic, and thus warranted the intervention of equitable jurisdiction. This court said of defendants' fraud: "Had it been limited to false or perjured testimony in the separate maintenance action another question would be presented, but here the conduct of the parties went beyond the giving of false or perjured testimony in the action itself. Under the findings of the court they engaged in an elaborate and active conspiracy to conceal the facts from the plaintiff so that she was thereby prevented from litigating the question of her rights in this [real] property in the separate maintenance action."

The trial court there had found that the defendants in the separate maintenance action had falsely and fraudulently testified that "they had never had any other business transactions * * * except a business transaction involving investment by them in a certain hydrosphere invention * * * which transaction had nothing whatsoever to do and was in no way related to the conspiracy here involved * * *".

That "Montreal action" had been tried January 31 and February 9, 1951. Judgment was entered May 4, 1951. The present action was filed September 16, 1952.

In this action, respondent wife alleges almost exactly the same matters included in the complaint in the Montreal action, and avers that such "fraudulent conspiracy, acts, representations and conduct" of appellants were designed to and did induce and cause the findings and judgment against respondent in the separate maintenance action. Appellants' answer set up the judgment in the separate maintenance action as res judicata. The evidence at the trial consisted principally of the transcript of testimony taken in the separate maintenance action, the court file in that action, and the findings, conclusions and judgment in the Montreal action. Upon this evidence, the trial court found that the stock was community property of respondent and appellant husband, having been fraudulently conveyed by him to appellants Sesenna, and awarded it to respondent.

It is apparent, as is conceded by respondent's brief, that "this same cause of action had been tried before and judgment rendered adversely to plaintiff in * * * the separate maintenance action." The question here is whether that prior judgment bars this action.

[1] "* * * [W]hen equitable relief from a final judgment is sought, it makes an important difference whether the fraud or mistake is intrinsic or extrinsic to the issues involved in the case in which the judgment was entered." Jorgensen v. Jorgensen, 32 Cal.2d 13, 18, 193 P.2d 728, 731, and see the full opinion in that case for a thorough discussion of the doctrine of res judicata.

[2, 3] Even though a judgment is based upon false allegations supported by perjured testimony such fraud is intrinsic, and the judgment, when final, will bar relitigation of the same issue if the losing party has not been precluded by fraud from participating in the proceeding or fully presenting his case. Gale v. Witt, 31 Cal.2d 362, 188 P.2d 755; Adams v. Martin, 3 Cal.2d 246, 44 P.2d 572; Hamilton v. Carpenter, 15 Cal.2d 130, 98 P.2d 1027. Even though a party does not appear in such a proceeding, if he has been given proper notice and has not been prevented from full participation, he "has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary. * * * Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack." Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, 107.

[4] It is apparent that the judgment in the separate maintenance action bars recovery here. In that action, plaintiff alleged fraudulent conveyance of the stock by her husband to the Sesennas, and a conspiracy of the husband and the Sesennas to conceal the husband's ownership from her. This issue was fully litigated, and was decided in defendants' favor. The only additional evidence now adduced is the finding

in the Montreal case that appellants here did, contrary to their testimony in the separate maintenance action, have business dealings other than those concerning the hydrosphere-corporate stock transaction. But these dealings were wholly collateral to the issue concerning the hydrosphere and the stock. Unquestionably, the transactions revealed by the Montreal action, if known at the time of the separate maintenance trial, would have had a tendency to impeach the testimony of defendants as to the hydrosphere-stock transaction. But mere impeaching testimony, even when discovered shortly after trial and made the basis of a motion for new trial, is not sufficient to require granting of new trial. Waer v. Waer, 189 Cal. 178, 207 P. 891; Peterson v. Peterson, 121 Cal.App.2d 1, 262 P.2d 613; Wilson v. Kopp, 114 Cal.App.2d 198, 250 P.2d 166; Anderson v. Freis, 61 Cal.App.2d 159, 142 P.2d 330. As already pointed out, the court in the separate maintenance action had before it other evidence impeaching defendants' credibility.

[5] Certainly, the additional impeaching evidence falls far short of establishing fraud which is extrinsic and therefore the basis for equitable intervention against the prior judgment. There is nothing in this testimony to indicate that respondent was prevented, in the separate maintenance trial, from fully presenting her claim that the stock transfer to the Sesennas was fraudulent and without consideration. At the most, it shows she was prevented from refuting some testimony as to matters other than the stock transfer, and from showing another fraud of appellants, wholly unconnected with the stock transaction. Even now, after trial of all three actions (separate maintenance, Montreal, and the case at bar), there is no evidence that the stock here sought was ever held by the Montreal Corporation, or that the conspiracy as to that corporation had any direct connection of any sort with the hydrosphere-stock transaction. In fact, the court found, in the Montreal case, that the hydrosphere-stock transaction "had nothing whatsoever to do with and was in no way related to the conspiracy here involved." Thus if all the evidence in the Montreal action had been before the court in the separate maintenance trial, it would, at most, have had the effect of attacking the integrity of the witnesses who testified that the stock transfer was bona fide.

A wholly different situation was presented in the Montreal case. As to the issue of the Montreal stock and properties, there was extrinsic fraud which permitted the later attack on the judgment. But the issue involving the Remillard-Dandini stock was the principal issue litigated in the separate maintenance action. The evidence in the present case does not even show falsity or perjury in the testimony directly upon that issue at the separate maintenance trial. It is obvious that the mere impeaching evidence here shown does not, as to the issue regarding the Remillard-Dandini stock, constitute extrinsic fraud such as to warrant equitable relief from the decree in the separate maintenance action insofar as it disposes of the stock here in issue.

[6] Mere afterthought, the fancied value of a changed approach, or fortuitous subsequent discrediting of the integrity of an opposing party or witness, is not enough to warrant exception to the rule of finality. Nothing more is here presented. However dissatisfied she may be with the decision in the separate maintenance action, respondent must recognize its finality upon the issue of stock ownership.

The judgment is reversed, with directions to the trial court to enter judgment for the defendants.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

146 Cal.App.2d 315

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Henry Valles BORBON, Defendant and Appellant.

Cr. 1211.

District Court of Appeal, Fourth District, California.

Nov. 27, 1956.

Defendant was convicted of robbery in the first degree. The Superior Court of Tulare County, Frederick E. Stone, J., entered judgment and an order denying a new trial, and defendant appealed. The District Court of Appeal, Griffin, J., held, inter alia, that arrest of defendant, who fit description of robber, and his brother and search of them and automobile operated by brother, in which defendant was riding, were justified and lawful.

Judgment and order affirmed.

1. Arrest ⚷63(4), 71

Officers, having received radio bulletin concerning robbery, had reasonable grounds to stop automobile, which resembled the description given and approached from direction of robbery shortly after occurrence thereof, and question occupants of automobile as suspects, and when officers observed that appearance, clothing and speech of one occupant of automobile fit description given of robber and saw on front seat of automobile receipts taken in robbery, arrest of occupant and driver of automobile and search of them and automobile were justified and lawful. West's Ann.Pen. Code, §§ 211, 836, subd. 3.

2. Criminal Law ⚷698(1)

Admitting in evidence in prosecution for robbery pocket knives taken from defendants at time they were arrested was not prejudicial error, though evidence showed that crime was committed by means of a gun, where no objection was made to testimony concerning knives, defense counsel questioned witness concerning them and prosecution stipulated that knives could go into evidence as marked for identification by defense counsel. West's Ann.Pen.Code, § 211.

3. Criminal Law ⚷369(1)

Evidence of separate offenses is not ordinarily admissible.

4. Criminal Law ⚷369(2)

Where defendant had denied any knowledge of gun found in automobile in which he was riding shortly after commission of robbery, testimony of bartender that on the Sunday preceding robbery, such gun had been taken from his coat which hung in storeroom at bar and that on such day defendant had worked part time in bar, was admissible in prosecution for robbery to show that defendant might have been possessed of the particular gun in committing offense charged. West's Ann.Pen. Code, § 211.

5. Criminal Law ⚷824(8)

Where trial court, in ruling on objection to testimony concerning a gun in prosecution for robbery, stated that it was admissible as circumstantial evidence of possession of the gun and defendant thereafter offered no instruction indicating that reception of such testimony should be limited to such purpose, defendant could not complain for the first time on appeal that trial court should have given such an instruction on its own motion. West's Ann.Pen.Code, § 211.

6. Criminal Law ⚷825(2)

Where trial court gave an instruction in language of statutory definition of robbery, followed by instruction to the effect that the intent with which the unlawful act charged was done must be proved, failure to give more particular charge regarding specific intent as a necessary element of robbery was not error, in absence of request for such instruction. West's Ann.Pen.Code, § 211.

7. Criminal Law ⚷824(1)

Failure of trial court to instruct on its own motion with reference to the intent necessary to make one a principal in the offense of robbery was not prejudicial to one of two joint defendants whom victim identified as the principal and the perpetrator of robbery. West's Ann.Pen.Code, § 211.

8. Criminal Law ⚿824(5)

Contradictory statements, allegedly made by defendants to officers, as to whereabouts of defendants at time of robbery did not amount to admissions of fact which would connect defendants with commission of robbery or constitute a confession of guilt or extrajudicial admission which would in any manner constitute an acknowledgment of some fact or circumstance which in itself would be sufficient to authorize a conviction or tend toward proof of ultimate fact of guilt, and hence failure to give cautionary instruction regarding oral admissions, in absence of request therefor, was not reversible error. West's Ann.Pen.Code, § 211.

9. Criminal Law ⚿814(17)

Where the circumstantial evidence produced is only incident to or corroborative of direct evidence connecting defendant with the offense charged, trial court is not required to instruct that if the evidence is susceptible of two constructions, each appearing to be reasonable, jury must reject that construction which points to defendant's guilt.

10. Criminal Law ⚿829(15)

Where jury was fully instructed in prosecution for robbery on the necessary proof required where the evidence produced is direct or circumstantial or both, failure to give defendant's proffered instruction that if the evidence is susceptible of two constructions, each appearing to be reasonable, jury must reject that construction which points to guilt of defendant was not error prejudicial to defendant identified directly by victim as the person who actually perpetrated the crime. West's Ann.Pen.Code, § 211.

Annette La Rue and Richard Johnson, for appellant.

Edmund G. Brown, Atty. Gen., Bonnie Lee Hansen, Deputy Atty. Gen., for respondent.

GRIFFIN, Justice.

Defendant and appellant Henry V. Borbon was charged jointly with his brother Richard C. Borbon with the crime of robbery. A jury verdict of robbery in the first degree against defendants resulted. A motion for new trial was denied. Defendant Henry V. Borbon alone appealed.

The complaining witness operated a small "Hot Spot" drive-in lunch counter in Lindsay. About 10 p. m. on January 26, she was closing the business and had placed the day's receipts of approximately $30, consisting of one ten and about eleven one-dollar bills, plus two handfuls of loose change (no pennies) in a yellow paper bag with her eye glasses and keys. She also placed therein five paid receipts from merchants who had sold goods to the "Hot Spot" that day. About that time appellant entered through the back door, held a shiny-barreled pistol in his hand and told her to "stick them up" and asked "Where is it?" The complaining witness handed him the paper bag and then asked him to return her glasses and keys. He hesitated a while and then refused. He left toward the back yard and just as the door of the car closed he took off across the intersection which was lighted by a red flashing neon sign. The complaining witness observed it and called the police. She described the robbery and the appellant to them, whereupon, an all-points bulletin was broadcast of this description furnished by her. She related the fact that $30 had been taken from her in the robbery; that the man who robbed her was a Mexican about 18 years old, five feet six or seven inches tall and thin build, wearing a light long-sleeved shirt and khaki pants; that he had dark curly hair, uncombed and "tousled", and spoke Mexican and English; that his voice was soft, his eyes bloodshot; and while holding a shiny-barreled pistol resembling a cap pistol on her, he was masked up to his eyes with a soiled white cloth or handkerchief; and he swayed from side to side but she could not say he was intoxicated. She described the car as a convertible model 1950 to 1953, "could be a hard top light colored—looked red". She later claimed the reflection of the red neon sign might have given the car a red colored appearance. She also concluded that there may have been another person in the car at the time, since the car started as soon as the door slammed.

Two deputy sheriffs received the call and description shortly after 10 p. m. while on the highway about 8 or 10 miles west, at a cross-road near Farmersville. About that time a 1950 model convertible Buick, light colored, approached on the road leading from Lindsay. The officers followed it for some distance. When it came under some lights, the Buick was stopped. A request was made of the driver, Richard, to see his operator's license. About that time the officer observed appellant seated next to Richard, wearing a light colored long-sleeved shirt and khaki pants. His hair was dark, curly and uncombed, a Mexican about 17 years of age, and he talked broken English. They told the officers they had just come from Lindsay and the officers informed them that a robbery had just been committed there. The officers became suspicious and asked them to step out toward the rear of their car and in the light and they were searched for a gun but none was found. They did find on appellant $31 in currency and approximately $12.65 in change (no pennies). In Richard's wallet was found a $5 bill and loose in his pocket were a ten-dollar and eight one-dollar bills. One officer returned to the Buick and, through the window and on the front seat, partially exposed, he observed the five receipts taken from the "Hot Spot" and subsequently observed that they were dated January 26, the date of the robbery and were made out to the "Hot Spot". A radio call was placed for further information in this respect and it was verified. The receipts were then taken as evidence. Two dimes and a nickel in change were found on the seat of the Buick by the officer. A yellow paper sack was found in the glove compartment. A more thorough search of the car revealed a shiny-barreled loaded semi-automatic gun with a pearl handle hidden up in the springs of the front seat of the Buick. There were some old dirty white rags under the seat. The chief of police arrived on the scene. He observed that appellant answered the description, that he had blood-shot eyes, and when standing he swayed from side to side. Defendants were asked about a gun and each denied any knowledge of one. It was not shown to them at the time it was found. According to the chief they told him they had not been in Lindsay that night and denied any connection with the robbery. They were taken to jail and the complaining witness positively identified appellant as her assailant, identified the gun as resembling the one used, identified the five receipts as the ones she placed in the bag, and identified a picture of the Buick as resembling the car she saw that night in the light of the neon sign.

At the trial, and after receiving the testimony of the chief that appellant denied any knowledge of the gun or of the robbery, the prosecution presented a witness who testified that this same gun in evidence, on the Sunday before, was taken from his coat which hung in the storeroom at his bar; that appellant was in the bar on that day assisting him part time in his duties, and he did not miss the gun until that evening. This evidence was received over objections and only as to appellant.

Appellant testified he had this great amount of silver in his pockets because he had been playing poker that morning; that on the evening in question they had been playing "Snooker" in Lindsay; that about 10:30 p. m. he and his brother drove toward Farmersville to check on the flood problem and that they were not involved in the robbery in any manner. He did admit telling the chief he knew nothing about the gun, and on cross-examination he admitted working, part time, for the bartender about the time this gun was taken from his clothes but claimed he knew nothing about its disappearance.

At the close of the evidence defendants moved to strike all testimony and evidence obtained as a result of the claimed unlawful search of defendants and the car. The motion was denied. This is the principal question presented on this appeal. It is appellant's contention that under the authority of People v. Gale, 46 Cal.2d 253, 294 P.2d 13, the facts in the instant case constitute only a road block and that the search of the defendants and their car was not justified on the ground that the officers had reasonable cause to believe a crime had been committed or that the search was made as an incident to a lawful arrest.

[1] The facts here related are quite different from those involved in the Gale case. In the instant case the arresting officers received an all-points bulletin regarding the robbery and describing the suspect. Based on the information received, they had reasonable grounds to stop defendants' car and question them as suspects. From the observation of appellant, dressed as he was, being a Mexican of his age, fitting the description of the suspect, riding in a car fairly well described, and observing the five receipts on the front seat of the car which were taken from the victim, the arrest of the suspects and search of them and the car were justified. People v. Jiminez, 143 Cal.App.2d 671, 300 P.2d 68; People v. Simon, 45 Cal.2d 645, 650, 290 P.2d 531; People v. Martin, 46 Cal.2d 106, 293 P.2d 52; Hatfield v. State of Texas, 161 Tex.Cr.R. 362, 276 S.W.2d 829, 830; People v. Brown, 354 Ill. 480, 188 N.E. 529, 530; People v. Baird, 135 Cal.App.2d 109, 286 P.2d 832; Sec. 836, subd. 3, Penal Code.

[2] Appellant next complains because the officers also took a bone-handled pocket knife from each of defendants and they were received in evidence. He contends they were not admissible because they were not connected with the offense, citing People v. Orloff, 65 Cal.App.2d 614, 151 P.2d 288; and People v. Milburn, 89 Cal.App. 526, 265 P. 285. We do not see the purpose of admitting these knives in evidence since the evidence shows the crime was committed by means of a gun. However, our examination of the transcript shows that no objection was made to the testimony in respect to the knives. In fact, counsel for defendant questioned the witness about them and the prosecution stipulated that the knives could go into evidence as marked for identification by defendant's counsel. No prejudicial error resulted. People v. Mason, 65 Cal.App.2d 5, 10, 149 P.2d 742; People v. Beltowski, 71 Cal.App.2d 18, 23, 162 P.2d 59; People v. Clemison, 105 Cal.App.2d 679, 682, 233 P.2d 924.

[3–5] Claim is next made that the trial court erred in receiving in evidence the testimony of the bartender that he lost this gun under the circumstances indicated and that it was found in the possession of appellant. Defendant denied knowledge of the gun to the officers. Although evidence of separate offenses is not ordinarily admissible, the testimony was admissible to show that appellant might well have been possessed of this particular gun in committing the offense charged. People v. Bingham, 44 Cal.App.2d 667, 668, 112 P.2d 941; People v. Cato, 13 Cal.App.2d 391, 56 P.2d 1245. The trial court, in ruling on the objection, stated that it was admissible as circumstantial evidence of possession of the gun. Appellant thereafter offered no instruction indicating that the reception of this evidence should be limited to such purpose. He cannot now be heard to complain for the first time on appeal that the court should have given such an instruction on its own motion. People v. James, 40 Cal.App.2d 740, 746, 105 P.2d 947; People v. Rubalcado, 56 Cal.App. 440, 443, 205 P. 709; People v. Weitz, 42 Cal.2d 338, 267 P.2d 295.

[6] Next it is argued that although appellant did not request an instruction to the effect that specific intent is a necessary element of robbery, such an instruction should have been given. The trial court did give an instruction in the language of

section 211 of the Penal Code, the statutory definition of robbery. It was followed by an instruction to the effect that the intent with which the unlawful act charged was done, must be proved. The court was not, without request, under obligation to give a more particular charge regarding specific intent. People v. Castile, 3 Cal.App. 487, 488, 86 P. 746; People v. Perhab, 92 Cal.App.2d 430, 433, 206 P.2d 1133; People v. Quinn, 77 Cal.App.2d 734, 737, 176 P.2d 404.

[7] This same conclusion must be reached in reference to the claim that the court failed on its own motion to instruct in reference to the intent necessary to make one a principal in the crime of robbery. Appellant may not be heard to complain since the victim identified him as the principal and the perpetrator of the crime. Such an instruction was not vital to the disposition of appellant's case. People v. Davis, 43 Cal.2d 661, 674, 276 P.2d 801; People v. Scanlon, 75 Cal.App. 620, 243 P. 63.

[8] A cautionary instruction regarding oral admissions of defendant was not offered nor given on the court's own motion. Appellant claims reversible error in this respect, citing People v. Cornett, 33 Cal.2d 33, 198 P.2d 877. The claimed statements are those related by the defendant in which he told the officers they had not been in Lindsay that evening and appellant told one officer they had just come from Yokahl Valley. If true, they were only contradictory statements of a minor character, were not a key part of the people's proof, and did not amount to admission of fact which would connect defendants with the commission of the crime. These claimed statements would not constitute a confession of guilt or an extrajudicial admission which would in any manner constitute an acknowledgment of some fact or circumstance which in itself would be sufficient to authorize a conviction, or which tended toward the proof of the ultimate fact of guilt. People v. Bemis, 33 Cal.2d 395, 398, 202 P.2d 82; People v. Deloney, 41 Cal.2d 832, 840, 264 P.2d 532. No prejudicial error resulted. People v. Lowell, 77 Cal.App.2d 341, 349, 175 P.2d 846; People v. Macias, 77 Cal.App.2d 71, 79, 174 P.2d 895; People v. Koenig, 29 Cal.2d 87, 94, 173 P.2d 1.

[9] Lastly, it is argued that it was prejudicial error for the trial court to fail to give defendant's proffered instruction in the language of CALJIC No. 26, i. e., if the evidence is susceptible of two constructions, each appearing to be reasonable, it is the duty of the jury to reject that which points to his guilt. As applied to defendant Richard Borbon, there would be some merit to the argument. He is not appealing. As to appellant, the people did not rely solely or even substantially on circumstantial evidence to convict him. He was identified directly by the victim as the person who actually perpetrated the crime, and the court is not required to instruct, as indicated, where the circumstantial evidence produced is only incident to or corroborative of direct evidence connecting the defendant with the crime charged. People v. Harmon, 89 Cal.App.2d 55, 59, 200 P.2d 32; People v. Monge, 109 Cal.App.2d 141, 144, 240 P.2d 432; People v. Jerman, 29 Cal.2d 189, 197, 173 P.2d 805; People v. Hatchett, 63 Cal.App.2d 144, 155, 146 P.2d 469.

[10] The jury was fully instructed on the necessary proof required where the evidence produced was direct or circumstantial or both. No prejudicial error is noted.

Judgment and order denying a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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Margaret B. FOWLER, Charlotte M. Mullin, Albertina M. Rodi, and Mildred M. Shank, Plaintiffs and Appellants,

v.

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES, a national Banking Association as Trustee designated under the Last Will and Testament of Warren F. McGrath, deceased, Callie D. McGrath; Margaret May Shank; Albertina C. Rodi; Margaret Lou Rodi; Karla Anne Rodi and John Mullin, Defendants and Respondents.

Civ. 21327.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1956.

Hearing Denied Jan. 8, 1957.

Proceeding by testator's daughters to impose constructive trust upon property which they contended he devised to his second wife in contravention of parol contract, with first wife, under which property should have gone to daughters. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment for defendants, and plaintiffs appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to support a finding either that no contract was made or that its terms were nebulous and did not preclude eventual testamentary disposition leaving some property to second wife.

Affirmed.

1. Trusts 🔑107, 110

In proceeding by testator's daughters to impose constructive trust upon property which they contended he devised to his second wife in contravention of parol contract, with first wife, under which property should have gone to daughters, daughters were under not only burden of persuasion in ordinary civil case, but as well under burden to establish oral agreement by full, clear and convincing evidence and to show that they suffered unjust and unconscionable injury and loss by reason of failure of decedent to bequeath and devise all such property to them. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc., § 1973, subd. 6.

2. Evidence 🔑236(1), 276

Oral declarations or admissions, particularly of persons who have died, form class of evidence which is not highly favored. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc., § 1973, subd. 6.

3. Appeal and Error 🔑1011(1)

Appellate courts will not reverse findings where there is any substantial conflict in evidence.

4. Trusts 🔑110

In proceeding by testator's daughters to impose constructive trust upon property which they contended he devised to his second wife in contravention of parol contract with first wife under which property should have gone to daughters, or contract with them evidence supported findings that no such parol contract had existed between testator and his first wife and that when daughters quitclaimed legacies which they received from testator's first wife to testator they did not do so in return for any oral promises. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc., § 1973, subd. 6.

5. Judgment 🔑23

The opinion of a trial court is not part of the findings and thus not decision of court, but is merged in and controlled by judgment and may not be used to impeach findings.

6. Appeal and Error 🔑1011(1)

Where remarks of trial judge indicate that he decided case on misapprehension of law and never truly exercised judicial function of weighing conflicting evidence, accepting some and rejecting other, judgment may be reversed for true decision on evidence.

7. Evidence 🔑265(2), 313

A contract may be proved by subsequent declarations of contracting parties without direct evidence of very circumstances where contract was consummated, and admissions or declarations against interest of party to contract may be sufficient to prove existence of agreement.

8. Appeal and Error ⚷1011(1)

Record, on appeal from judgment for defendants in proceeding by testator's daughters to impose constructive trust upon property which they contended he devised to his second wife in contravention of parol contract with first wife under which property should have gone to daughters, failed to indicate that trial judge was under claimed misapprehension of law that contract could not be proved by subsequent declarations of contracting parties. West's Ann.Civ.Code, §§ 1565, subd. 3, 1624, subd. 6; West's Ann.Code Civ.Proc., § 1973, subd. 6.

9. Contracts ⚷14

A contract is result of objective manifestations of parties, and if those manifestations are sufficient, parties' subjective intentions or beliefs are immaterial. West's Ann.Civ.Code, § 1565, subd. 3.

10. Contracts ⚷14

The same interchange of words may or may not be a binding contract depending on circumstances under which words are uttered, tone of voice used, and to whom they are addressed, and if words are either spoken under circumstances where it is obvious that neither party would be entitled to believe that other intended a contract to result, there is no contract. West's Ann. Civ.Code, § 1565, subd. 3.

11. Specific Performance ⚷86, 119
Trusts ⚷107

Before court of equity will decree quasi specific performance or impose constructive trust against estate of decedent in derogation of his expressed testamentary desires, plaintiffs must prove that they would be victims of fraud should agreement not be enforced and terms of agreement must be definite and certain. West's Ann.Civ. Code, § 1624, subd. 6; West's Ann.Code Civ.Proc., § 1973, subd. 6.

12. Specific Performance ⚷86

Equity is loath specifically to enforce contract which would prevent testator from providing for his wife, a natural and legitimate object of his bounty.

13. Trusts ⚷110

In proceeding by testator's daughters to impose constructive trust upon property which they contended he devised to his second wife in contravention of parol contract with first wife under which property should have gone to daughters, evidence sufficient to support a finding either that no contract was made or that its terms were nebulous so as to preclude eventual testamentary disposition leaving some property to second wife.

14. Evidence ⚷278

Statement in dying declaration that beneficiary of declarant's property is contractually bound eventually to distribute his assets to certain third person is not a declaration against interest and is not admissible to prove contract. West's Ann.Code Civ.Proc., § 1870, subd. 4.

Loeb & Loeb, Herman F. Selvin, Los Angeles, for appellants.

Chandler, Wright, Tyler & Ward, Los Angeles, for respondents Security First Nat. Bank of Los Angeles, and Callie D. McGrath.

MOORE, Presiding Justice.

Plaintiffs appeal from a judgment in their action to impose a constructive trust upon property left by their deceased father, Warren McGrath. The contentions are that the findings are not supported by substantial evidence, and that the opinion of the trial judge indicates that because of an erroneous conception of the law he refused to consider and weigh the majority of appellants' evidence.

On April 24, 1895, the testator and his first wife, Lottie, were married. During the following fifty-one years they raised four daughters and accumulated a considerable fortune. Lottie died March 13, 1946, leaving no will. A portion of her separate property which devolved by the law of intestate succession was quitclaimed to the father, Warren, by the four daughters at his suggestion. The testator was then 74 years of age. A little over one year after Lottie's death, he married his secretary, Callie, a woman twenty-eight years his junior. By his final will, executed after his marriage to Callie, Warren left one fourth of his property outright to her; the balance in trust with one half of the oil income and one third of the remaining income to Callie for life, the daughters or their issue to receive the residue of the income until Callie's death, and all of the income thereafter. Upon the death of the survivor of them, the trust estate is to go in equal shares to the surviving issue of the daughters per capita.

Alleged Grounds for the Action

The daughters brought this action alleging that the testator and Lottie had entered into a parol contract that the first to die would leave all his property to the survivor, who in turn would bequeath it in equal shares to the daughters; that Lottie died intestate in the belief that her husband would succeed to her estate and in reliance on his promise to make the children his eventual beneficiaries; that the final will of Warren McGrath unconscionably violates his promise in that his second wife and the children of his daughters are given some interest in his estate. Furthermore, they urge that they quitclaimed to their father that portion of Lottie's separate possessions which would have gone to them upon her death in reliance upon his representation that they would eventually inherit Lottie's property in addition to his own estate.

The Findings

The trial court found that no parol contract between Warren and Lottie had ever been formulated; that Lottie had relied on no such agreement at the time of her death in 1946; that Warren did not promise his daughters that he would will all his property to them in return for the quitclaim of a portion of Lottie's separate property.

Evidence of an Oral Contract

Appellants' only evidence of the existence of a parol contract between the testator and Lottie is the various declarations of decedent testified to by the four girls, a friend, a bank executive and two ministers acquainted with Warren. The purport of all these declarations was that Warren and Lottie had an "agreement" as to the manner of the disposition of their property in event of death of both or either, and that the daughters were to have a substantial share in that disposition.

Margaret Fowler testified that Warren had stated in her presence that "Mama and I have always agreed that everything shall go to you girls and it will probably be your responsibility to take care of most of it because the other girls have other interests." Upon another occasion, he remarked that he and "mama" had agreed that everything should go to the four girls after the two of them were gone; "You know mama and I have had that agreement all our lives, everything would go to you girls, we have spent our lives working for everything for you girls, and that is what it is going to be."

Mildred Shank asserted that the decedent had said to her that "Lottie and I have arranged an agreement whereby either one of us will have the estate for our lifetime and at the death of both of us it will be divided between the four of you." The other two daughters recalled similar conversations with their father. According to each of them, Warren had mentioned that he and Lottie "understood" that the girls were to receive a substantial portion or all the property held by the parents. Mr. McGrath at one time told Paul Neushaeffer, vice president of a bank, that he was not interested in setting up any trusts with the bank as trustee since "as long as I am capable I want to attend to my own business because I am looking after my girls. * * * My girls are everything that I have and what I have is for them." A similar statement was made by decedent to Mrs. A. C. Pancoast.

Reverend J. Whitcomb Brougher, Jr., testified that Warren McGrath had intimated to him that "he had an obligation, he felt, to * * * his daughters because * * * it was his and Lottie McGrath's plan to set up a program whereby the estate would fall to his daughters and since Lottie had passed away he said 'I think I should talk with them because they are the ones who are primarily involved [in any plan to contribute to a church building program]'."

Reverend James W. Fifield, Jr., testified that "he told me at that time and on numbers of other times that the plan was that the resources that he and his wife had accumulated in their partnership was to go to the girls, the children, and presumably pass on to the grandchildren * * * and he always said that he felt it was his duty and that he felt honor bound with his wife to carry out this program for the children."

In order to prove reliance by Lottie upon such a "contract" as would estop decedent's legatees and devisees from asserting the statutes which require such agreements to be written, Civ.Code, § 1624, subd. 6; Code Civ.Proc. § 1973, subd. 6, the husband of one of the daughters testified that Lottie told him on her deathbed that she had not made a will nor would she make one because "for years she and Warren had talked about what they wanted to do, that Warren understood her ideas on the subject, that everything was to go to the girls, that was their plan, they had discussed it in detail and everything was as she wished it."

Respondents countered by introducing into evidence, without objection by appellants on any tenable ground, eight previous wills of Warren McGrath. The last one was dated January 18, 1946. These wills, executed during the period that the oral contract between Lottie and Warren supposedly existed, presented a display of testamentary schemes differing in many respects from the alleged oral agreement. To be sure, in all the wills the daughters were extensively provided for; but the testator created various trust schemes, in some of which his grandchildren took a share as well as his daughters. These wills are cogent evidence explaining the meaning of Warren's several statements relative to his "understanding" with Lottie. They indicate either that the testator felt that his discussions with Lottie were not intended by either to be in the nature of a binding contract but rather mere family planning; or that if there was an agreement, its terms did not prevent Warren from utilizing various testamentary schemes to achieve the substance of the agreement which was to provide liberally for his daughters.

Other witnesses testified that in the meetings over the estate which followed the testator's demise, the daughters expressed disappointment over the size of their gifts but were strangely silent relative to any existence of a contract to dispose of the property otherwise. A. Calder Mackay, attorney for Warren McGrath, and C. W. Smith, vice president of a national bank, testified that at no time during the extensive negotiations over the prospective probate of the estate did any of the appellants indicate that they claimed the whole of the estate in contravention of the terms of the will.

On cross-examination, two of the witnesses for the plaintiffs testified that they were intimately acquainted with decedent and that it was their opinion that his character was such as would prevent him from ever violating a promise he had indeed made.

Also on cross-examination, one of the daughters admitted that Lottie McGrath was undoubtedly familiar with the California laws of intestate succession at the time she died. Therefore, she was aware that her property which she held separately would not pass in its entirety to her husband in accordance with the agreement which appellants claim existed at that time. The inference is that Lottie could not have relied upon the asserted oral "understanding" between herself and Warren. A further inference is that if there was such an agreement, its terms did not demand that the spouse first to die must will *all* the property to the survivor who in turn would will his *entire* estate to the daughters.

Findings Supported by Evidence

[1, 2] Was the evidence introduced by respondents as beneficiaries of the last will sufficient to support the finding that no oral

contract to dispose of his property otherwise had been entered by the testator? Not only are the appellants here under the ordinary burden of persuasion in a civil case, but since they are seeking to impose a constructive trust upon the estate of a deceased person in contravention of his expressed testamentary wishes, they must establish "the oral agreement by *full, clear, and convincing evidence* * * * and * * * that plaintiff suffered an *unjust and unconscionable* injury and loss by reason of the failure of decedent to bequeath and devise all * * * property [to them]." Khoury v. Barham, 85 Cal.App.2d 202, 211, 192 P.2d 823, 828, emphasis added; Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198; Monsen v. Monsen, 174 Cal. 97, 103, 162 P. 90; Barham v. Khoury, 78 Cal.App.2d 204, 211, 177 P.2d 579; Notten v. Mensing, 20 Cal.App.2d 694, 696, 67 P.2d 734. Therefore, appellants must convince this court not only that they presented the preponderance of the evidence, not only that the evidence was clear and convincing, but that it was error for the trial court not to be so convinced of its verity as to upset the testament. "It must be remembered that testimony of oral declarations or admissions (particularly those of persons who have been silenced by death) form a class of evidence which is not highly favored in the law." Monsen v. Monsen, supra, 174 Cal. at page 103, 162 P. at page 92.

[3] Appellants fully recognize that appellate courts will not reverse findings by a trial court where there is any substantial conflict in the evidence, but point out that "where the great current of the evidence is against the verdict [or finding], and we cannot escape the conviction that it is wrong, we should not be deterred from setting it aside * * *." Field v. Shorb, 99 Cal. 661, 666, 34 P. 504, 505. It is interesting to note that of the twenty-one cases cited by appellants in support of this position, sixteen reversed judgments in *favor* of the party with the burden of persuasion. Here the judgment is against that party. No case has been cited reversing the refusal of a trial court to find the existence in the evidence of grounds for a constructive trust.

[4] Consider the very nature of all attempts to impose a constructive trust upon an estate because of an alleged oral agreement. In almost every case it must be very difficult for the proponents of the will to introduce any evidence directly rebutting the existence of such a contract. Plaintiffs claim that the testator made an oral promise to them. Who is alive to testify to the contrary? Respondents here were fortunate to muster the contradictory evidence, namely, the inconsistent wills, the strong, forthright and honest character of decedent, the silence of appellants at a time when they should ordinarily have asserted their claims, and Lottie's death without a will to leave all her property to Warren. Such evidence warrants inferences in conflict with the proof adduced by appellants and is sufficient to support the findings.

Appellants make much of the fact that a short gap existed between the date of the last inconsistent holographic will of decedent and the death of Lottie, and that during this period Warren made some further declarations relative to an "agreement" with Lottie. Therefore, the argument runs, for this critical period of time, appellants' testimony is absolutely uncontradicted. Surely plaintiffs in an action to declare a constructive trust are not entitled to a decision as a matter of law merely because no contradiction exists as to their evidence of occurrences during a short period of an allegedly long and continuous series of interrelated events. If in spite of appellants' testimony of the repeated admissions of a contract made by the testator before January 18, 1946 (the date of the last will before Lottie's death), no contract yet existed, the inference is strong that further similar declarations of the decedent did not evidence the creation of an oral contract between that time and his wife's decease.

The case of Notten v. Mensing, supra, 20 Cal.App.2d 694, 67 P.2d 734, is apropos. There appellants attempted to prove an oral contract not to revoke a will. The evidence also consisted of declarations of the decedent relative to an "agreement." The appellate court refused to upset a decision for the proponent of the subsequent will. Khoury v. Barham, supra, 85 Cal.App.2d 202, 192 P.2d 823, reached a similar result.

The alleged, oral promise by Warren to will all his property to the daughters in exchange for their quitclaim to him of that portion of Lottie's property which they had inherited was dependent upon the existence of a prior contract with Lottie. If that agreement was not proved, neither was the subsequent quitclaim transaction. The trial court was justified in finding, after hearing evidence of the dominant role Warren McGrath played in the management of family affairs, that his daughters would readily quitclaim to him the small estate left them by Lottie if he should so suggest without the necessity of any return promises.

Findings Not Based On Misapplication Of Law

Prior to adopting findings of fact, the trial judge spoke an accompanying opinion from the bench which he prefaced by stating "I think the case before me and the decision I render will warrant an appeal and that it should be taken. * * * The first important question here for determination by this Court is whether the evidence is or is not sufficient as a matter of law to sustain the claim that there was a binding agreement among the parents. Now, the mere fact that the trial court accords credibility to the testimony offered and received to sustain a claim or a defense is not yet sufficient if the evidence is not sufficiently specific to meet the controlling rules of law that are applicable. My difficulty here in this case arises right at that point."

[5–8] The opinion of a trial court is not a part of the findings and thus is not the decision of the court. The opinion is merged in and controlled by the judgment and may not be used to impeach the findings. Gschwend v. Stoll, 104 Cal.App.2d 806, 809, 232 P.2d 494. However, where remarks of the trial judge indicate that he decided the case as he did because of a misapprehension of the law and never truly exercised the judicial function of weighing the conflicting evidence, accepting some and rejecting the other, the judgement may be reversed if necessary for a true decision on the evidence. Guardianship of Estate of Gestner, 90 Cal.App.2d 680, 686, 204 P.2d 77; Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal.App.2d 776, 790, 194 P.2d 148; Felsenthal v. Warring, 40 Cal.App. 119, 134–135, 180 P. 67. Appellants suggest that the opinion of the trial court here indicates that he was of the impression that a contract could not be proved by the subsequent declarations of the contracting parties without direct evidence of the very circumstances wherein the contract was consummated. That is not the law. The admissions, or declarations against interest as the case may be, of a party to a contract may be sufficient under the circumstances to prove the existence and terms of that agreement. Steinberger v. Young, 175 Cal. 81, 86, 165 P. 432; Bean v. Wilson, 120 Cal.App.2d 58, 61, 260 P.2d 134; Airola v. Gorham, 56 Cal.App.2d 42, 47–49, 133 P.2d 78. However, we do not agree that the trial judge was under this misapprehension of the law or that his findings were indeed based upon such a consideration.

Some of the witnesses presented by plaintiffs are wholly disinterested in the outcome of this action. Their character is such that it would be unthinkable that they would deliberately falsify testimony before a court of law and under oath. As stated by the trial judge, "The recollection of the witnesses in this case may not in all respects be strictly accurate particularly in respect to the language used by the decedent Lottie or the decedent Warren McGrath but I see no reason to doubt the credibility of the witnesses even though the recollections of some of them may not be entirely accurate and therefore may not be entertained." Thus, assuming that appellants' witnesses spoke the truth insofar as they were able, is it yet not possible that respondents were entitled to a decision in their favor?

An important key to the decision is the admonition of the judge that "It is not unusual for parents and their children to have a general family understanding that the surviving parent will take all the assets and that the surviving parent will leave the assets then or pass them on to the children. Discussions are often had to that effect in families but are such discussions to be classed as contracts? My wife has said time and time again 'I want to leave my property to you and I want you to give it to our three daughters.' I said, 'That is exactly my idea of things too.' Have we entered into a contract? I don't think so." To which it may be added, perhaps you have and perhaps you have not. It depends upon the circumstances, the words and phrases employed, the understanding of the parties, the type of family involved. When persons reach the age attained by Lottie and Warren McGrath and accumulate a sizeable fortune, it is natural to suppose that they oftentimes discuss what would happen to their wealth should either die. Whether these spoken "plans," "understandings," or "agreements" are intended by the family members as a binding contract among them is a question of fact for the trial court. Here that court was of the opinion that Mr. McGrath "was a man of unusual attainments and a very forcible character. If he had been requested at any time in his life to enter into an agreement with his wife to the effect that he would be bound to handle all the property after his wife's death toward giving it to the daughters he never would have done it. He was the type of man who had made his way and he was the type of man who could not be thus restricted." Therefore, his family would not be entitled to believe that their normal family planning constituted more than a moral obligation on each member.

[9, 10] A contract is indeed the result of objective manifestations of the parties. If those manifestations are sufficient, the parties' subjective intentions or beliefs are wholly immaterial. Civ.Code, § 1565(3); Brant v. California Dairies, Inc., 4 Cal.2d 128, 48 P.2d 13; Rest., Contracts, §§ 3, 19–20. However, the same interchange of words may or may not be a binding contract depending upon the circumstances under which the words are uttered, the tone of voice used, to whom they are addressed. If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract. As lucidly pointed out by Justice Learned Hand, "the form of utterance chosen is never final; it is always possible to show that the parties did not intend to perform what they said they would, as, for example, that the transaction was a joke * * * or that it arose in relations between the members of a family which forbade it * * *. It is quite true that contracts depend upon the meaning which the law imputes to the utterances, not upon what the parties actually intended; but, in ascertaining what meaning to impute, the circumstances in which the words are used is always relevant and usually indispensable." New York Trust Co. v. Island Oil & Transport Corporation, 2 Cir., 34 F.2d 655, 656. Furthermore, appellants never did prove the "objective manifestations" of this alleged contract. They could only testify to declarations by the decedent that some such manifestations had indeed occurred and that an "agreement" resulted. Therefore, the so-called objective test to be applied to alleged contract transactions does not solve this case.

[11, 12] Before a court of equity will decree "quasi-specific performance" or impose a constructive trust against the estate of a decedent in derogation of his expressed testamentary desires, the plaintiffs must prove that they would be the victims of a "fraud" should the agreement not be enforced. Walker v. Calloway, 99 Cal.App.2d 675, 681, 222 P.2d 455; Brown v. Freese, 28 Cal.App.2d 608, 615, 83 P.2d 82; Kurtz

v. de Johnson, 42 Cal.App. 221, 227, 183 P. 588. The terms of the agreement must be definite and certain. Bank of America Nat. Trust & Savings Ass'n v. O'Shields, 128 Cal.App.2d 212, 215, 275 P.2d 153. Therefore, appellant was under the burden of convincing the trial court that the various declarations of the decedent indicated definitely and certainly that a fraud would be worked upon the daughters of the testator should their children or the decedent's second wife be allowed to take any share in his estate. As pointed out by the trial judge, "Is there anything unconscionable in what was here done? The decedent left one-fourth of his estate to his widow, Callie McGrath, *three-fourths of the estate to his daughters,* and their interest was taken subject to a half-interest in the income—I think it was of oil or gas—maybe it was larger—and another half-interest in the income from other properties so the girls, therefore, in effect, if we compute it received the full mother's share when you add it up." The testimony introduced by appellants indicates that the decedent and Lottie felt a strong obligation to see that the survivor of them was well cared-for and that a substantial portion of their estate eventually devolved upon their children. However, the holographic wills of Warren McGrath and the death of Lottie intestate indicate that neither was bound to pursue any particular testamentary method to achieve this objective. To sustain appellants' claim that the "agreement" between Lottie and Warren absolutely required the latter to bequeath and devise all his property in a lump to the daughters would prevent the decedent from achieving considerable tax savings by the formation of a well-considered estate plan. Considering the size of the McGrath estate, it is unlikely that the husband and wife ever intended to reach such a result. Furthermore, so to hold would preclude a subsequent wife of the testator from receiving upon his death *any portion of the property which was his to bequeath.* Equity is loath specifically to enforce a contract which would prevent a testator from fully providing for his wife, a natural and legitimate object of his bounty. Owens v. McNally, 113 Cal. 444, 453, 45 P. 710, 33 L.R.A. 369.

[13] Therefore, the evidence is sufficient to support a finding either that no contract was made, or that its terms were too nebulous to preclude the eventual testamentary disposition actually made by the testator. Consideration of the trial court's remarks from the bench does not change this conclusion.

Admission of Evidence

[14] Appellants introduced into evidence certain statements made by Lottie on her deathbed, out of the presence of the testator indicating her belief that an "agreement" existed. The trial court allowed such declarations to be introduced solely for the purpose of showing Lottie's state of mind. Appellants now contend that the declarations were against her pecuniary and proprietary interest at the time as known by her and should have been admitted to show the existence of a contract. Code Civ.Proc. § 1870(4). The simple answer is that they were self-serving hearsay statements and inadmissible to prove the contract. The statement of a dying declarant that the beneficiary of the declarant's property is contractually bound eventually to distribute all his assets to certain third persons is certainly not against the interest of the speaker.

Appellants' complaint against the introduction of Warren's holographic wills is raised for the first time on appeal. Therefore, it cannot constitute a ground for reversal.

Affirmed.

FOX, J., concurs.

ASHBURN, J., did not participate herein.

146 Cal.App.2d 22

Lillie BUTLER and Ernest W. Butler, Executrix and Executor, respectively, of the last will and testament of Aaron Burr Butler, Deceased, Plaintiffs, Cross-Defendants and Respondents,

v.

J. R. HOLMAN, Jack M. James, Lavonna James, Andrew J. Thickstun and Alta Mae Thickstun, Defendants, Cross-Complainants and Appellants,

G. M. Russell, R. W. Russell and E. F. Chambers, Cross-Defendants and Respondents.

Civ. 5356.

District Court of Appeal, Fourth District, California.

Nov. 15, 1956.

As Modified on Denial of Rehearing
Dec. 10, 1956.

Hearing Denied Jan. 8, 1957.

Executors' action to recover for ore allegedly removed by defendants from decedent's land. The primary controversy concerned location upon ground of south boundary line of decedent's property. The Superior Court of Fresno County, George M. DeWolf, J., rendered judgment for plaintiffs, and defendants appealed. The District Court of Appeal, Coughlin, J. pro tem., held that evidence sustained finding for plaintiffs.

Affirmed.

1. Boundaries 🔑37(3)

In executors' action to recover for ore allegedly removed by defendants from decedent's land, wherein primary controversy concerned location upon ground of south boundary line of decedent's property, evidence sustained finding for plaintiffs.

2. Mines and Minerals 🔑51(1), 52

In action to recover for ore removed, for an accounting to determine amount thereof, and for an injunction to restrain any further trespass by defendants, who continued to conduct their mining operations during trial, court was authorized to adjust rights of parties up to time of entry of judgment; but, under circumstances of case, it was proper to reserve to plaintiffs the right to supplemental accounting.

3. Action 🔑65

Relief administered in equity is such as nature of case and facts, as they exist at close of litigation, demand.

4. Equity 🔑72(1)

Laches is an unreasonable delay in asserting a right which causes such prejudice to an adverse party as renders granting of relief inequitable.

5. Equity 🔑84

In determining whether delay has been unreasonable, circumstances in each case in which defense of laches is asserted must be taken into consideration.

6. Mines and Minerals 🔑51(3)

In executors' action to recover for ore allegedly removed by defendants from decedent's land, wherein primary controversy concerned location upon ground of south boundary line of decedent's property, evidence sustained finding for plaintiffs on laches issue.

7. Appeal and Error 🔑989, 994(1), 996

Weight of evidence, inferences to be drawn therefrom, and credibility of witnesses are not matters for consideration by reviewing court.

◆

Ted R. Frame, Coalinga, Albert W. Dilling, Chicago, Ill., and Charles L. Gilmore, Sacramento, for appellants.

Aten & Aten, Fresno, Henry T. Leckman, Coalinga, and Rowell, Lamberson & Thomas, Fresno, for respondents.

COUGHLIN, Justice pro tem.

In 1913, Aaron B. Butler received a patent from the United States Government to land in Fresno County, described as the South one-half of the Southeast quarter and the South one-half of the Southwest quarter of Section 34, Township 18 South, Range 13 East, M. D. B. M. Upon his death the plaintiffs Butler were appointed executors of his will. Several years thereafter, the defendants James and Thickstun located the "Mistake Lode Mining Claim" upon a deposit of chrome ore which they contend is situated immediately south of the Butler property, in Section 2, Township 19 South, Range 13 East, M. D. B. M. They leased the mine to the defendant Holman. An extensive development program was undertaken resulting in the excavation of a large pit, by bulldozers, and the removal of several thousand tons of ore. The executors first learned of this mining activity through information furnished by some hunters, who had been in the vicinity. An investigation ensued which led the plaintiffs to believe that the mine was on the Butler property. Thereupon the complaint in this action was filed seeking damages for the ore removed; an accounting to determine the amount thereof; and an injunction to restrain any further trespass.

The defendants filed an answer and cross-complaint by which they denied the material allegations of the complaint; set up the defense of laches; sought to quiet their title to the mine; and asked for an injunction against the plaintiffs.

From a judgment in favor of the plaintiffs awarding damages in the sum of $161,558.23, the defendants appeal.

[1] The primary controversy in this case concerns the location upon the ground of the south boundary line of the Butler property.

In 1879, W. F. Benson, a United States Deputy Surveyor, made a survey of Township 18 South, Range 13 East, M. D. B. M. in which the Section 34 referred to in the Butler patent is located. The monument marking the Southeast corner of said section is intact. However, the monument marking the Southwest corner thereof cannot be found. In his field notes Benson, the surveyor, records a tie of this Southwest corner to two trees: one to the Southwest and the other to the Northwest. From the section corner the tree to the Southwest was described as a forked pine, 24″ in diameter, bearing South 26 degrees west, 690 links distant, and the tree to the northwest was described as a pine 10″ in diameter, bearing north 56¼ degrees west, 380 links distant.

In an effort to determine the location of the true south line of Section 34, the parties to this action caused several surveys to be made. Each resulted in a different boundary. In the course of these surveys, a surveyor by the name of Hardgrove found the fallen trunk of a forked pine tree which, undoubtedly, was one of the trees referred to by Benson in his field notes, for it carried the inscription "B T S 33 T 18 S R 13 E" (meaning, bearing tree—Section 33, Township 18 South, Range 13 East). Hardgrove identified this tree as the 24-inch Southwest bearing tree described in Benson's field notes, and, using it as such, established the Southwest Section corner in question.

Shortly thereafter, a surveyor by the name of Ross discovered the root system and burned remains of another tree, farther to the south, which he identified as the 24-inch pine tree in question. On October 20, 1955, using this tree as the Southwest bearing tree described in Benson's field notes and using the scribed tree found by Hardgrove as the Northwest bearing tree described in those notes, and following the calls and distances recorded therein, Ross established what he testified was the Southwest corner of Section 34.

The Ross section corner is south of the Hardgrove section corner.

Hardgrove never located a witness tree northwest of the corner which he established.

The trial court found that the corner established by Ross was the true section corner and described the southerly end line of Section 34 accordingly. The pit from which the defendants had excavated ore is north of this line; within Section 34; and on the property of the plaintiffs.

The defendants claim that, in accepting the Ross corner as the true section corner, the court found that the 24-inch forked pine tree referred to in the Benson field notes was not southwest of the corner, as recorded therein, but was northwest of the corner; that in so doing the court refused to follow those notes, contrary to the rule of law which provides that the field notes of an approved government survey are conclusive on the owner of patented land described by the use of such survey. Weaver v. Howatt, 171 Cal. 302, 306, 152 P. 925; Chapman v. Polack, 70 Cal. 487, 492, 11 P. 764; Trabucco v. Sorrels, 113 Cal.App. 401, 403, 298 P. 521; Phelps v. Pacific Gas & Electric Co., 84 Cal.App.2d 243, 247, 190 P.2d 209.

The defendants' contention is based upon the false premise that the scribed tree, which the court found was northwest of the Ross corner, was the 24-inch forked pine tree referred to in the field notes. The evidence upon this point is in conflict. There is substantial proof, by fact and by inference, that this scribed tree was not the 24-inch forked pine tree in question. The finding in this regard is adequately supported by testimony from which the court could conclude that this tree was not 24 inches in diameter at the time of the survey, whereas the tree to the southwest, located by Ross, approximated this size; that the blaze on the scribed tree, when it was standing, faced in the direction of the corner as established by Ross, which connected it with that corner in view of the accepted custom of surveyors to cause the blaze on a witness tree to face the corner to which it is tied; and that this tree was in Section 33, requiring the common corner for sections 33 and 34 to be to its southeast, because approved surveying practice required a tree to be marked to agree with the section in which it stands.

Contrary to the contention of defendants, the trial court did not change the position of any of the trees described in the field notes. Instead, it found that the remains of the tree described by Ross was the tree which Benson recorded as bearing southwest of the section corner, and that the fallen tree discovered by Hardgrove was the tree referred to as bearing northwest of that corner.

In addition to the testimony with respect to the bearing trees referred to in the field notes, there is other evidence that the location of the disputed section corner is at the place designated by Ross in his survey of October 20, 1955. In their opening brief, respondents cite eight different factual situations, supported by substantial evidence, each of which corroborates the finding of the trial court.

The defendants next attack the judgment on the ground that the amount awarded as damages is excessive.

The court found that the defendants converted in excess of $600,000 worth of chromium and other substances which they had mined from the Butler property and from which they netted a profit of $161,558.23. The latter sum was awarded as damages.

It is contended that, at least, a part of the ore in question came from the defendants' property. However, this contention is based on testimony respecting the location of the mine in relation to a boundary line fixed by a survey which the court did not accept as establishing the true line. Although, in their opening brief, the defendants say that the award of damages is the result of either "passion and prejudice on the part of the trial court" or "pure speculation", yet, at the hearing before this court, they admitted that if the boundary line as established by the judgment was sustained, their claim that the award included damages for ore taken from their own property was without merit.

The trial of this case started October 17, 1955. At that time, the defendants still were conducting their mining operations, and continued to do so thereafter. The complaint alleged a continuing trespass, and asked for an accounting. The defendant Holman furnished the Court with a statement of all sales up to October 3, 1955. This statement did not include payments for ore shipped before that date, upon which returns had not yet been made. The judgment was based upon an accounting up to October 3, and reserved to the plaintiffs the right to a further accounting, for ore removed after October 3, and for ore removed before that date but for which payment had not been received by the defendants. From the time ore is shipped to the mill, until payment is received by the shipper, it must be milled into concentrates which are shipped to a purchasing agency, which, in turn, makes certain tests preliminary to acceptance or rejection, and, if accepted the price is fixed, depending upon the quality of the ore. It is apparent that the time and amount of payment are subject to many variable factors.

[2, 3] Although the court was authorized to adjust the rights of the parties up to the time of entry of judgment, Union Oil Company of Cal. v. Mutual Oil Co., 19 Cal. App.2d 409, 412, 65 P.2d 896, under the circumstances of this case, it was proper to reserve to the plaintiffs the right to a supplemental accounting as "The relief administered in equity is such as the nature of the case, and the facts as they exist at the close of the litigation, demand; * * *." Collins v. Sargent, 89 Cal.App. 107, 112, 264 P. 776, 779.

It is further contended that the evidence does not sustain a finding that the defendants received a net profit of $161,558.23. The record contains substantial evidence from which it may be concluded that the amount of ore concentrates sold by the defendants was between 6,000 and 7,042.86 tons; that the average price of concentrates was between $100 and $115 per ton; that the total gross received for this ore was between $600,000 and $809,830 or more; that the actual return paid to James and Thickstun, as lessors, was $66,075.40; that $5,482.83 was paid to an investment group as interest on their investment; and that the actual return to the defendant Holman, as net profit, was an additional 15 per cent of the gross return. This evidence would support a judgment for as much as $193,032.73. The findings of fact are based on such of the evidence as established damages in the lesser sum of $161,558.23.

The defendants charge the trial judge with bias because he did not accept the testimony of Mr. Holman that his estimated profit was "somewhere between Sixty-eight and Seventy thousand dollars" instead of his testimony that such estimated profit was 15 per cent of a gross of $600,000, or $90,000. Stated thusly, the charge is reduced to an absurdity.

In this same vein, the defendants pose the question: "Was further bias shown when the trial court permitted plaintiffs to file late pleadings?" Reference is made to an order denying defendants' request to strike an affidavit and memorandum of authorities in connection with a motion for a new trial. The affidavit was in the nature of an argument rather than a statement of facts. The matters contained in the memorandum could have been presented orally at the hearing. It is not alleged that any prejudice resulted from this order and none appears from the record. The complaint is trivial and, even if well taken, is not cause for a reversal. Dam v. Lake Aliso Riding School, 6 Cal.2d 395, 398, 57 P.2d 1315.

[4–7] As a defense to the equitable relief prayed for in the complaint, the defendants invoke the doctrine of laches. To sustain their contention that the adverse decision of the trial court on this defense was error, the defendants assume a state of facts contrary to the findings. The issue thus raised is the sufficiency of the evidence to sustain the findings in question.

In November, 1951, the premises now known as "Mistake Lode Mining Claim" were located as a Placer and described as being in Section 2 of Township 19 South, Range 13 East, M. D. B. M. In May, 1953, the same property was located as a Lode.

Some development work took place after the original location, but the mine was not actually in operation until January, 1953. By the time this action was commenced an extensive operation was under way, and the mine pit had been opened to a hundred feet in depth.

The plaintiffs first learned that mining operations were going on in the general area in August, 1954. Thereafter they saw their attorney; caused a survey to be made; after this survey, by letter dated April 12, 1955, notified the defendants that they were operating on the Butler property; and in June, 1955, brought this action.

The land in question is hilly and covered with brush and trees. It has been used by one of the Butler brothers, for grazing purposes, under a lease from the plaintiffs. There is no evidence that either of the plaintiffs had seen the property from 1926 until 1955.

The defendants constantly have contended that their mine was not on the Butler property; refused to stop operations; obtained a preliminary injunction to prevent the plaintiffs from interfering with the same; and, now, on appeal, still contend that their claim is located in Section 2 and not in Section 34.

Laches is an unreasonable delay in asserting a right which causes such prejudice to an adverse party as renders the granting of relief inequitable, Cahill v. Superior Court, 145 Cal. 42, 46, 78 P. 467. In determining whether a delay has been unreasonable, the circumstances in each case must be taken into consideration, Hiett v. Inland Finance Corp., 210 Cal. 293, 300, 291 P. 414. Many factors may be involved, amongst which is the plaintiffs' knowledge of the defendants' wrongful acts. Verdugo Canon Water Company v. Verdugo, 152 Cal. 655, 674, 93 P. 1021; Alexander v. State Capital Company, 9 Cal.2d 304, 313, 70 P.2d 619.

There is no evidence that the plaintiffs knew that the defendants were operating a mine located in Section 34, until after the survey, following a consultation with their attorney. The defendants urge that the plaintiffs had constructive knowledge of this fact, because they had the means of knowledge, citing Lady Washington Consolidated Company v. Wood, 113 Cal. 482, 487, 45 P. 809. Whether the plaintiffs had constructive knowledge of the unlawful acts of the defendants, under the circumstances of this case, was a question of fact.

Likewise, whether any delay by the plaintiffs in bringing this action was unreasonable, also, was a question of fact, concluded by the finding of the trial court based on substantial evidence. Newport v. Hatton, 195 Cal. 132, 148, 231 P. 987; Williams v. Marshall, 37 Cal.2d 445, 455, 235 P.2d 372.

In addition, the record substantiates a finding that the defendants were not prejudiced by any alleged delay. Unless the party asserting the defense of laches has been injured by the delay complained of no prejudice has occurred. Alexander v. State Capital Company, supra, 9 Cal.2d at page 313, 70 P.2d 619. It may be inferred that the defendants would have proceeded with the development of the mine regardless of the time suit was commenced. Moreover, the award in favor of the plaintiffs was limited to the net profits received by the defendants.

[8] The appellants were given a fair hearing. They complain that the trial judge was biased. There is not the slightest basis for this contention. The findings about which the defendants complain are supported by adequate and substantial evidence. This case falls within the oft repeated rule that the weight of the evidence, the inferences to be drawn therefrom, and the credibility of witnesses are not matters for consideration by an appellate court. Hardin v. San Jose City Lines, Inc., 41 Cal.2d 432, 436, 260 P.2d 63; Chan v. Title Ins. & Trust Company, 39 Cal.2d 253, 258, 246 P.2d 632; Massow v. Gianaclis, 120 Cal.App.2d 24, 27, 260 P.2d 655.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

146 Cal.App.2d 249

In the Matter of the ESTATE of Gertrude WOLPER, Deceased.

Erving WOLPER, Contestant and Appellant,

v.

Larry WOLPER et al., Proponents and Respondents.

Civ. 22053.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1956.

Will contest. The Superior Court of Los Angeles County, Otto J. Emme, J., entered judgment admitting will to probate and contestant appealed. Proponent made motion to dismiss appeal and contestant made motion to be relieved of default in regard to required procedure on an appeal. The District Court of Appeal, Doran, J., held that where appellant failed to deposit with clerk of court the cost of preparing a reporter's transcript or to secure a waiver of such deposit by the reporter, and also nothing was done to perfect the appeal by settled statement or narrative statement in lieu of reporter's transcript if appellant was financially unable to pay required costs, appeal would be dismissed.

Motion to dismiss appeal granted.

1. Appeal and Error 🔑629

Although the trial court has power to relieve a party from default for failure to comply with statute setting out procedure to perfect an appeal, where such default is suffered through inadvertence, surprise, excusable neglect or mistake, such statutory requirements are not meaningless, and the party requesting such relief must affirmatively show that the situation is one which clearly falls within such category. West's Ann.Rules on Appeal, rules 4(a, c), 5(c), 7(a), 10.

2. Appeal and Error 🔑629

Rules which prescribe the necessary proceedings on appeal and the time within which the various steps shall be taken, are mandatory and should not be relaxed save in those meritorious cases where appellant's fault is clearly excusable. West's Ann.Rules on Appeal, rules 4(a, c), 5(c), 7(a), 10.

3. Appeal and Error 🔑627(2)

Where appellant failed to deposit with the clerk of court the cost of preparing a reporter's transcript or to secure a waiver of such deposit by the reporter, and also failed to perfect the appeal by settled statement or narrative statement in lieu of a reporter's transcript if appellant did not have funds to perfect the appeal, and in addition appellant did not make required deposit for the clerk's transcript until clerk had made the certificate in a dismissal, appeal would be dismissed. West's Ann.Rules on Appeal, rules 4(a, c), 5(c), 7(a), 10.

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Benjamin D. Brown, Los Angeles, for appellant.

Alfred J. Smallberg, Los Angeles, for respondents.

DORAN, Justice.

A judgment was entered on July 25, 1956, admitting to probate the decedent's will which had been contested by appellant, a son who had been disinherited in the will. Among other things, the contestant claimed that the decedent was acting under undue influence exercised by David Wolper, another son, who was favored in the will. There was no motion for a new trial, and notice of appeal was filed on August 6, 1956. The clerk's certificate indicates that there was no stipulation to prepare an agreed statement, or any proposed narrative statement, nor any order extending the time for preparation of such record, and that no record was certified due to the fact that no payment had been received by the clerk within the time prescribed by Rule 5(c) of Rules of Appeal.

The respondents' motion to dismiss the appeal is predicated on appellant's failure to comply with Rules 4(a) and (c) providing that a notice of appeal shall not be effective unless within 10 days after notification, appellant shall either deposit with the clerk the cost of preparing a reporter's transcript or secure a waiver of such deposit by the reporter. Upon being notified of estimated cost in the sum of $315, appellant failed to comply with the above rules.

The motion to dismiss also relies upon Rule 5(c), making a similar requirement in respect to preparation of a Clerk's Transcript. It appears from respondents' motion that "A letter by Respondent's attorney to Appellant indicated that a Motion to Dismiss the Appeal would be made unless payment of costs was made by the 13th"; that on September 13, 1956, the clerk delivered to respondent's attorney the Clerk's Certificate Re Dismissal at about 3:00 p. m., and that sometime thereafter, on the same day, appellant's attorney paid to the Clerk the cost of the Clerk's Transcript.

Rule 7(a) provides that appellant within 30 days after notice, shall serve a condensed statement in narrative form, but that appellant has not initiated any such proceeding. Rule 10 provides that where failure to comply with rules is the fault of appellant, the appeal may be dismissed.

Respondents' Amended Motion to Dismiss Appeal was filed on October 1, 1956, and on October 19, 1956, appellant filed a Motion to be Relieved of Default on the ground of surprise, inadvertence, excusable neglect and mistake. The supporting affidavit avers that appellant was without sufficient funds to pay the $315 required for the Reporter's Transcript, and that the sum of $43.55 was paid to the clerk for the Clerk's Transcript on September 13, 1956.

Appellant's affidavit states that "It is the opinion of affiant that regardless of the availability of the testimony * * * there are errors which will be disclosed by the Judgment Roll and the papers contained in the Clerk's Transcript involving notices to certain heirs and proceedings taken without notice * * * and that essentially a trial was held without the proper participation of all named heirs in the Will, and that Appellant's right to a jury trial thereby has not been waived".

The respondents' counter affidavit calls attention to the fact that appellant "was and is fully aware of the fact that no money was required * * * to initiate proceedings for a settled statement", and that a narrative statement in lieu of a Reporter's Transcript could have been procured without the outlay of any money; that a jury trial had been duly waived by appellant's counsel, that all interested parties were in court, and that appellant was merely continuing the dilatory tactics previously followed.

[1, 2] While it is true that the court has the power to relieve a party from default suffered through inadvertence, surprise, excusable neglect or mistake, these words are not meaningless, and the party requesting such relief must affirmatively show that the situation is one which clearly falls within such category. Likewise, the rules which prescribe the necessary proceedings on appeal and the time within which the various steps shall be taken, are mandatory and should not be relaxed save in those meritorious cases where appellant's fault is clearly excusable.

[3] In the instant case, appellant has made no such showing. As is pointed out by the respondents, appellant's counsel must have been fully conversant with the requirements, and with the pecuniary condition of appellant, yet nothing was done to perfect the appeal by settled statement or narrative statement in lieu of a Reporter's Transcript. In regard to the Clerk's Transcript, appellant likewise did nothing until the clerk had made the certificate in re dismissal, whereupon appellant made the required deposit for the Clerk's Transcript.

As stated in respondents' affidavit, "The Appellant will have gained ten weeks from the time the Notice of Appeal * * * to the date of this hearing * * * with no evidence before the Court as to how or when the record * * * will be completed and transmitted to this Court in order to expedite the final disposition of the appeal".

The appellant's motion to be relieved of default is denied, and the appeal is dismissed.

WHITE, P. J., and FOURT, J., concur.

146 Cal.App.2d 106

Louis JABLON and Charles Thorson, Plaintiffs and Appellants,

v.

John T. JAVASILE, Alexander Bisno, individually and doing business under the fictitious firm name and style of Bisno & Bisno, Henry Bisno, and Herbert Bisno, Monterey Oil Company, Mort D. Goldberg, and Jergins Building Corporation, Defendants.

Alexander Bisno, individually and doing business under the fictitious firm name and style of Bisno & Bisno, Henry Bisno, and Herbert Bisno, and Jergins Building Corporation, Respondents.

Civ. 22075.

District Court of Appeal, Second District, Division 1, California.

Nov. 19, 1956.

Action for collection of a broker's commission, damages, and appointment of a receiver. The Court entered judgment for defendants and plaintiffs appealed. Defendants moved to dismiss the appeal. The District Court of Appeal, Fourt, J., held that where plaintiffs failed to deposit estimated cost of preparing reporter's transcript, or a waiver of such deposit, and failed to serve or file any opposition to defendants' motion to dismiss plaintiffs' appeal within five days before the date designated for hearing, and in carrying on negotiations for dismissal of the appeal discussed the matter with the attorney for only one of the defendants, they were not entitled to relief from default in preparing their appeal, and motion to dismiss their appeal would be granted.

Motion to dismiss appeal granted in each instance.

1. Appeal and Error 🔑627(2), 629

Where plaintiffs failed to deposit estimated cost of preparing reporter's transcript, or a waiver of such deposit, and failed to serve or file any opposition to defendants' motion to dismiss plaintiffs' appeal within five days before the date designated for hearing, and in carrying on negotiations for dismissal of the appeal discussed the matter with the attorney for only one of the defendants, they were not entitled to relief from default in preparing their appeal, and motion to dismiss their appeal would be granted. West's Ann.Rules on Appeal, rules 4(a, c), 5, 10(a), 41(a).

2. Appeal and Error 🔑629

In determining whether an appellant should be relieved from default in preparing an appeal, each case must be determined in the light of its own facts.

Leonard Horwin, Beverly Hills, for appellants.

Mario L. Clinco and Earl Oakley, Los Angeles, for respondents Bisno.

Rothman, Goodman & Hirschberg, Los Angeles, for respondent Jergins Building Corp.

O'Melveny & Myers, Sidney H. Wall, William P. Martin and John P. Pollock, Los Angeles, for defendant Monterey Oil Co.

Maurice Rose, Beverly Hills, and Cogen & Landrum, Los Angeles, for defendant Goldberg.

FOURT, Justice.

The plaintiffs and appellants herein brought an action to collect a broker's commission, for damages and for the appointment of a receiver. Judgment was entered May 3, 1956, after a trial, that the plaintiffs take nothing and defendants were discharged with costs as set forth in the judgment. No notice of intention to move for a new trial was filed. A notice of appeal was filed June 11, 1956.

The Jergins Building Corporation, by and through its attorneys, Rothman, Goodman & Hirschberg, and Alexander Bisno, individually and doing business as Bisno & Bisno, Henry Bisno and Herbert Bisno, by and through their attorneys, Earl Oakley and Mario L. Clinco, made separate motions to dismiss the appeal in the above entitled cause for the reason that the appellants failed to deposit the necessary sum of money to secure the estimated cost of preparing the reporter's transcript, and failed to procure and file a waiver of such deposit signed by the reporter, as required by rule 4(c) of the Rules on Appeal; further, that although appellants deposited the amount of the clerk's estimate on the clerk's transcript, pursuant to rule 5 of the Rules on Appeal, appellants did, on or about August 15, 1956, request the return to them of said deposit, and no clerk's transcript has been certified or filed.

The clerk's certificate in this matter sets forth, among other things, that notice to the clerk to prepare clerk's and reporter's transcripts was filed June 19, 1956, and pursuant to rule 4(a) of the Rules on Appeal, a copy of that notice was mailed June 24, 1956, to the court reporter. Pursuant to rule 4(a), above mentioned, the clerk's office received a copy of the letter dated August 3, 1956, addressed to Leonard Horwin, attorney for the appellants, from the court reporter designating the estimated cost of $1,025, for the preparation of the reporter's transcript on appeal. The clerk's certificate recites that to date no arrangement with the clerk for the payment thereof has been made, and no waiver of deposit has been filed by the reporter.

The clerk's certificate further recites that pursuant to rule 5 of the Rules on Appeal, a notice by the clerk designating the estimated cost for the preparation of the clerk's transcript was mailed July 26, 1956, to Horwin; that on August 6, 1956, the estimated amount of $189.95, was received from the attorney for the preparation of the clerk's transcript, and that on August 15, 1956, the clerk's office received a letter, dated August 14, 1956, from Horwin, reading in part as follows: "There is concurrently being filed a Stipulation for Termination of Appeal in the above action, in which your Transcript Division agreed to withhold any preparation of Clerk's Transcript pending expected settlement which has now occurred. Return to this office of the amount of $189.95, deposited on August 6, 1956, to cover original and one copy of Clerk's Transcript, will be appreciated." It is further set forth in the clerk's certificate that on or about August 28, 1956, a refund was arranged for, and that no clerk's transcript has been certified or filed. There is no entry on the Register of Actions of the filing of a stipulation for termination of the appeal.

The appellants contend that prior to the lapse of the time for the deposit of the costs of the reporter's transcript they entered into a settlement and stipulation governing this cause with Lee W. Landrum, who was the attorney for one of the defendants, namely, Mort D. Goldberg. The settlement allegedly called for a dismissal of the appeal. Appellants further contend that they requested of Landrum that Landrum procure the consent of the defendants Bisno & Bisno, Alexander Bisno, Herbert Bisno and Henry Bisno, in addition to the consent of his own client, Mort D. Goldberg. Appellants further claim that Landrum reported to them on August 10, 1956, at the time of concluding the stipulation and settlement verbally, that he had obtained consent of the parties indicated.

Appellants admit that Jergins Building Corporation and Monterey Oil Company were not involved in the settlement and stipulation nor were they requested to participate in any such proceedings. They do state, however, that Jergins Building Corporation was specifically informed of the settlement on August 23, 1956.

The affidavit of Leonard Horwin, attorney for the appellants sets forth that in connection with the settlement Landrum had requested that Horwin prepare the necessary documents and that Horwin told Landrum, at the time, that in reliance on the verbal understanding, he would refrain from depositing the costs required for the reporter's transcript, and would advise the Transcript on Appeals Division of the Clerk's office that the appeal would be dismissed. The affidavit continues, in substance, that Horwin prepared the documents of settlement and sent them to Landrum, and that he sent a letter to the clerk wherein he told the clerk, in essence, that the appeal was being dismissed and requested a return of his deposit theretofore made to cover the cost of the clerk's transcript. Horwin then set forth that Landrum later told him that the stipulation was approved with some revisions, and was being filed with the court. Further, it was stated that on September 4, 1956, for the first time, Landrum told Horwin that the stipulation had not been executed because Goldberg insisted upon the inclusion of an additional paragraph. Horwin then advised Landrum, in writing, that appellants regarded Goldberg as bound by the verbal arrangements made with his attorney, and that the new proposed paragraph was objectionable and would not be accepted. Thereafter there were other negotiations between Horwin, as the attorney for the plaintiffs, and Landrum, as the attorney for Goldberg.

Appellants apparently are now ready to make the proper deposits and proceed with the appeal.

Rule 10(a) of the Rules on Appeal provides in part as follows: "* * * If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

Rule 41(a) of the Rules on Appeal provides in part: "* * * Such notice and accompanying papers shall be served and filed at least 10 days before the date designated for hearing of the motion. Any showing in opposition to the motion shall be in writing, served and filed at least 5 days before the date so designated."

[1] The petitioning respondents herein complied with the rules. The appellants failed completely to comply in that they failed to file any opposition within the five-day period, or at any time, until the motion was actually made in open court.

In this case the negotiations for the dismissal of the appeal were carried on between the attorney for the appellants and Landrum, the attorney for Goldberg. None of the petitioners herein were contacted or consulted by the appellants—they were not parties to any discussions or negotiations having to do with any proposed stipulation or settlement.

[2] We believe that as a matter of ordinary precaution and business acumen the appellants should have, at least, made some inquiries of the petitioners herein before proceeding as they did. In determining whether an appellant should be relieved from default in preparing an appeal each case must be determined in the light of its own facts.

The motion to dismiss the appeal is granted in each instance.

WHITE, P. J., and DORAN, J., concur.

Albert J. BATINI and Dolindo Massei, Plaintiffs and Respondents,

v.

Louis HOFFMAN and Harold Stelling, individually, and as copartners doing business as The Royal Showcase Company, Defendants and Appellants. *

Civ. 8880.

District Court of Appeal, Third District, California.

Nov. 20, 1956.

Rehearing Granted Dec. 17, 1956.

For Opinion on Rehearing see 305 P.2d 84.

Action by refrigeration equipment buyers against sellers for amount allegedly paid by buyers on behalf of sellers in paying judgment obtained against buyers alone in prior action by third party against buyers, sellers, and sellers' supplier and subcontractor for services rendered in installing the equipment on buyers' premises. The Superior Court, Humboldt County, Carl L. Christensen, J., entered judgment adverse to sellers, and sellers appealed. The District Court of Appeal, Van Dyke, P. J., held that sellers were properly required to repay such amount to buyers.

Judgment affirmed.

1. Judgment ⚷956(5)

In action by refrigeration equipment buyers against sellers for amount allegedly paid by buyers on behalf of sellers in paying judgment obtained against buyers alone in prior action by third party against buyer, sellers, and sellers' supplier and subcontractor for services rendered in installing the equipment on buyers' premises, issues in present action would not be held to have been litigated in the prior action in view of fact that, upon failure to present to the District Court of Appeal either the evidence or the judgment roll in the prior action, only thing which could be said to have been determined in prior action was that buyers were indebted to third party. West's Ann. Rules on Appeal, rule 10(b).

2. Money Paid ⚷9

In action by refrigeration equipment buyers against sellers for amount allegedly paid by buyers on behalf of sellers in paying judgment obtained against buyers alone in prior action by third party against buyers, sellers, and sellers' supplier and subcontractor for services rendered in installing the equipment on buyers' premises, evidence was sufficient to sustain trial court's finding that, by terms of the agreement, sellers had promised to install the equipment on buyers' premises.

3. Money Paid ⚷1

One who is compelled, by reason of a legal liability to pay an obligation for which another in equity and good conscience should pay may recover from such other the money so paid, and it is not necessary that the payment have been coerced by actual legal proceedings, but the mere existence of the legal liability is sufficient.

4. Money Paid ⚷1

Where third party, in action against refrigeration equipment buyers, sellers, and sellers' supplier and subcontractor for services rendered in installing the equipment on buyers' premises, recovered judgment against buyers, buyers, in paying such judgment, were forced to lay out money for benefit of sellers, since sellers ought to have made such payment, and, therefore, sellers were properly required to repay such money to buyers.

5. Money Paid ⚷9

In action by refrigeration equipment buyers against sellers for amount allegedly paid by buyers on behalf of sellers in paying judgment obtained against buyers alone in prior action by third party against buyers, sellers, and sellers' supplier and subcontractor for services rendered in installing the equipment on buyers' premises, evidence was sufficient to establish that amount paid by buyers was the reasonable value of work done by third party.

G. H. Van Harvey, San Francisco, for appellants.

Falk & Falk, Eureka, for respondents.

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* Opinion vacated 305 P.2d 84.

VAN DYKE, Presiding Justice.

This is an appeal from a money judgment in an action brought upon a common count for an amount alleged to have been paid by respondents on behalf of the appellants.

The money paid by respondents was paid in satisfaction of a judgment recovered against respondents by one Nelson Rossig. In that prior action Rossig sued respondents herein, appellants herein and Marine Electric Company for the reasonable value of his services in installing on the property of respondents certain refrigeration equipment which respondents had purchased from appellants and which appellants in turn had purchased from Marine Electric Company. In the Rossig action appellants herein and Marine Electric Company were granted nonsuits at the close of Rossig's case in chief. The action then proceeded against respondents herein, and Rossig obtained a judgment against them. Respondents paid the judgment and then brought this action to recover from appellants the money so paid out by respondents, alleging it to have been paid out on behalf of appellants and at their request. In response to the common count pleaded against them by respondents, the appellants generally denied the allegations of the complaint and pleaded a special defense of res judicata, alleging that in the prior action brought by Rossig all issues as between respondents and appellants herein, co-defendants in the Rossig action, had been litigated and that it had thus been adjudged as between the parties to this action that any sums that may have been paid by respondents upon the demand of Rossig were as between the parties hereto the sole obligation of respondents herein and not money laid out for appellants' benefit.

[1] We do not have before us either the evidence presented in the prior action or the judgment roll therein. It appears that the judgment roll was introduced in evidence, but appellants have not caused the same or a certified copy thereof to be presented here in accordance with Rule 10(b) of the Rules on Appeal. We assume, therefore, that the only thing determined in that action was that respondents herein were indebted to Rossig for the reasonable value of his work and labor in installing the refrigerating equipment in and on the property of respondents; and that whatever were the issues between defendants in the Rossig action as to the person upon whom the ultimate liability to pay Rossig lay, the same was not litigated; that on the contrary, for some reason, appellants herein succeeded in securing in their favor a nonsuit at the close of Rossig's case in chief and thereupon departed from the action. On this record, therefore, appellants' contention that the issues herein litigated were also litigated in the Rossig action cannot be sustained.

Appellants further contend that there is not sufficient evidence in the record to sustain the trial court's findings of fact. Those findings may be summarized as follows: That on October 16, 1946, the respondents and appellants entered into an agreement providing in part that appellants would furnish to respondents certain refrigeration equipment; that by the terms of that agreement appellants agreed to install the equipment in the premises of respondents; that thereafter appellants engaged the services of Marine Electric Company as subcontractors to install said equipment; that Marine Electric Company engaged Rossig to do the work; that Rossig did the work and presented his charges therefor to respondents herein, which charges were reasonable for the work done; that respondents paid the charges of Rossig in accordance with the judgment rendered in favor of Rossig against respondents herein in an action brought by Rossig against respondents herein; that in said action appellants herein were joined as co-defendants with respondents, but that during the course of the trial a nonsuit was granted in appellants' favor. In the findings the trial court stated further that the judgment in the Rossig action did not constitute an adjudication of the issues pleaded in the present action between respondents and appellants nor present any issue as to any liability of appellants to respondents for the charges of Rossig. The court further found that upon payment of the Rossig judgment, appellants herein became indebted to respondents for the money so laid out.

[2-4] As to the terms of the agreement between respondents and appellants, Mr. Batini, testifying at the trial of the action herein, said that the agreement placed upon appellants the burden not only of furnishing the refrigeration equipment but also that of installing it and all for the agreed price which respondents paid to appellants. That testimony sufficiently supports the trial court's finding that by the terms of the agreement appellants promised to install the refrigeration equipment in the premises of respondents. There was other evidence to the same effect. Thus, when Rossig threatened to sue respondents, Mr. Batini forwarded the demand to Mr. Stelling, one of appellants, appending the following notation: "Are you going to pay your Bills—With Our Money—or have us *sew*ed. This is not our way of doing Business. We paid you promptl*e*y." Stelling wrote in reply that the Marine Electric Company was responsible for the bill as "the supplying of the refrigeration equipment and its installation was a sub-contract between ourselves and the Marine Electric Company of San Francisco." The situation presented then is this: Appellants agreed to sell and, at their cost, to install on the premises of respondents certain refrigeration equipment. So far as respondents were concerned appellants performed that agreement, Mr. Rossig doing the work of installation. The contract was completed and no breach thereof occurred. Nevertheless, Rossig was able to obtain a judgment against respondents. We are not here concerned with the circumstances under which that occurred, for as between appellants and respondents the money respondents were forced to pay Rossig ought to have been paid by appellants. Respondents, therefore, were compelled to lay out money for the benefit of appellants, and the trial court correctly adjudged that appellants were thereupon obligated to repay the monies so laid out. "'One who is compelled, by reason of a legal liability therefor, to pay an obligation for which another in equity and good conscience should pay, may recover from that other the money so paid. It is not necessary that the payment should have been coerced by actual legal proceedings; the mere existence of the legal liability is sufficient.'" Weaver v. Fickett, 82 Cal.App. 116, 120, 255 P. 257, 259. We quote the following from Page v. Podol, 4 Cal.App.2d 229, 231, 41 P.2d 167, 168:

> "Plaintiff relies upon the equitable doctrine that one who is compelled to pay a debt or whose property is made liable for a debt which another in good conscience ought to pay is entitled to recover against that other the amount so paid. In commenting upon this rule the Supreme Court said in Finnell v. Finnell, 159 Cal. 535, 539, 114 P. 820, 821: 'The soundness of this doctrine has been upheld by innumerable decisions of courts of the highest authority in many jurisdictions and it is so obviously just and reasonable that it is matter of wonder that it should ever have been called in question.'"

[5] Appellants contend that there was in the record no evidence that the amount paid by respondents was the reasonable value of the work of installing the refrigeration equipment. Assuming that such proof was necessary, the assignment is not supported by the record. During the trial Mr. Stelling admitted that if all of the equipment, including tubing and gas, which was itemized in the statement from Mr. Rossig, had been necessary for the job then the charges would not have been unreasonable; and Mr. Batini testified directly that all of the items itemized had actually been used in the installing of the equipment.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

146 Cal.App.2d 307

Eugena K. WILLIAMS, Plaintiff, Cross-Defendant and Respondent,

v.

Edwin L. WILLIAMS, Defendant, Cross-Complainant and Appellant.

Civ. 5266.

District Court of Appeal, Fourth District, California.

Nov. 27, 1956.

Wife brought action for separate maintenance, and husband filed a cross-complaint for divorce on ground of extreme cruelty. The wife thereafter filed an amended and supplemental complaint for divorce on ground of extreme cruelty. The Superior Court, Riverside County, Hilton H. McCabe, J., entered judgment granting both parties a divorce, and the husband appealed. The Court of Appeal, Mussell, J., held that where Superior Court granted both husband and wife a divorce on ground of extreme cruelty and awarded wife more than half of the community property, but Superior Court did not find that husband was guilty of extreme cruelty or that acts or conduct of husband caused wife either bodily injury or mental suffering, judgment would be reversed on appeal, and case would be remanded so that entire matter could be retried.

Judgment reversed.

1. Divorce ⚷27(1)

To support a judgment for divorce, on ground of extreme cruelty, court must find that conduct characterized by the findings as cruel, wrongfully inflicted on the innocent grievous bodily injury or grievous mental suffering or both, since the injury or suffering is the ultimate fact entitling the injured party to a severance of the marital ties.

2. Divorce ⚷147, 150(2)

Question whether one spouse has inflicted grievous bodily injury or grievous mental suffering on the other is a question of fact to be determined by the trial court as the ultimate fact in a divorce action for cruelty, and it is the trial court's duty to find on such issue.

3. Divorce ⚷150(2)

Where trial court found in divorce action that husband had been guilty of cruel treatment toward the wife and that husband, with malice, caused wife to be committed to hospital as a mentally ill person, trial court, before awarding wife a divorce, on ground of extreme cruelty, should have found that husband was guilty of extreme cruelty or that acts or conduct of husband caused wife either bodily injury or mental suffering.

4. Divorce ⚷252

When a divorce is granted to both husband and wife, neither is "innocent" within meaning of rule that section of the Civil Code providing that if divorce is granted for extreme cruelty, court may apportion community property as it deems just, permits an award of more than half of the community property only to an "innocent" spouse. West's Ann.Civ.Code, § 146.

5. Divorce ⚷186

Where trial court granted both husband and wife a divorce on ground of extreme cruelty and awarded wife more than half of the community property, but trial court did not find that husband was guilty of extreme cruelty or that acts or conduct of husband caused wife either bodily injury or mental suffering, and only husband appealed, judgment would be reversed on appeal and case would be remanded so that entire matter could be retried. West's Ann. Civ.Code, § 146.

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Hennigan & Ryneal, J. David Hennigan, Riverside, for appellant.

Best, Best & Krieger, Enos C. Reid, Riverside, for respondent.

MUSSELL, Justice.

On July 29, 1954, plaintiff filed an action herein for separate maintenance. Defendant answered and also filed a cross-complaint in which he sought a divorce from plaintiff on the ground of extreme cruelty. Plaintiff then on December 9, 1954, filed an amended and supplemental complaint for divorce. In the first cause of action therein she alleged extreme cruelty in general terms and in the second cause of action alleged specifically that the defendant maliciously caused her to be committed as a psychopathic case in the detention ward of a general hospital. Both parties sought an award of the community property and custody of the children of the marriage. The trial court rendered a judgment granting a divorce to plaintiff on her amended and supplemental complaint and also granted a divorce to the defendant on his cross-complaint. Defendant appeals from the judgment rendered in favor of the plaintiff and against the defendant. He contends, among other things, that the findings of fact fail to support the judgment and that the court erred in ordering an unequal division of the community property of the parties. Both of these contentions are meritorious and warrant a reversal of the judgment in favor of the plaintiff.

Plaintiff testified to many acts of physical violence and cruelty on the part of the defendant which were not corroborated by the testimony of other witnesses. She also testified that the defendant had her committed to a hospital as an insane person when she was not in fact insane. This testimony was corroborated in part by the testimony of a physician to the effect that she was received at the hospital and examined by him. However, the hospital records or the commitment papers were never received in evidence and the defendant testified that he had plaintiff sent to the hospital on the advice of physicians. The testimony shows that plaintiff was in the hospital two or three days and then released.

[1–3] The court found that "It is true that the defendant has been guilty of cruelty toward the plaintiff" and that "It is true that defendant, on October 18, 1954, with malice, caused plaintiff to be committed to the Riverside General Hospital as a mentally ill person." However, there is no finding that the defendant was guilty of extreme cruelty or that the acts or conduct of the defendant caused plaintiff either bodily injury or mental suffering. In Ritter v. Ritter, 103 Cal.App. 583, 587, 284 P. 950, 952, the court held that "To support a judgment for divorce upon the ground of extreme cruelty, it is essential that the court find that the conduct characterized by the findings as cruel, 'wrongfully inflicted upon the [innocent party] grievous bodily injury or grievous mental suffering, or both'" and "this is so because the injury or suffering is the ultimate fact entitling the injured party to a severance of the marital ties." See also Booth v. Booth, 100 Cal.App. 28, 30, 279 P. 458. The question whether one spouse has inflicted grievous bodily injury or grievous mental suffering upon the other is a question of fact to be determined by the trial court as the ultimate fact in a divorce action for cruelty and it was the trial court's duty herein to find on this issue. LaMar v. LaMar, 30 Cal.2d 898, 901, 186 P.2d 678.

[4] The trial court found that the parties had community property valued in the total sum of $11,187 and further found that the community obligations amounted to the sum of $10,727.16. The net community assets, therefore, amounted to the sum of $459.84. In its judgment the trial court erroneously awarded plaintiff the household furniture, valued at $1,500 and the further sum of $3,500 as her share of the community property. In De Burgh v. De Burgh, 39 Cal.2d 858, 874, 250 P.2d 598, 607, the court said:

> "Section 146 of the Civil Code provides that if the divorce is granted for extreme cruelty, the court may apportion community property as it deems just, but that statute has been interpreted to permit an award of more than half of the community property only to an innocent spouse. Eslinger v. Eslinger, 47 Cal. 62, 64. When a divorce is granted to both parties, neither is innocent within the meaning of this rule, and the community property must be equally divided."

In Rethers v. Rethers, 140 Cal.App.2d 28, 33, 294 P.2d 968, 971, it was held as follows:

> "'* * * If it be determined as a fact that they are community debts, then they should be deducted from the gross value of the community property, before a division thereof is made.'"

[5] Defendant, in his notice, appeals from the judgment in favor of plaintiff. However, there is only one judgment and it is adjudged therein that plaintiff is entitled to a divorce from the defendant and further that defendant is entitled to a divorce from plaintiff on his cross-complaint. Plaintiff has not appealed from the judgment. We conclude that under the circumstances shown by the record the entire matter should be retried and in view of this conclusion, we do not pass upon the other points raised by the appellant.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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146 Cal.App.2d 305

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Manuel FRATERS, Defendant and Appellant.

Cr. 2700.

District Court of Appeal, Third District, California.

Nov. 27, 1956.

Prosecution for murder of the second degree. The Superior Court, Mariposa County, Thomas Coakley, J., entered judgment of conviction and denied defendant's motion for a new trial on issue of insanity and he appealed. The District Court of Appeal, Peek, J., held that evidence was sufficient to sustain verdict that defendant was sane at the time of his commission of homicide in question.

Judgment and order affirmed.

1. Criminal Law 🔑311

The State has the benefit of the disputable legal presumption that a defendant was sane, and such presumption remains in the case to be weighed by the jury with all evidence adduced.

2. Homicide 🔑237

In prosecution for murder of the second degree, evidence was sufficient to sustain verdict that defendant was sane at the time of his commission of homicide in question.

3. Criminal Law 🔑778(7)

In prosecution for murder of the second degree, in view of evidence adduced as to defendant's mental state, it was proper for court to instruct jury upon presumption of sanity, and to refuse defendant's proposed instruction upon presumption of insanity.

Samuel K. Brantley, Jr., Merced, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., and Dean C. Lauritzen, Dist. Atty., Mariposa County, Mariposa, for respondent.

PEEK, Justice.

Defendant appeals from a judgment of conviction of murder of the second degree, and from the order denying his motion for a new trial on the issue of insanity. It is our conclusion that his attack upon the sufficiency of the evidence to sustain the verdict that he was sane at the time of the commission of the homicide and his contention that the trial court erred in instructing the jury that he was presumed sane and in refusing an instruction that he was presumed insane are without merit.

[1,2] There would appear to be no reason for an extensive summary of the evi-

dence. Suffice it to say that defendant places sole reliance upon the testimony of two psychiatrists and that of certain other witnesses that he was insane at the time of the homicide. In so doing he has ignored the testimony of other witnesses who were present a short period after the homicide occurred who testified he appeared rational, spoke coherently, was oriented as to time, place and those persons who were present, knew that he had committed the offense and knew the consequences of his act. Even in the absence of such testimony it is the rule that "[t]he state had the benefit of the disputable legal presumption that he was sane, a presumption that remained in to be weighed by the jury with all evidence adduced * * *." People v. Harmon, 110 Cal.App.2d 545, 553, 243 P.2d 15, 19. This presumption, standing alone, would have been sufficient to sustain the verdict of the jury. People v. Chamberlain, 7 Cal.2d 257, 60 P.2d 299. Although counsel for defendant most earnestly argues the overwhelming preponderance of the testimony given by the two psychiatrists, nevertheless, under the rules above enunciated the weight of this testimony was for the jury.

[3] In support of his second contention defendant relies upon the case of People v. Baker, 42 Cal.2d 550, 268 P.2d 705. The fact that defendant herein had been taken to the Modesto State Hospital immediately following the killing did not warrant such an instruction, nor are the facts herein in any way comparable to those in the Baker case where the court specifically noted the defendant's numerous commitments to the Camarillo State Hospital, and that he was on parole from that hospital at the time of the crime. It necessarily follows that it was proper for the court to instruct the jury upon the presumption of sanity and to refuse defendant's proposed instruction upon insanity.

The judgment and order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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146 Cal.App.2d 241

Margaret Mary RODGERS, Plaintiff and Respondent,

v.

John C. RODGERS, Defendant and Appellant.

Civ. 21725.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1956.

Proceeding on motion of divorced wife to vacate order suspending support provisions of interlocutory divorce judgment. The Superior Court of Los Angeles County, John Gee Clark, J., granted motion, and restored to calendar the hearing on modification of children's support. Husband appealed. The District Court of Appeal, Doran, J., held that action of trial court was proper, where wife, who had substituted herself as attorney of record few days prior to leaving state, claimed that she had plausible reason for trip, and wife had not had actual notice of hearing and had not been present, nor represented by authorized attorney, and order unjustly penalized children for whom original support order had been made.

Order affirmed.

Divorce ⚿308

Action of trial court in vacating previous order suspending support provisions of divorce judgment was proper, where wife, who had substituted herself as attorney of record few days prior to leaving state, claimed that she had plausible reason for trip, and wife had had no actual notice of hearing and had not been present nor represented by authorized attorney, and order unjustly penalized children for whom original support order had been made. West's Ann.Code Civ.Proc., § 473.

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Don Lake, Los Angeles, for appellant.

Harold F. Pettee, Jr., Earl W. Favor, Pasadena, for respondent.

DORAN, Justice.

On September 1, 1953, an interlocutory judgment of divorce was entered which ordered the defendant to pay to plaintiff $150 per month for the support of the two minor children. Plaintiff was given the custody of the two minor children. Plaintiff was given the custody of the children "subject to the right of defendant to reasonably visit said children * * * defined as the right to visit the minor children either at their home or to take them away from said home from the hour of 12:00 noon until 7:00 P.M. or each and every Sunday".

The respondent wife secretly removed the minor children from California to Florida about October 1, 1955, and, as stated in the appellant's brief, "On September 27, 1955, Respondent substituted herself as her attorney in propria persona". On October 6, 1955, the appellant husband secured an order to show cause in re modification of the support order which, by court order, was served on the wife's previous attorney of record by mail. At the hearing on October 14, 1955, the respondent wife did not appear but the wife's former attorney, Harold F. Pettee, Jr., was present. The court having found that the wife had taken the children out of the State of California, and thereby denied the right of visitation to the appellant, suspended the order for support "until further order of Court".

Thereafter, and on November 18, 1955, the trial court granted plaintiff's motion for an order vacating the order of October 14, 1955, and restored to the calendar "the hearing on the modification re children's support". It is from this order that the defendant appeals.

The respondent wife, by affidavit, claimed that the trip to Florida was made "In order to increase her earnings in order to better support herself and her two minor children", and avers that the previous suspension of the support order "works a great and grievous injustice to the two minor children".

It is the appellant's contention that the order vacating the previous order suspending the support provisions of the judgment should be reversed for the reason that this was not a case falling within the provisions of Section 473 of the Code of Civil Procedure, authorizing a court to relieve a party from an order "taken against him through his mistake, inadvertence, surprise or excusable neglect." Apropos this matter, appellant contends that the plaintiff's substitution of "herself as attorney of record * * * a few days prior to leaving the State of California * * * was an attempt (unsuccessful) to deprive defendant of an opportunity of serving her with process or of notices of motions".

Careful consideration of the record and of the showing made on this appeal leads to the conclusion that the action of the trial court in vacating the previous order suspending the support provisions, must be sustained. The support order was originally made for the benefit of the minor children, and to penalize such children for some act of the mother can hardly be considered equitable. Moreover, on the showing made in the affidavits, indicating a plausible reason for plaintiff's trip to Florida, and that at the time of the order suspending the support payments, plaintiff had no actual notice of the hearing, and was not present nor represented by an authorized attorney, the trial court's action in vacating such order and restoring the matter to the calendar cannot be deemed reversible error.

The order appealed from is affirmed.

WHITE, P. J., and FOURT, J., concur.

146 Cal.App.2d 257

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Billy RAY, Defendant and Appellant.
Cr. 5604.

District Court of Appeal, Second District, Division 1, California.
Nov. 26, 1956.

Hearing Denied Dec. 19, 1956.

Prosecution for burglary in the second degree and grant theft. The Superior Court of Los Angeles County, Aubrey N. Irwin, J., entered judgment of conviction and order denying motion for new trial and defendant appealed. The District Court of Appeal, Doran, J., held that evidence sustained conviction and record failed to show that defendant suffered any prejudice by reason of appointment of public defender to represent him although after trial he contended he wished to represent himself.

Affirmed.

1. Criminal Law ⚷1166½(1)

In prosecution for burglary in the second degree and grand theft, record failed to show that defendant suffered any prejudice whatsoever by reason of appointment of public defender to represent him although after conviction defendant claimed that he had wished to represent himself.

2. Burglary ⚷41(1)

Larceny ⚷65

Evidence sustained conviction for burglary in the second degree and grand theft.

3. Criminal Law ⚷1130

Where defendant was convicted of burglary in the second degree and grand theft of several articles, including typewriters, and knew of alleged receipt purportedly showing that he had purchased typewriters in question at time of his motion for new trial, since such evidence was merely corroborative of testimony which jury chose not to believe, petition to District Court of Appeal for permission to file supplemental brief to present evidence as to alleged receipt would be denied.

4. Criminal Law ⚷1028

Matters raised in the brief, which appear to be merely unsworn statements of the defendant as to certain purported facts not before presented to the trial court for consideration, cannot be considered on appeal.

◆

E. R. Williams, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., Bonnie Lee Hansen, Deputy Atty. Gen., for respondent.

DORAN, Justice.

The appellant was convicted of burglary in the second degree, and of grand theft. During the night of August 1, 1955, the Huntington Park High School was entered, apparently through a window, and five typewriters, a small radio, and an electric coffee pot were missing the next morning.

About August 9, 1955, the defendant was arrested in Dallas, Texas, while attempting to pawn one of the typewriters. Prior to arrest, the defendant had pawned another of the typewriters in Dallas, using the name of Robert Jackson. The defendant had also pawned a third such typewriter at San Bernardino, California, en route to Dallas; defendant admitted having sold a coffee pot for $3.

In explanation of the possession of the stolen property, the defendant claimed to have bought it from a merchant seaman, paying $125 therefor, but testified that the bill of sale had been taken by the Dallas police, and that the seller's name had been forgotten. The defendant admitted two prior convictions.

[1] At the arraignment defendant denied having money to employ an attorney and stated, "I would rather be by myself—defend myself", to which the court replied, "I will appoint the Public Defender". There was no further objection by the defendant who was thereafter represented by a Deputy Public Defender. After the trial and conviction, defendant discharged the Public Defender.

It is now contended that "The public defender was appointed to defend appellant contrary to the wishes of the appellant, this violates appellant's constitutional right to defend himself and was prejudicial error". This contention must be deemed untenable. As set forth in the respondent's brief, it is conceded that a defendant "does have a right to represent himself", but to all appearances the defendant in this case waived such right. It appears that appellant cooperated with the Public Defender's office throughout the trial, and "It was not until after the appellant was found guilty that he maintained he had been deprived of his right to defend himself". As respondent states, "An accused cannot remain silent gambling on his chances for a favorable verdict and then when the verdict has gone against him, raise objections of which he knew and which could have been raised during the trial".

The record fails to show that the appellant suffered any prejudice whatsoever, by reason of the appointment of the Public Defender to represent appellant, or otherwise, but on the contrary indicates that appellant was ably and adequately represented at the trial, and that the case was fully and fairly presented. At the hearing of appellant's motion for a new trial, the trial court said: "I do at this time commend the public defender for the manner in which he presented the case. The case was tried by the jury; they apparently refused to believe the story of the defendant".

[2] That the record discloses substantial and sufficient evidence to sustain the judgment of conviction cannot be doubted. The defendant's recent possession of the stolen typewriters coupled with the offered explanation thereof, evidence of flight on the day following the burglary, defendant's inability to remember the name of the alleged seller of the property or to produce the claimed bill of sale therefor, together with other evidence, adequately support the jury's verdict. No miscarriage of justice has been made to appear.

[3] The appellant has petitioned this court for permission to file a supplemental brief and to present in evidence an alleged receipt purporting to show that appellant purchased the stolen typewriters. This document reads as follows:

"Los Angeles, California.
"August 2, 1955

"I received from Bill Ray this date the sum of *$125.00* as payment in full for three Royal Typewriters.

"/s/ Frank Grabowski
"/t/ Frank Grabowski, USMM
"1537 Rodney Drive
"Los Angeles, Calif."

The verified petition by appellant's attorney in reference to the above paper states, "On October 16, 1956 I received the original document * * * by airmail from the appellant's brother, Quentin Ray, who resides in Indianapolis, Indiana. I have been informed by the brother that this document which is a receipt was found in a suitcase which belonged to appellant and which was sent to the brother pursuant to appellant's instructions by the Dallas, Texas, Police Department".

The petition must be denied. As respondent points out, the purported receipt is "merely corroborative of testimony which the jury heard and chose not to believe. This is the type of evidence which should have been argued, if at all, on a motion for new trial. The receipt * * * was known about at the time of trial. There was no showing that an attempt was made to locate it in time for the trial nor in time for the motion for a new trial. Finally, it appears, that the evidence * * * is pure hearsay. * * * Even if these facts were established there is no guaranty that the receipt is authentic * * *".

[4] The rule expressed in People v. Evans, 102 Cal.App.2d 320, 227 P.2d 461, 462, is here applicable, namely, that "matters raised in the brief, which appear to be merely unsworn statements of the defendant as to certain purported facts * * *

not before presented to the trial court for consideration, cannot be considered on appeal."

The petition to file supplemental brief is denied. The judgment and order denying a new trial are affirmed.

WHITE, P. J., and FOURT, J., concur.

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146 Cal.App.2d 243

Ennis COTTON, Plaintiff and Respondent,
v.
JEWELL THEATRE CORP., a corporation; Mark Hansen: Doe I: Doe II: Doe III, a co-partnership; Doe IV, a corporation, Defendants.

Mark Hansen, Appellant.
Civ. 21907.

District Court of Appeal, Second District, Division 1, California.
Nov. 26, 1956.
Rehearing Denied Dec. 14, 1956.
Hearing Denied Jan. 23, 1957.

Real estate broker's action for commission. The Superior Court of Los Angeles County, Samuel R. Blake, J., entered judgment for broker and vendor's agent appealed. The District Court of Appeal, White, P. J., held that where offer to sell recited that "broker shall be credited with $10,000 in and through this escrow which shall be the broker's commission", and although purchaser accepted the terms the escrow was never opened and the deal was never consummated because of argument between broker and representatives of corporate owner over payment of commission which broker insisted was to be entirely in cash from escrow fund contrary to intention of written offer, broker was not entitled to any commission.

Reversed.

1. Brokers 🔑48

Where broker makes his compensation dependent upon a contingency or happening of a condition precedent and such contingency does not occur he has no right of recovery.

2. Brokers 🔑60

Where offer to sell recited that "broker shall be credited with $10,000 in and through this escrow which shall be the broker's commission" and although purchaser accepted the terms the escrow was never opened and the deal was not consummated because of argument between broker and representatives of corporate owner over payment of commission which broker, contrary to wording of agreement, insisted was to be entirely in cash, broker was not entitled to any commission.

3. Damages 🔑22

Where there is no claim of bad faith, a breach of warranty must be the proximate cause of an injury detrimental to the promisee in order to enable him to recover damages therefore. West's Ann. Civ.Code, § 1789(6).

4. Brokers 🔑60
Corporations 🔑306

Where offer to sell property purportedly on behalf of corporate owner recited the terms and conditions of the brokerage commission but sale was not consummated because of broker's fault, broker was not entitled to recover any commission and fact that representative of corporate owner had no authority to sign agreement for corporation had no causal connection with claimed damage to broker who had also asserted an action against such representative on basis of breach of warranty of authority to act on behalf of corporation. West's Ann. Civ.Code, § 1789(6).

Milton M. Cohen, Jr., Patti Sacks Karger, Los Angeles, for appellant.

Borah & Borah, Los Angeles, for respondent.

WHITE, Presiding Justice.

Plaintiff instituted this action against defendant corporation and Mark Hansen to recover a real estate commission in the sum of $10,000, allegedly due plaintiff as a real estate broker. A sales agreement had been executed between plaintiff's client and defendant Jewell Theatre Corp. by Mark Hansen, its president. The sale itself was never consummated, and at the time of trial defendant corporation still owned the property. A second cause of action was included in the complaint against defendant Mark Hansen alone, alleging that the sale was not consummated by reason of defendant Hansen's lack of authority to bind defendant corporation, and was founded on a claimed breach of warranty of authority on the part of defendant Hansen to act for the corporation. The trial court found that defendant Hansen lacked corporate authority so that plaintiff could not recover upon his first cause of action against either defendant; that on the second cause of action plaintiff was damaged because of defendant Hansen's breach of warranty of authority, in the amount of $8,600. From a judgment against defendant Mark Hansen in such sum on the second cause of action, defendant Hansen prosecutes this appeal.

Concerning the factual background surrounding this litigation, the following is conceded to be a correct epitome thereof. Plaintiff Ennis Cotton is and was a licensed real estate broker at all times in which the matters pertaining to this action transpired.

The defendant Jewel Theatre Corp. is and was a California corporation during the same period.

The defendant Jewel Theatre Corp. at all times was the owner of a parcel of real estate which was the subject of the dealings between the parties to this action.

Said real property was substantially all of the assets of the Jewel Theatre Corp.

Defendant Mark Hansen executed a number of documents involving the real property owned by Jewel Theatre Corp.; such documents were signed by Mark Hansen as president of the Jewel Theatre Corp.

The defendant Mark Hansen at all times during the transactions was the president of defendant Jewel Theatre Corp.

A Mr. Harold Herond was present with Hansen and plaintiff throughout most of the negotiations and transactions. Herond was a 25 per cent stockholder in defendant Jewell Theatre Corp. However, Mr. Herond died prior to the trial of this action and, therefore, was unavailable as a witness.

On February 18, 1954, plaintiff called at Hansen's office and wrote up an exclusive listing card which defendant Hansen signed as follows: "Jewell Theatre Inc., Mark Hansen President,". Said card listed the property at a price of $175,000.

Thereafter plaintiff presented three written offers to defendant Hansen, none of which were accepted. The said offers were: Offer of plaintiff dated March 8, 1954, to purchase the property for the sum of $165,000 with $5,000 cash as down payment; offer executed by plaintiff's client, Irving Smith, dated April 1, 1954, wherein said Smith offered to purchase the property for the sum of $160,000 with $15,000 cash down; offer executed by plaintiff's client Irving Smith dated April 7, 1954, wherein Smith offered to purchase the property for the sum of $165,000 with $15,000 cash down.

When the last offer was rejected, plaintiff requested that Hansen sign a document for plaintiff to take back to Smith as a counter-offer.

Plaintiff wrote up the offer dated April 12, 1954 which was signed "Jewel Theatre Corporation, Mark Hansen."

Said document (Exhibit 6) contained, among other things, the following language and provisions:

> "(a) Purchase price of $172,000.00.
>
> "(b) Broker shall be credited with $10,000.00 in and through this escrow which shall be broker's commission.
>
> * * *

"(c) An escrow shall be opened at any branch of Security-First National Bank within 8 days.

"(d) That the property is sold subject to approval of owner and this offer is effective and irrevocable on my part until April 15, 1954, at 6 p. m. to enable agent herein to procure owner's approval.

"(e) Time is the essence of this contract.

"(f) I agree to sell the above described property on the terms and conditions herein stated and agree to pay the above named broker as commission the sum of 5% or one-half the deposit in case same is forfeited by purchaser, provided the same does not exceed the full amount of the commission."

Thereafter, and on the evening of April 12, 1954, at about 6 or 7 p. m., the prospective purchaser, Irving Smith, signed the document.

No consent of the Board of Directors of Jewel Theatre Corp., and no approval of the principal terms of the transaction embodied in the aforesaid Exhibit No. 6 by vote or written consent of the shareholders entitled to exercise a majority of the voting power of the corporation was obtained; no meeting of the stockholders was held nor was consent of the stockholders obtained for that purpose, either before or after the execution of the aforesaid agreement designated as Exhibit No. 6.

Defendant Hansen represented that he had authority to sell the said property and pay a commission for said sale, which authority he did not have. Hansen was sincere in his representations, and believed that as president he had the authority. Hansen believed he could and would get the necessary authority.

On April 23, 1954, plaintiff, defendant Hansen, Mr. Harold Herond, now deceased (who was a stockholder of defendant corporation), and the prospective purchaser, Irving Smith, went to the Security-First National Bank, Larchmont Avenue Branch, to open an escrow relative to the prospective sale of the property in accordance with Exhibit No. 6, at which place they met with the escrow officer of said bank.

At the escrow, an argument developed between plaintiff and defendant Hansen relative to the manner in which plaintiff's commission was to be paid. Plaintiff contended that the language of the agreement, "Broker shall be credited with $10,000.00 in and through this escrow * * *", required that he, the plaintiff, was to receive said commission by a cash payment at close of escrow and as a disbursement out of the $15,000 down payment to be deposited by the purchaser. Hansen and Herond maintained that it was the intent of said language that plaintiff's commission was to be derived by deferred payments from the deal rather than by cash out of the down payment to be paid by the buyer. As a result of this argument, all parties left the escrow bank without entering into an escrow agreement, and no escrow was ever entered into, nor was the property sold. The plaintiff informed defendant Hansen at the escrow that he would not accept his commission by taking paper for the same.

With reference to the interpretation of the foregoing Exhibit 6, the court found "that the plaintiff Ennis Cotton was to be credited with $10,000.00 in and through the escrow as his compensation; *that he was to be credited, not in cash, but through extended payments through escrow;* that the plaintiff's compensation was based upon 5% of the sales price of $172,000.00 plus an additional sum by reason of the extended payment, making a total compensation to be paid to the plaintiff in the sum of $10,000.00." (Emphasis added.)

Plaintiff Cotton at no time notified Hansen, or anyone connected with the corporation, that he, the plaintiff, withdrew his repudiation of the provisions of Exhibit 6 relative to commissions or that he would accept performance under the terms of Exhibit 6 by taking his commission in a manner other than by cash through escrow; and he maintained in his complaint that he had fully performed all of the terms and conditions to be performed by him in said agreement (Exhibit 6), and that the sum of $10,000 was due him for commission.

To us it seems axiomatic that respondent's claim for a commission herein is dependent upon the aforesaid purchase agreement of April 12, 1954, designated Exhibit No. 6. This agreement provided that "Broker shall be credited with $10,000 in and through this escrow which shall be broker's commission * * *" the meaning of which is explained in the finding of the court quoted above. The agreement contemplated the opening of an escrow, necessarily a condition upon which the promise to pay a commission was predicated. That payment of the commission was conditioned upon the completion and closing of the escrow is evidenced by the court's finding that the commission was not payable in cash but through extended payments through the escrow to be opened and closed. But, in the instant case, the escrow was not even opened. The query naturally arises, Why? The answer is contained in the court's finding "* * * That Mark Hansen intended to consummate the sale of the real property up until the time of the escrow; *that Mark Hansen left the escrow not because he did not have authority from the Board of Directors of Jewel Theatre Corp., but because the escrow instructions were not drawn in accordance with the agreement set forth in Exhibit 6 * * *"*. (Emphasis added.) From a review of the record it is evident that the escrow was not opened because respondent insisted, contrary to the language of the agreement, as found by the trial court, that he was to be paid his commission in cash at the close of escrow out of the $15,000 to be deposited by the purchaser, rather than out of deferred payments on the transaction.

[1, 2] The right of a broker to recover his commission must be measured primarily by the terms of his employment. It seems clear to us that in the case at bar two conditions in the agreement concerning a commission were unfulfilled, viz.: no escrow opened and no escrow closed. And, from the findings of fact it is apparent that the failure to fulfill the aforesaid conditions was attributable to respondent's refusal to adhere to the provisions of the purchase agreement of April 12, 1954 (Exhibit 6). Where the broker makes his compensation depend upon a contingency or the happening of a condition precedent (the opening or closing of an escrow), and such contingency does not occur, he has no right of recovery. Dale v. Raines, 115 Cal.App.2d 309, 311, 252 P.2d 22; Ridgway v. Chase, 122 Cal.App.2d 840, 847, 265 P.2d 603; Sanstrum v. Gonser, 140 Cal. App.2d 732, 739, 295 P.2d 532.

[3, 4] We are further persuaded that appellant's admitted lack of authority to sign the agreement for the corporation had no causal connection with the claimed damage to respondent. Where, as here, there is no claim of bad faith, the breach of warranty must be the proximate cause of an injury detrimental to the promisee. Civ. Code, sec. 1789, subd. (6). A mere reading of what we have hereinbefore said concerning respondent's conduct at the escrow office leads unerringly to the conclusion that it was respondent's erroneous construction of the legal effect of the language of the contract regarding the method of paying his commission that, as the trial court stated, "broke up the entire situation." In other words, let us assume that appellant possessed the requisite corporate authority to sell the property of the corporation, what could respondent have recovered from the latter when the deal failed to materialize because of respondent's conduct at the escrow office as hereinbefore narrated? We are satisfied that there could be no recovery since no escrow was opened or closed due to the facts, as the trial court found, that respondent insisted that the escrow instructions concerning his commission be drawn in a manner contrary to the foregoing sales

agreement—Exhibit 6. The opening and closing of an escrow being conditions upon which respondent's right to a commission depended, and he himself having prevented the happening of these conditions by insisting upon escrow instructions which the court found were repugnant to the sales agreement, he cannot now contend that he "performed all of the conditions on his part to be performed," and thereby earned his commission. Had the escrow instructions been signed and appellant refused or was unable to file in the escrow the necessary documents showing consent of the shareholders of the corporation, then respondent could of course recover damages by reason of appellant's lack of corporate authority necessary to consummate the transaction, but such a situation never materialized due to respondent's own acts in violation of the terms of the foregoing Exhibit 6. We are persuaded that there was no causal connection between appellant's lack of warranted corporate authority and respondent's claimed damage.

For the foregoing reasons, the judgment is reversed.

DORAN and FOURT, JJ., concur.

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146 Cal.App.2d 299

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles BLAIR, Defendant and Appellant.

Cr. 5619.

District Court of Appeal, Second District, Division 3, California.

Nov. 27, 1956.

Application by defendant serving sentence imposed after conviction for forgery of a fictitious name, to vacate judgment. The Court, Clement D. Nye, J., denied motion and defendant appealed. The District Court of Appeal, Parker Wood, J., held that where no explanation was made upon motion to vacate judgment with respect to reason for defendant's delay in presenting questions of fact that he did not cash or attempt to cash a check and that his counsel had promised him a jail sentence if he pleaded guilty, order denying motion would be affirmed.

Affirmed.

1. Criminal Law 🔑997(11)

Motion to vacate judgment in order to present questions of fact which were not presented to court at trial, is equivalent of an application for writ of error coram nobis.

2. Criminal Law 🔑997(1)

Function of application for writ of error coram nobis is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment.

3. Criminal Law 🔑997(4)

Where prisoner serving sentence upon conviction for forgery of a fictitious name made application for vacation of judgment in order that he might present questions of fact that he did not cash or attempt to cash a check and that his counsel promised him he would receive a jail sentence if he pleaded guilty, and he made no statement with respect to his delay in presenting such alleged matters to the trial court, and no affidavit was filed in support of his motion, it was properly denied.

4. Criminal Law 🔑997(15)

Even if defendant or someone in his behalf, on defendant's motion to vacate judgment of conviction and to present questions of fact which he had not presented at his trial, made statements in affidavits or otherwise regarding reasons for delay, trial court would not be required to accept such statements as true.

5. Criminal Law ⚷997(5)

Claim of denial of effective counsel may not be raised in a proceeding in the nature of a petition for writ of error coram nobis.

◆

Charles Blair, appellant, in pro. per.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was charged with forgery of a fictitious name. He pleaded guilty. It was also alleged in the information that he had been convicted of a felony. He denied that allegation, but it was found to be true.

In another information, defendant Blair and four other persons were charged with burglary. This information was dismissed, as to Blair, in the interest of justice.

Defendant Blair was sentenced to state prison on the forgery charge. That judgment was entered on April 22, 1954. No appeal was taken therefrom.

On November 14, 1955, defendant Blair filed a motion to vacate the judgment as to the forgery charge. He asserted therein that the charge was "unlawful" in that he was arrested on suspicion of burglary and he could not be prosecuted for forgery because he did not cash or attempt to cash a check. He also asserted therein that he pleaded guilty to signing his name to the check because his counsel (a deputy public defender) promised that if he would plead guilty he would get a jail sentence. The motion to vacate the judgment was denied. Defendant appeals from the order denying the motion.

Upon application of appellant for appointment of counsel, this court referred the matter to the Los Angeles Bar Association Committee on Criminal Appeals for a report as to the merit of the appeal. A member of that committee made a written report to the court stating that he researched the matter and he could see no practical reason why a brief should be prepared in appellant's behalf, as it would avail appellant nothing in the opinion of the member of the committee. Appellant was notified as to the report, and he was given an opportunity to file a brief in propria persona. He has filed an opening brief and a closing brief.

It appears that about one and one-half years after judgment was entered upon defendant's plea of guilty, defendant sought to vacate the judgment in order to present questions of fact which he had not presented to court. Such proposed questions of fact were that he did not cash or attempt to cash a check, and that his counsel promised that defendant would receive a jail sentence if he pleaded guilty.

[1–5] Such a proceeding is the equivalent of an application for a writ of error *coram nobis*. People v. Larsen, 144 Cal.App.2d 504, 301 P.2d 298. "The function of such an application is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before the rendition of judgment." People v. Mendez, 144 Cal.App.2d 500, 301 P.2d 295, 297. Whether or not defendant cashed or attempted to cash a check was a matter within his knowledge at the time he pleaded guilty. Whether or not he was deceived by his counsel with respect to pleading guilty was a matter within his knowledge at the time sentence was pronounced. Defendant did not make any statement in his motion (to vacate the judgment) with respect to his delay in presenting those alleged matters to the trial court. No affidavit was filed in support of his motion. Even if defendant, or someone on his behalf, had made statements in affidavits or otherwise regarding such delay, the trial court would not have been required to accept the statements as true. People v. Kirk, 98 Cal.App.2d 687, 692, 220 P.2d 976. In People v. Mendez, supra, it was said 144 Cal.App.2d at page 503, 301 P.2d at page 298: "[I]t is well established that a claim of denial of effective aid of counsel may not be raised in a proceeding in the nature of a petition for writ of error *coram nobis*."

The order denying the motion to vacate the judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

146 Cal.App.2d 133

SOUTHERN LUMBER COMPANY, a corporation, Petitioner and Appellant,

v.

The CITY COUNCIL OF SAN JOSE and George Starbird, William J. Foley, Parker L. Hathaway, Paul Moore, Joseph Santora, Louis Solari, and Fred Watson, as members of said City Council, Respondents.

Civ. 16780.

District Court of Appeal, First District, Division 2, California.
Nov. 20, 1956.

Action brought to prevent city from annexing territory. The Superior Court, County of Santa Clara, John D. Foley, J., dismissed the action, and the petitioner appealed. The District Court of Appeal, Kaufman, J., held that government Code section relating to annexation requires only that the "proposal" for annexation be submitted to county boundary commission, and where territory involved in first and second annexation petitions was identical, it was not necessary that there be a resubmission of proposal.

Affirmed.

Municipal Corporations ⟜33(1)

Government Code section relating to annexation requires only that the "proposal" for annexation be submitted to county boundary commission, and where territory involved in first and second annexation petitions was identical, it was not necessary that there be a resubmission of proposal. West's Ann.Gov.Code, §§ 34302, 34303.5, 34304, 35001, 35002, 35301.

◆

Smith, Wool & Perren, Donald B. Richardson, Jr., San Jose, for appellant.

Ferdinand P. Palla, City Atty., San Jose, Robert J. Costello, Richard K. Karren, Harry Kevorkian, Asst. City Attys., San Jose, for respondents.

KAUFMAN, Justice.

This is an appeal from an order dated March 17, 1955, granting respondent's motion to dismiss the above entitled action and to quash a writ of certiorari and a writ of mandamus, which order was made pursuant to respondent's motion, appellant having failed to amend its petition after demurrer was sustained with ten days leave to amend on February 17, 1955. Appellant Southern Lumber Company brought this action to prevent the City of San Jose from annexing the territory known as Monterey Park No. 4., and which territory includes real property owned by appellant. The Superior Court of Santa Clara County issued alternative writs of mandamus and certiorari, and pursuant to court order, respondent filed a return, and also a demurrer and answer. After the sustaining of the demurrer, appellant chose not to amend.

The sole contention of appellant on this appeal is that the City of San Jose failed to comply with one of the mandatory requirements set forth in the Government Code for the annexation of uninhabited territory. The annexation herein was made under the provisions of the annexation of Uninhabited Territory Act of 1939. Government Code, § 35301 of that Act provides that in annexation proceedings pursuant to this article (article 5), "the provisions of this article and of Article 1 of this chapter alone apply." Government Code, § 35002 of article 1 provides as follows:

> "No petition seeking the annexation of territory to a city shall be circulated or filed, nor shall any public officer accept any such petition for filing, nor shall any legislative body initiate proceedings to annex on its own motion, until the proposal for the annexation of territory to a city has been submitted to and reported upon to the proponents by the boundary commission of the county with respect to the definiteness and certainty of the proposed boundaries.
>
> "If the boundary commission does not report upon the petition or proceeding within 20 days after it is submitted to it, the petition or proceeding shall be deemed correct."

The chronology of events in the annexation proceedings as set forth in appellant's petition is as follows:

On June 22, 1953, a petition for the incorporation of a new city to be known as the City of South San Jose was filed with the Board of Supervisors of Santa Clara County. This petition particularly described the boundaries of the proposed city which included all the territory designated in the first and second annexation proceedings as Monterey Park No. 4, which park included petitioner's lands.

On May 29, 1953, more than 20 days before the filing of the aforesaid petition for incorporation with the Board of Supervisors, a petition accurately describing the boundaries of the proposed city was filed with the Boundary Commission pursuant to §§ 34303.5 and 34304 of the Government Code. No report thereon was made by said commission within twenty days thereafter.

On August 17, 1953, while the incorporation proceedings were pending before the Board of Supervisors, Mayfair Parking Company, a corporation filed a petition with the San Jose City Council seeking annexation of its real property and the real property of petitioner to the City of San Jose. Said council, assertedly acting under the provisions of the Annexation of Uninhabited Territory Act of 1939, adopted Resolution 9972 giving notice of the proposed annexation and notice of the time and place for hearing protests. This petition is referred to throughout appellant's petition for a writ as the "first annexation proceedings."

On June 2, 1953, and more than 20 days prior to the filing with the city council of the petition for annexation pursuant to Government Code, § 35002, a proposal describing the boundaries of Monterey Park No. 4 was filed with the Boundary Commission, but no report was made thereon by said Commission within twenty days thereafter.

On November 9, 1953, the Board of Supervisors adopted a resolution by which it established the boundaries of the proposed city of South San Jose and determined the number of inhabitants to be less than 500. Having made this determination, the Board refused to call an incorporation election in said territory. (Under Section 34302, Government Code, a portion of a county in order to be incorporated as a city, must have not less than 500 inhabitants.)

On November 9, 1953, after the adoption of the above resolution by the Board of Supervisors, the San Jose City Council adopted a resolution finding that it had no jurisdiction to proceed with the proposed annexation of Monterey Park No. 4, and discontinuing hearing of protests thereto.

Also on November 9, following the adoption of the above resolution by the City Council, a second petition was filed with said council by Mayfair Packing Company seeking annexation of its real property and that of petitioner to the City of San Jose. Said council, purporting to act under the Uninhabited Territory Act of 1939, adopted Resolution No. 10057 giving notice of the proposed annexation to the City of San Jose of the territory designated as Monterey Park No. 4, and giving notice of the time and place of hearing of protests thereto. Appellant states in his petition that the territory described in the second petition (for annexation) is the same as that described in the first petition.

Appellant then alleged that no proposal for the annexation to the City of San Jose of Monterey Park No. 4 in the second annexation proceedings was ever filed with the Boundary Commission pursuant to Section 35002, Government Code, after the abandonment, dismissal and discontinuance of the first annexation proceedings, and prior to the filing with and acceptance of the second petition by said City Council.

The date of hearing of protests before the City Council had been set by Resolution 10057 for December 21, 1953, and on the date petitioner protested in writing against the annexation of its land to the City of San Jose. After receiving petitioner's protest, said council continued the hearing to December 28, 1953, and on that date rejected petitioner's protest. It then proceeded "to adopt to print an ordinance" No. 4295 annexing Monterey Park No. 4 to the City of San Jose.

Although it does not appear in the petition, appellant sets forth in his brief the fact that on January 4, 1954, it filed a petition for writ of certiorari and/or writ of mandamus asking that petitioner's protests be sustained and disapproving the annexation of Monterey Park. After hearing, judgment was entered on January 11, 1955, denying the petition. The appeal from the judgment in that proceeeding to this court was dismissed on September 5, 1956.

On December 6, 1954, the petition further alleges, the city council threatened to finally adopt an ordinance of annexation of Monterey Park No. 4, whereupon this petition for writ of certiorari and/or writ of mandamus, was filed asking that petitioner's protest be sustained and the proposed annexation disapproved. Demurrer was sustained with leave to amend on February 8, 1955. Appellant states in his brief that because of the judgment denying the first petition for a writ in the other action, petitioner chose not to amend.

Respondents demurred to each cause of action in the petition on the ground that no cause of action was stated which would authorize the issuance of such writ, and further, that it appeared from the petition that petitioner had been guilty of laches.

From the face of the petition it appears that a proposal to annex Monterey Park No. 4 to the City of San Jose was submitted to the Boundary Commission on June 2, 1953, pursuant to Section 35002 of the Government Code. No report being made thereon within twenty days, the proposed boundaries were then deemed correct. That the territory involved in the first and second annexation petitions is identical is admitted by appellant's petition.

It is clear from Section 35002 that a proposal for annexation shall be submitted by the proponents to the Boundary Commission not less than twenty days before a petition may be circulated or a legislative body may initiate proceedings to annex on its own motion. Mayfair Packing Company was the proponent of both the first and second petitions. Its proposal for annexation of Monterey Park No. 4 was the same proposal in both proceedings. The section requires only the proposal to be submitted to the Boundary Commission. The "petition" need not be, nor is a copy of the proposed petition required to be submitted. The Commission is concerned only with the definiteness and certainty of the boundaries. The resubmission of the proposal in this case would appear to have been an idle act. Although appellant argues that conditions within the territory proposed to be annexed might have changed between the filing of the first petition (August 17, 1953) and the filing of the second (November 9, 1953) his petition for the writ does not allege that any change occurred. As respondent points, out, Government Code, § 35001 requires only that a petition be filed within six months of the date when the first signature was obtained, and although this much time may have elapsed, there is no requirement that the Boundary Commission must reexamine the matter to determine if conditions have changed. Here, about five months had elapsed between June 2, and November 9, 1953.

Section 35002 of the Government Code was before this court in Jefferson Union School District of Santa Clara County v. City Council, 129 Cal.App.2d 264, 277 P.2d 104, 105. In that case the petition for annexation was circulated and signed before it was submitted to the Boundary Commission, which reported that the boundaries were definite and certain. The school district instituted proceedings in mandamus and in certiorari against the city questioning the legality of the city's adoption of a resolution proposing the annexation. The court in affirming the judgment in favor of the city noted that the purpose of the statute had been fulfilled. It observed that when the Legislature added Section 35002 to the Government Code and amended Section 35301 to make it applicable to the Annexation of Uninhabited Territory Act of 1939, it did not prescribe any penalties for non-compliance with said section, the consequences being left to inference. "It did not even declare the consequences of a report when the commission finds the proposed boundaries are indefinite and uncertain. It dispensed with the report if not filed within 20 days." The court then expressly held that the provisions of Section 35002 are directory, not mandatory, that such provisions are a guide to orderly proceedings. The court added, as appellant points out, that they need not consider what the consequences mights have been if the council had acted without submitting the petition to the Boundary Commission or if the Commission had filed an adverse report. However, as we have stated earlier, the proponents had submitted their proposal for the annexation to the Boundary Commission in this case although the second petition describing the identical proposal was not so submitted.

In People ex rel. Klevesahl v. City of San Bruno, 124 Cal.App.2d 790, 269 P.2d 211, 214, it was said in regard to the regulatory provisions of the Annexation Act of 1912, that its purpose was to assure a fair election to property owners in the area to be annexed, "and to assure them that they will not be imposed upon or misled". In the cited case it was clearly demonstrated that no one had been misled by the variance. In the present case, there are no facts alleged in the petition for the writ that show that appellant was in any way injured by failure to again submit the proposal to the Boundary Commission. There is no allegation that the boundaries are indefinite or uncertain, and those are the only subjects of the Boundary Commission's report under this section. Nor is there any allegation that any change occurred within this territory after the submission of the proposal to the Commission on June 2, 1953. There is only the admission that the territory is the same in both proceedings.

Whether the statute in this particular be regarded as mandatory or directory, it is our view that there was a substantial compliance with the statutes involved and that the petition of appellant does not state facts which state a cause of action.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, Justice pro tem., concur.

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146 Cal.App.2d 86

James Jacob GROVER, Plaintiff and Respondent,

v.

SAN MATEO JUNIOR COLLEGE DISTRICT OF SAN MATEO COUNTY, a Public Corporation, Defendant and Appellant.

Civ. 16888.

District Court of Appeal, First District, Division 1, California.

Nov. 19, 1956.

Rehearing Denied Dec. 19, 1956.

Hearing Denied Jan. 16, 1957.

Student's action for personal injuries received in airplane crash against junior college district and operator of plane. The Superior Court, County of Alameda, Donald K. Quayle, J., entered judgment for student, and college district appealed. The District Court, Peters, P. J., held that evidence supported finding that operator and owner of airplane was an employee of junior college that arranged to have him take students enrolled in college's aeronautics course on a flying trip, within statute rendering school district liable for injuries arising out of negligence of the district, its officers or employees.

Affirmed.

1. Schools and School Districts ⚿89.2

Statute imposing liability on school district for negligent acts of its officers or employees, imposes liability for acts of its agents as well. West's Ann.Education Code, §§ 3, 1007, 1029.

2. Colleges and Universities ⚿10

In former student's action against junior college district and owner and operator of airplane for injuries sustained in airplane crash, evidence supported finding that owner and operator of airplane was employee of junior college that arranged to have him take students enrolled in college's aeronautics course on a flying trip, within statute imposing liability on school district for negligent acts of its officers and employees. West's Ann.Education Code, § 1007.

◆

Keith C. Sorenson, Dist. Atty., of San Mateo County, Redwood City, Wallace & Parker, Charles F. Parker, San Francisco, for appellant.

J. Adrian Palmquist, Oakland, Francis T. Cornish, Berkeley, for respondent.

PETERS, Presiding Justice.

Respondent, while a student at San Mateo Junior College, was seriously injured when an airplane in which he was riding crashed. The plane was then being operated by Harry D. Cranston, Jr., who ran a flying school under the name of Cranston Air Service. The flight in which respondent was injured was arranged and paid for by the College, being a non-compulsory part of an aeronautics course given by the College and in which respondent was enrolled. Respondent brought this action against the college district and Cranston. The jury brought in a verdict of $100,000 against both defendants. On motion for a new trial respondent agreed to a remission of part of the judgment so as to reduce it to $75,000. From that reduced judgment the college district appeals.

It is conceded on this appeal that the implied finding of the jury that the crash was proximately caused by the negligence of Cranston in the operation of the plane is supported by the evidence. The sole contention of appellant is that Cranston was not the employee of appellant, but an independent contractor for whose negligence appellant is not responsible. Appellant recognizes that to prevail on this point it must establish, as a matter of law, that Cranston was an independent contractor, and that, insofar as the question is one of fact, it has been adversely decided against it by the jury.

It is admitted that appellant's liability, if any, is predicated upon section 1007 of the Education Code. That section imposes liability on any school district "for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers, or employees", where a claim has been filed. A claim was here filed.

The partial reporter's transcript contains the following evidence relating to the issue involved:

Respondent at all times here relevant was a student at appellant college, enrolled in a course entitled "Aeronautics I." That course was described in the official catalogue of the college as follows:

"Objective: To give a general background to the subject of Aviation.

"Content: History of aviation, aircraft structures and problems of flight, navigation and meteorology for an air-age world, community problems, vocational problems, national and international aspects of aviation. Flight experience will be provided for those who have not flown previously."

Respondent testified that he was interested in aeronautics; that he intended to follow it as a career; that this affected his choice of San Mateo Junior College as a school; and that the opportunity for flying led him to enroll in the course here involved. Flight training was an integral, but optional, part of this course. Grades in the course were in no way dependent upon taking the flight. Students were graded the same whether or not they took the flight.

The instructor in the course was George Van Vliet, admittedly an employee of the appellant. He was a qualified pilot, with a special secondary teaching credential in aviation, and was licensed as a commercial flight instructor. Prior to making the arrangement with Cranston, he had taken students up in planes rented by the appellant school district, because the college never owned any planes. The purpose of the flights was to give the students a practical demonstration of the theories that they had learned in the classroom. Because, after 1950 or 1951, Van Vliet no longer had the time to fly the students in a rented plane, arrangements were entered into with Cranston to conduct these orientation flights. These arrangements were made by Van Vliet on behalf and with the approval of appellant, and the appellant paid Cranston for the services rendered. The arrangement between Van Vliet and Cranston was that the latter would be paid by appellant $5 per hour per student, that there would be three students in each flight, and that each flight would be planned to cover about three hours. The length, nature and general coverage of the flights were worked out by Van Vliet and Cranston at the beginning of the relationship. They talked over what things Cranston should cover in the indoctrination of these students, so that the practical demonstration would fit in with the theory discussed in class. Van Vliet told Cranston that he considered the cross-country flight a "valuable" part of the course. It was agreed that the time of the flights would be arranged between Van Vliet, the students, and Cranston, so as to fit everyone's convenience. The students were to select the place they would like to go and, under the general supervision of Van Vliet, were to make up a flight plot. Cranston, however, was empowered to alter these plans if flying conditions did not warrant carrying out the flight as suggested by the students. Van Vliet did not go along on these flights, but, normally, when three students determined when and where they wanted to go, Van Vliet made the arrangements.

These arrangements between appellant and Cranston were oral. Customarily, Van Vliet would prepare a list of the students who wanted to take the flights and then send it to appellant's business office. That office would issue a work order authorizing the flights. After the flight Cranston or his company would send in a bill and this bill, periodically, was paid by the college district.

Cranston was a licensed flying instructor approved by both the Civil Aeronautics Administration and the State Department of Education. As already pointed out, he operated as the Cranston Air Service.

On the particular flight here involved, the three students, including respondent, decided upon the day they would like to go, and communicated this fact to Van Vliet, who made the arrangements with Cranston. The students worked out in class a detailed flight plan under Van Vliet's supervision, but, when they arrived at the airport, Cranston, because of adverse weather conditions in the area plotted, suggested a change in route which was agreed upon by the students. They took off in the plane and followed this new flight plan, Cranston explaining the operation of the plane, permitting the students to fly it in the air, and discussing with them the other matters agreed upon with Van Vliet. As a result of the negligence of Cranston in the operation of the plane, it crashed, and respondent was injured.

On these facts, the sole question now presented is whether Cranston, as a matter of law, was an independent contractor for whose negligence appellant is not liable.

Much has been written on the subject of what facts make a person an independent contractor and what facts make him an employee. There are many things to be considered. The problem most frequently arises either under the workmen's compensation or similar law, or in tort cases where it is sought to impute the negligence of one person to another. While the same general test to determine the nature of the relationship is used in the various situations involved, it is quite clear that the emphasis to be placed upon any particular factor may vary, dependent upon which of the two general situations is being considered in the particular case. Certainly, the public policy and legislative purpose behind the workmen's compensation act are different from those behind statutes such as section 1007 of the Education Code imposing liability on school districts for the negligence of its employees. In the tort situation a very important question may be the relationship between the person injured and the one sought to be held as an employer, a problem not usually present in the normal workmen's compensation case.

In the present case, the relationship was between a student enrolled in a regular college course and the college that conducted that course. While the flying part of the course was not compulsory, it was clearly an integral and regular part of the course, an inducement to take the theory part of the course, and was paid and arranged for by the college. So far as the students were concerned, Cranston was just as much the instructor in that class as was Van Vliet. The students did not seek, select, or solicit Cranston for the flight training. They went to the college, and, if they took this course, they had to take Cranston for this purpose. Cranston was offered to the students by the college as the instructor in the flying part of the course. No student had any right to designate or select who should teach them the flying part of the course, any more than they could select the teacher to teach the theory part of the course. The student depended upon appellant to select the flying instructor, and to arrange and pay for the flights. Thus, the furnishing of the flights was part of the school's function. From the students' standpoint, Cranston was in no different position than Van Vliet, who was admittedly an employee of the appellant. Thus, the fact that appellant made no income deduction from Cranston's compensation for social security or income tax, while a factor in determining how Cranston and appellant looked upon the relationship, is not conclusive in the over-all picture so far as respondent is concerned.

[1] The parties argue as to whether or not section 1007 of the Education Code imposes liability on the district for negligent acts of "agents" of the college as well as "employees." The section imposes liability for the negligence of the "district, or its officers, or employees" and does not specifically enumerate "agents." It can be argued that imposing liability on the "district" includes all manner of ways in which the "district," an artificial entity, can be liable, that is, by the acts of its "agents" as well as by the acts of its "officers, or employees". This construction seems reasonable in view of section 3 of the Education Code which declares that the provisions of that code "are to be liberally construed, with a view to effect its objects and to promote justice." See Kline v. San Francisco, Unified School Dist., 40 Cal. App.2d 174, 104 P.2d 661, 105 P.2d 362. Apparently the Legislature believed that section 1007 included a liability for the acts of "agents" because when it came to provide for the expenditure of public funds for insurance coverage for the liability created by section 1007 it provided for such coverage for "the negligent act by the district, or by a member of the

board, or any officer, agent, or employee when acting within the scope of his office, agency, or employment." Ed.Code, § 1029.

[2] Regardless of this issue, however, it is quite clear that there is ample and substantial evidence to sustain the finding that, so far as section 1007 of the Education Code is concerned, Cranston was the employee of the appellant. All the cases concede that the basic question involved on this issue is the nature and extent of the control exercised by the one sought to be held as employer. Sudduth v. California Emp. Stab. Comm., 130 Cal.App.2d 304, 278 P.2d 946; Empire Star Mines Co. v. California Emp. Comm., 28 Cal.2d 33, 168 P.2d 686; Isenberg v. California Emp. Stab. Comm., 30 Cal.2d 34, 180 P.2d 11, and cases cited therein; see also section 220 of the Restatement of Agency.

In the instant case the evidence shows that the appellant district had sufficient "control" over Cranston to make him an employee. The control here involved is not the minute control over the actual operation of the airplane. The objective of the relationship was the orientation of the students to the principles governing cross-country flights, that is, to practically demonstrate some of the theories taught in the classroom. The evidence shows that the appellant district had the contractual right to determine how that was to be done, and what subjects Cranston should talk about to the students while on the flight. Had appellant desired to do so, it could have ordered flights over designated routes, subject to due considerations being given to the weather, and in other obvious ways have controlled the method by which the desired result was to be obtained. In this respect the instant case is no different in principle from Isenberg v. California Emp. Stab. Comm., 30 Cal.2d 34, 180 P.2d 11, in which it was held that free lance jockeys, engaged separately for each race, were employees within the meaning of the Unemployment Insurance Act. West's Ann. Unempl. Ins. §§ 601-603.

The legal and factual situation here involved is also not substantially different from that involved in Smith v. Fall River Joint Union High School Dist., 118 Cal. App. 673, 5 P.2d 930. There the plaintiff was a high school student. The school furnished the students bus tranportation, and plaintiff was injured while riding in the bus as a result of the negligence of the driver. This bus was owned and operated by one Fitzwater, who had a written contract with the district obligating him to transport students to and from the school, which contract was terminable at any time by the school district. It was held that the court properly submitted to the jury the question of whether Fitzwater was an employee or an independent contractor, and that its finding that Fitzwater was an employee was supported. The appellate court found the necessary control in the right of the school district to terminate the contract at will—a right clearly existent in the instant case. In so holding, the appellate court stated, 118 Cal.App. at page 681, 5 P.2d at page 933:

"* * * The primary consideration which leads to this conclusion is the right reserved by the district to terminate the agreement at will. It is not the actual exercise of control, but the right of control—that is to say, the potential power of control—which is important in a determination of whether or not the status of an employee or independent contractor exists. [Citing a case.] A circumstance tending to negative the independence of the driver is the right to terminate the employment at any time. [Citing a case.] In New York Indemnity Co. v. Industrial Acc. Comm., 80 Cal.App. 713, 252 P. 775, 776, the court said: 'Coincident with the right of control is the right of either the employer or the employee to terminate the relation without liability. This is but another way of stating the rule, for the right to immediately discharge involves the right of control.'

"As was stated in the case of Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 121, 210 P. 820, 823: 'One of the means of ascertaining whether or not this right to control exists is the determination of whether or not, if instructions were given, they would have to be obeyed. In the instant case, it is undisputed that the Press Publishing Company had the power to hire and the power to discharge its carriers for unsatisfactory service, and in this regard Benefiel was in no better position than the other carriers. *This power of discharge made obligatory any instructions given, for it gave to the Press Publishing Company the power to require obedience to those instructions and insured their being carried out.*'

"By retaining the power of discharge the district was virtually in a position to control every act of the driver."

For the foregoing reasons the judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

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146 Cal.App.2d 204

Grace Defenderfer Ryan HIXSON, Plaintiff and Appellant,

v.

William Carter HIXSON, Defendant and Respondent.

Civ. 21975.

District Court of Appeal, Second District, Division 2, California

Nov. 21, 1956.

Action by a wife for divorce. From an order of the Superior Court of Los Angeles County, Stanley Mosk, J., denying plaintiff's motion to amend a final judgment granting her a divorce to conform to parties' oral agreement to eliminate by stipulation provisions of judgment as to payment of spouses' federal income taxes, plaintiff appealed. On defendant's motion to dismiss the appeal, the District Court of Appeal, Ashburn, J., held that the order was not appealable.

Motion granted and appeal dismissed.

1. Appeal and Error ⚷82(1)

To be appealable, a special order, made after final judgment, must affect judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. West's Ann. Code Civ.Proc., § 963, subd. 2.

2. Divorce ⚷177

An order denying divorced husband's motion to amend final divorce judgment to conform to parties' oral agreement, after expiration of time for appeal from judgment, to eliminate therefrom by stipulation provisions as to payment of parties' federal income taxes, was not appealable, as it left judgment intact and neither added to nor subtracted from it. West's Ann.Code Civ.Proc., § 963, subd. 2.

Gold & Needleman, Beverly Hills, for appellant.

Morris Lavine and Wm. J. Clark, Los Angeles, for respondent.

ASHBURN, Justice.

Motion to dismiss appeal from order refusing to amend final decree of divorce to conform to oral agreement of parties that such amendment be made. Trial judge found that the agreement was made in fact but that he had no jurisdiction to make the requested amendment, the decree having become final.

The parties were in litigation with the government over their income taxes at the time of the divorce. Both the interlocutory decree and the final provided that certain property should go to the wife subject to the government's lien; that each party should be responsible for one-half the debt to the government up to $10,000; in the event it exceeded that amount the wife should pay the next $3,000 and the parties were to share equally any excess over $13,000; the husband to pay all penalties imposed on either or both parties. After the time for appeal from the final decree had expired it was orally agreed between the parties that each of them should negotiate and settle separately with the government and that the above mentioned portion of the divorce decree should be eliminated therefrom by stipulation. Each of them did effect a settlement of the tax claim, but the husband refused to go through with his agreement to amend the judgment, claiming through substituted counsel that he had never agreed to that. The appeal is from the order denying plaintiff's motion to amend the judgment.

[1] Defendant's motion is made upon the ground that the order is not appealable. The test of appealability of an order not mentioned in § 963, Code of Civil Procedure, is stated in the cited case of Sjoberg v. Hastorf, 33 Cal.2d 116, 119, 199 P.2d 668, 670, as follows: "It is not sufficient that the order determine finally for the purposes of further proceedings in the trial court some distinct issue in the case; it must direct the payment of money by appellant or the performance of an act by or against him." But a special order after final judgment is mentioned in § 963 and the test of appealability seems to be somewhat different. Lake v. Harris, 198 Cal. 85, 89, 243 P. 417, 419: "In order that a special order, made after final judgment, as contemplated by subdivision 2 of section 963 of the Code of Civil Procedure, be appealable, such order must affect the judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution, Griess v. State Investment, etc., Co., 93 Cal. 411, 28 P. 1041; Kaltschmidt v. Weber, 136 Cal. 675, 69 P. 497; Watson v. Pryor, 49 Cal.App. 554, 193 P. 797; 2 Cal.Jur. 153." The quoted language was used with respect to an appeal from an order striking the judge's certificate from a clerk's transcript on appeal. The court further said that the making of that order "neither added to nor subtracted from the relief granted by the judgment." 198 Cal. at page 89, 243 P. at page 419. The stated test has been applied repeatedly.

Lande v. Southern Cal. Freight Lines, 78 Cal.App.2d 417, 177 P.2d 936, dealt with an appeal from an order directing engrossment of a settled statement by incorporating certain amendments therein. The court dismissed the appeal, saying, 78 Cal. App.2d at page 419, 177 P.2d at page 937: "But the orders after judgment which are appealable under this section are only those which affect the final judgment in some manner or bear some relation to it either by way of enforcing it or staying its execution. Lake v. Harris, 198 Cal. 85, 89, 243 P. 417; Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 150 P.2d 881. The test is the same with relation to orders made in the preparation of records on appeal. An order terminating proceedings for the preparation of a record has the same effect as an affirmance of the judgment or dismissal of the appeal, and is appealable (Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922; W. J. Somers Co. v. Smith, 45 Cal.App. 703, 188 P. 311), but an order denying a motion to terminate such proceedings is not appealable (Hohnemann v. Pacific Gas & Elec. Co., 29 Cal. App.2d 551, 85 P.2d 151; Landreth v. Ducommun, 9 Cal.App.2d 136, 48 P.2d 984)". Among other cases applying the Lake v. Harris test are: Williams v. Superior Court, 14 Cal.2d 656, 666, 96 P.2d 334; Imperial Beverage Co. v. Superior Court, 24 Cal.2d 627, 632, 150 P.2d 881; McWilliams v. Hudson, 98 Cal.App. 185, 189, 276 P. 598, 277 P. 529; Kaufman v. Brown, 106 Cal.App.2d 686, 689, 235 P.2d 632. In Hilliker v. Board of Trustees, 91 Cal. App. 521, 526, 267 P. 367, this court held appealable an order denying a motion to amend a judgment by eliminating a recital that it was entered upon stipulation. This was because the judgment as it stood recited that it was entered by consent and thereby would deprive the party of a right of appeal.

[2] The order at bar leaves the judgment intact; it neither adds to it nor subtracts from it. Had the motion been

granted the order doubtless would be appealable for it would make a material change in the obligations of the judgment. But the order actually made has no such effect and is not appealable.

The motion is granted and the appeal is dismissed.

MOORE, P. J., and FOX, J., concur.

146 Cal.App.2d 49

Matter of the ESTATE of Oscar FREEMAN, Deceased.

Frederick WARRINER, Edith Maud Hannam, Lois Patricia Hannam Thompson, John Hannam, Oscar Freeman Hannam, Frank Baldwin Hannam, Bruce Waldon Webb, Edna Earl Webb, Charles J. Webb, Arthur Moulton Webb, Contestants and Appellants,

Pasadena Home for Aged, Contestant and Appellant,

v.

SECURITY-FIRST NATIONAL BANK, Petitioner and Respondent,

Salvation Army, Scottish Rite Cathedral Association, Troop Memorial Church, Pasadena Lodge 272 F. & A. M., Pasadena Commandery No. 31, Crown Chapter No. 72—R. A. M., Pasadena Council No. 16, Royal Select Masters, Pasadena Dispensary, Boys' & Girls' Aid Society, Child Health Foundation, Congregational Church of Genoa, Wisconsin, Legatees and Respondents.

Civ. 21714.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1956.

Rehearing Denied Dec. 13, 1956.

Hearing Denied Jan. 8, 1957.

Proceeding by testamentary trustee for instructions as to distribution of balance of terminated trust, under prior decree of distribution. The Superior Court of Los Angeles County, Otho G. Lord, Judge pro tem., gave instructions to the trustee and dissatisfied legatees appealed. The District Court of Appeal, Moore, P. J., held that provisions in the decree for payments to appellants if there should be sufficient funds merely indicated order of abatement and did not condition the gifts upon existence of funds at time of death of life beneficiary of the trust.

Reversed and judgment rendered.

1. Executors and Administrators 🔑315(5)

Under decree of distribution creating a trust and providing that after death of life beneficiary thereof, certain trusts should be established for testator's relatives out of funds remaining, and that cash should be paid for memorial to testator's mother if there should be sufficient funds remaining, the contingent provision merely indicated the order of abatement of bequests and did not condition the gifts upon the presence of funds at time of life beneficiary's death, and hence funds subsequently accruing as result of termination of another trust were payable to relatives and to the memorial, rather than to residuary beneficiaries.

2. Wills 🔑630(1)

A gift is contingent when founded upon an event such that it is presumed that testator meant to make no gift unless that event happened.

3. Executors and Administrators 🔑315(5)
Wills 🔑687(4)

Upon termination of a testamentary trust, the corpus does not fall into residuum of settlor's estate until all general bequests have been fully paid; and this rule is applicable to interpretation of decrees of distribution.

4. Executors and Administrators 🔑315(5)

A rule that is efficacious in determining testator's intention in testamentary dispositions will be also of assistance in deriving court's intent as expressed in order distributing his estate.

5. Executors and Administrators ⚷315(5)
Wills ⚷448

Construction of a will or decree of distribution which would lead to intestacy is not favored. West's Ann.Prob.Code, § 102.

6. Executors and Administrators ⚷315(5)

Under decree of distribution providing that all balance of the estate which might remain should be distributed to named charities, directing distribution of trust corpus to such charities before payment of general legacies was erroneous in absence of provision to justify conclusion that such charities were more than mere residuary beneficiaries.

7. Executors and Administrators ⚷315(5)

Under decree of distribution creating trust and providing that certain immediate relatives should take first from the trust estate, then more distant kin, then a gift in memorial of testator's mother, and finally the "balance" to numerous assorted charities whose activities had no particular interrelationship, court intended such charities to be the residuary safety valve for any surplusage in the estate, but immediately to take only moderate sums bequeathed them in particular paragraph of decree; and did not intend to benefit such charities to exclusion of the kin and the memorial.

8. Executors and Administrators ⚷315(6)

A decree of distribution that has become final is a conclusive determination of terms and validity of will, trusts created therein, and rights of all parties thereunder.

9. Executors and Administrators ⚷315(6)

In proceeding by testamentary trustee for instructions with reference to distribution of balance, decree of distribution creating the trust could not be attacked on ground that it did not properly construe the will upon which it was based

10. Evidence ⚷450(2)

In proceeding by testamentary trustee for instructions as to proper disposition under prior decree of distribution, the will construed by such decree was inadmissible unless the decree was ambiguous, in which event the will should be admitted merely to clarify the decree.

11. Appeal and Error ⚷1175(7)

Where a will, which trial court refused to admit in evidence in proceeding by testamentary trustee for instructions, as to proper disposition of funds under decree of distribution, indicated even more lucidly than the decree of distribution a testamentary scheme contrary to trial court's interpretation of such decree, reviewing court would declare proper interpretation of the decree and give instructions to trustee without further reference to trial court.

12. Trial ⚷136(3)

The proper construction of a written instrument when no extrinsic evidence is in dispute is a mere question of law.

◆

Cecil Whitehead and Robert McWilliams, Altadena, for appellant, Pasadena Home for the Aged.

Russell K. Lambeau, Los Angeles, for appellant relatives, contestants.

Rinehart, Merriam, Parker & Berg, Pasadena, by Ralph T. Merriam and Jay D. Rinehart, Pasadena, for legatee respondents.

Newby, Holder & Newby, Los Angeles, for Salvation Army.

Anderson & Howard, Arcadia, for Congregational Church.

Boyle, Bissell & Atwill, Pasadena, by Charles R. Newby, Los Angeles, Henry H. Hege, Arcadia (of Anderson & Howard), Arcadia, and John R. Atwill, Jr., Pasadena, for Boys & Girls Aid Soc., Pasadena Dispensary, and Child Health Foundation, Respondents.

MOORE, Presiding Justice.

Security-First National Bank, trustee of certain testamentary trusts created by the will of Oscar Freeman, seeks instructions with reference to distributing the balance of one trust which has now terminated. The instrument to be construed is the decree of distribution entered March 28, 1933. The claimants are on the one hand certain relatives of the decedent and the Pasadena Home for the Aged, on the other fourteen miscellaneous charities.

The following is a summarization of the pertinent portions of the decree:

"(4) All the rest, residue and remainder of the property of the said deceased, whether real, personal or mixed, wherever situate, to the Security-First National Bank of Los Angeles, a National Banking Association, in trust, however for the following uses and purposes: * * *

"(b) One-half to pay to Lois F. Baldwin, the net income therefrom as long as she lives. * * *

"(e) Upon the death of said Lois F. Baldwin, there shall be set apart a separate trust fund in the sum of Fifty Thousand Dollars ($50,000.), to pay the net income therefrom to Alice Webb and Helen Hannam equally as long as they live, or if one should die, then to pay the whole of said net income to the other as long as the survivor lives.

"(f) After the death of said * * * Lois F. Baldwin and after the setting apart of the * * * trust funds of Fifty Thousand Dollars * * * hereinbefore referred to, [as well as certain other trust funds provided for before this point in the decree] then out of the funds remaining in the hands of the Trustee, *if there shall be sufficient thereof*, there shall be established the following trusts, the amounts of which should the funds remaining in the hands of the trustee prove insufficient to completely establish all, shall be ratably reduced, proration to be among the said trusts as entities:" [Thereupon followed three numbered trusts created, inter alia, in favor of Edith Maud Hannam, Lois Patricia Hannam, John Hannam, Frank Baldwin Hannam, Bruce Walden Webb, Edna Earl Webb, Charles J. Webb, Jr., and Arthur Moulton Webb. All are appellants in this action. If any of the last named persons should have died before attaining thirty years, the opposing claimant charities, respondents herein, would have taken such gifts under these trusts.]

"(g) When all of the foregoing trusts have been established, then out of the funds remaining in the hands of said trustee, there shall be paid in cash to: [certain designated persons including Oscar Freeman Hannam, appellant herein.]

"(h) Out of the funds remaining in the hands of the Trustee, there shall be paid in cash to the Pasadena Home for the Aged of Pasadena, California, the sum of Fifty Thousand Dollars * * * as a memorial to Mary Helen Freeman, mother of the decedent, which, *if there be sufficient funds remaining in the hands of the Trustee, shall be paid in full before any of the specific bequests enumerated in Paragraph (i) are paid.*"

"(i) [This paragraph awarded general bequests to the Salvation Army of Pasadena, Scottish Rite Temple Association of Pasadena, Pasadena Free Dispensary and eleven other charities, respondents on this appeal.]

"(j) All the balance of said estate which may remain in the hands of said trustee, *either by reason of the termination of the trusts, hereinbefore referred to, or by* * * * *lapsation* * * * then said *balance* shall be divided among * * * [the fourteen respondent charities] * * * in the proportion that the bequest to each institution bears to the total bequests."

Between the date of the execution of the will and the decree of distribution, the business depression of the 1930's occurred. A shrinkage of the estate resulted in a depletion of funds to such extent as to make it impossible to pay all the bequests. This was true specifically upon the death of Lois F. Baldwin, the first life tenant of one half of the estate. Also, it was true upon the death of the life tenant of the other half. Notwithstanding the fact that there were enough funds at that time to establish the $50,000 life trust in favor of Alice Webb and Helen Hannam (paragraph e), the bequests to appealing relatives and to the Pasadena Home for the Aged remained unfulfilled. Now that some 22 years have elapsed since the decree of distribution, and Alice and Helen have passed on, the corpus of their $50,000 trust must be distributed. The trial court determined that the decree of distribution should be so interpreted as to allow the fourteen respondent charities to take under paragraph (j) of the decree the funds from the terminated trust to the exclusion of the relatives and the Pasadena Home for the Aged. The court excluded appellants' offer of the will of the testator and other evidence offered to prove that the true intention of the deceased was contrary to the trial court's interpretation.

First, *considering the decree of distribution by its four corners, did the trial court properly award the corpus of the terminated trust to respondent charities?*

[1, 2] The several paragraphs of the decree (f, g, and h) provide substantially that the bequeathed sums are to be distributed only in the event that there be *"sufficient funds" remaining in the hands of the trustee at the death of Lois F. Baldwin.* Now, respondents contend that these words condition the gifts to appellants. In other words, they argue (1) that such gifts were contingent upon the existence of sufficient funds in the estate at the time of the death of Lois F. Baldwin, the original life tenant, to discharge the legacies, and (2) that the contingency failed. However, there is no reason whatsoever to construe the gifts to appellants as contingent upon the presence of funds. A gift is contingent when founded upon an event of such a nature that it is presumed that the testator meant to make no gift unless that event happened. In re Estate of Blake, 157 Cal. 448, 459–460, 108 P. 287. A reading of the decree indicates that "if there be sufficient funds" merely serves to indicate the order of abatement of the bequests. That is what occurred here: appellants' gifts were abated because there were not enough assets in Freeman's estate to meet the prior gifts provided by the dedecree and yet leave "sufficient funds" for appellants. Nothing indicates an intention on the part of the court to condition these gifts by its decree rather than abate them.

[3, 4] It is generally recognized to be the law that upon the termination of a testamentary trust the corpus does not fall into the residuum of the estate of the settlor *until* all general bequests have been fully paid. Sibley v. Livermore, 332 Mass. 730, 128 N.E.2d 329, 332; In re Markey's Will, Sur., 125 N.Y.S.2d 246; note, 118 A.L.R. 352. This rule, though usually applied to the construction of wills, has been applied in California to the interpretation of decrees of distribution. In re Estate of Loring, 29 Cal.2d 423, 438, 175 P.2d 524, citing the A.L.R. note, supra. That such practice comports with sound reasoning readily appears. When a court decrees the distribution of the estate of a testate decedent, its aim and function are to effectuate the intention of the testator in disposing of his property. It is only logical that a rule that is efficacious in determining such intention of the testator as reflected in his testamentary disposals will be also of assistance in deriving the intent of the court as expressed subsequently in the order distributing his estate.

[5, 6] In labelling the contestants here for application of the above principle, it is clear that appellants are unsatisfied general legatees. But the question is: are respondents only residuary beneficiaries? Disregarding certain language to be discussed immediately below, paragraph (j) of the decree is in general a residuary clause. It is extremely unlikely that a decree of distribution would fail to create a residuum without mentioning the possible intestacy which would result. The construction of a will or decree which would lead to intestacy is not favored. Prob.Code, § 102; Buttram v. Finley, 37 Cal.App.2d 459, 467, 99 P.2d 1093. A glance at paragraph (j) clinches the point. It provides that "all the balance of said estate which may remain" should be distributed to the fourteen respondent charities. According to the foregoing rule, the trial court erred in directing distribution of the trust corpus to respondents before the general legacies have been paid *unless* some provision of the decree can be found to justify the conclusion that respondents were more than mere residuary beneficiaries.

Paragraph (j) provides that "All the *balance* of said estate which may remain in the hands of said trustee, *either by reason of the termination of the trusts, hereinbefore referred to, or by * * * lapsation * * **" shall be distributed to respondent charities. It is this language which respondents assert to be clear and unambiguous in passing over appellants' gifts to respondents' upon termination of the trusts. This argument is, in effect, that the language purports to create a *remainder* in the charities after termination of the life estates in trust. Such contention persists despite the fact that when the court directed remainders after the exhaustion or lapse of other trusts created in the decree, the remainder was included in the paragraph which created the trust. (See paragraph f.) In order fairly to appraise the phraseology of the decree and to ascertain the court's purpose, it is deemed helpful to scan the language of other wills or decrees which courts have adjudged insufficient to create a remainder in the residuary beneficiary and overcome the effect of the rule that general legacies must first be satisfied:

"'[I]f it fails within said time to secure such site, then the bequest to it shall absolutely lapse and shall thereupon pass under the residuary clause of decedent's will.'" In re Estate of Loring, supra, 29 Cal.2d 423, 438, 175 P.2d 524, 533. "'At her death, the said trust fund shall be divided in accordance with the residuary clause of this will.'" Sibley v. Livermore, supra, 332 Mass. 730, 128 N.E.2d 329, 330. Trust principal to "'go * * * as part of the residuum under the 26th clause of this will.'" Louisville Presbyterian Theological Seminary v. Fidelity Trust & S. V. Co., 113 Ky. 336, 68 S.W. 427, 428. In Smith v. Livermore, 298 Mass. 223, 10 N.E.2d 117, 126, 127, it was held that language similar to the foregoing when coupled with a provision in the residuary clause that it was to include all "'reversions and remainders'" buttressed the conclusion that general legacies should first be paid.

On the other hand, In re Reynolds' Will, 242 N.Y. 389, 152 N.E. 124, decided that when the *clause in the will which created the trust* provided that the corpus upon its termination should go to "'the institutions hereinafter named in clause twelfth'", referring to the residuary clause, those institutions were intended to take as remaindermen rather than as residuary beneficiaries.

In view of the above authorities, the trial court erred in so construing the decree as to create a remainder in respondents after termination of the $50,000 trust. The only language of the decree indicating that the charities should take as remaindermen is found not in the clause creating the trusts but in the residuary provision. By the original decree, the court provided in paragraph (j) that respondents were to take the "balance" of the estate. Had nothing further been said, the "balance" would include the principal of terminated testamentary trusts, subject of course to satisfaction of general bequests. Neither was anything added nor was any change effected by the express provision that the "balance" was to include sums accruing "by reason of the termination of the trusts." The language of the instant decree is singularly similar to that in Smith v. Livermore, supra, 298 Mass. 223, 10 N.E.2d 117, 127. There the residual clause expressly included "'reversions and remainders'"; the instant decree places in the residuum funds left after the "termination of trusts." The Massachusetts court held that the residuary beneficiaries are not entitled to any reversions or remainders while general legatees are still unsatisfied.

[7] The above conclusion is supported by a consideration of the entire decree. The scheme there set up provides that certain immediate relations are to take first from the estate, then more distant kin (appellants), then a gift to the Pasadena Home for the Aged in memoriam of the deceased's mother, and finally the "balance" to the assorted charities. A glance at the list of charities indicates that they could not have been the prime object of the court's concern in effectuating the intent of the testator. They include many divers, though

worthy, institutions whose activities have no particular interrelationship whatsoever. The conclusion is inescapable that the court intended these charities to be the residuary safety valve for any surplusage in the testator's estate, but immediately to take only those moderate sums bequeathed them in paragraph (i) of the decree. It would do violence to the obvious scheme of distribution created by the court in compliance with the testator's intent to benefit these charities to the exclusion of the kin and the memorial for decedent's mother. In re Estate of Olson, 144 Cal.App.2d 694, 301 P.2d 501.

Second, *should the trial court have allowed into evidence the will of the testator upon which the original decree was based?*

[8-10] A decree of distribution that has become final is a conclusive determination of the terms and validity of a will, trusts created therein, and the rights of all parties thereunder. Pacific Mutual Life Insurance Company v. McConnell, 44 Cal.2d 715, 726, 285 P.2d 636; Federal Farm Mortgage Corporation v. Sangburg, 35 Cal.2d 1, 4, 215 P.2d 721; In re Estate of Loring, supra, 29 Cal.2d 423, 427, 175 P.2d 524. It cannot be attacked now on the claim that it did not properly construe the will upon which it was based. In re Estate of Loring, supra, 29 Cal.2d at page 432, 175 P.2d 524. Thus, the proferred evidence was properly excluded unless the decree was *ambiguous*, in which event the will should be admitted merely to clarify the decree. In re Estate of Goldberg, 10 Cal.2d 709, 713, 76 P.2d 508; Buttram v. Finley, supra, 37 Cal.App.2d 459, 465, 99 P.2d 1093.

The question, then, is whether this decree is ambiguous in any material particular. Our discussion above indicates that if this decree is certain and *unambiguous*, its clarity militates against rather than in favor of respondents. However, for the sake of argument, several ambiguities may be suggested: (1) It could be argued that paragraph (j) does not clearly indicate whether respondents are to take the "balance" of the estate including funds from the "termination of the trusts" as residuary beneficiaries or as remaindermen. (2) Does the provision that respondents are to take funds from terminated trusts refer only to those trusts created in paragraph (f) of the decree in which the assorted charities were expressly named as remaindermen or alternative beneficiaries? (3) Could the court have intended in 1933 that should any of the trusts have been immediately void or lapsed the language of paragraph (j) would serve to entitle the charities to the sums to the exclusion of the kin and the Pasadena Home for the Aged, each of which ranked higher in the scheme of the decree? If any of these purported ambiguities are of consequence, the will may be introduced to explain the decree.

[11] A casual glimpse at the provisions of the will confirms our interpretation of the decree. (1) The will mentions nothing in the clause paralleling paragraph (j) relative to the funds to be derived from termination of the testamentary trusts. (2) The bequest to the Pasadena Home for the Aged, which preceded the gifts to respondents, expressly provided that it was to be "paid in full before *any* of the gifts which follow." (Emphasis added.) A reading of the entire will indicates even more lucidly than the decree a testamentary scheme in which the respondent charities were residuals; commendable institutions to be aided only after the testator had fully provided for his kin and created a memorial to his mother.

[12] The proper construction of a written instrument when no extrinsic evidence is in dispute is a mere question of law. In re Estate of Norris, 78 Cal.App.2d 152, 159, 177 P.2d 299. Therefore, the interpretation of the 1933 decree is accomplished here without further reference to the trial court.

The orders contained in paragraphs II and III of the decree are reversed. The trustee is hereby instructed to use the assets of the trust estate herein accounted for after deduction of taxes, including the sum of $200 reversed by the trustee for Federal and California income taxes, to set up the remainder of the Frederick P. Warriner trust provided for under subdivision (d) of the decree of distribution; and to use the balance of the funds to set up the trusts and pay out the cash legacies provided for under the provisions of subdivisions (f) (1), (f) (2), and (f) (3), (g), (h) and (i). All such distributions are to be in accordance with the order of preference provided in the 1933 decree. If any funds should remain in the hands of the trustee after compliance with the foregoing instructions, the balance is to be distributed to the charities listed in subdivision (i) of the decree in accordance with the ratio established in paragraph III of the order and decree herein on appeal.

FOX, J., concurs.

ASHBURN, J., did not participate herein.

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146 Cal.App.2d 302

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Kermit Joseph JOHNSON and Thomas Jefferson Pleasant, Defendants,

Thomas Jefferson Pleasant, Defendant and Appellant.

Cr. 5675.

District Court of Appeal, Second District, Division 3, California.

Nov. 27, 1956.

Defendant was convicted of second degree burglary. The Superior Court, Los Angeles County, LeRoy Dawson, J., in non-jury trial after waiver of jury, entered judgment, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to sustain conviction.

Judgment affirmed.

1. Burglary 🔑41(2)

In burglary prosecution, evidence was sufficient to prove the corpus delicti despite defendant's contention that there was no evidence that he had entered the burglarized store or was a co-conspirator or principal or agent of person who did enter the store. West's Ann.Pen.Code, § 31.

2. Criminal Law 🔑414

Where the corpus delicti is established by evidence other than extrajudicial statements of defendant, connection of defendant with the crime may be proved by statements made by him.

3. Burglary 🔑41(1)

Evidence was sufficient to sustain conviction for second degree burglary. West's Ann.Pen.Code, § 31.

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Gladys Towles Root and Joseph Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant Pleasant and one Johnson were charged with burglary. Johnson pleaded guilty. In a nonjury trial (jury having been waived), Pleasant was adjudged guilty of burglary of the second degree. He appeals from the judgment, and he contends that the evidence was insufficient.

The owner of a drugstore in Los Angeles testified that when he left the store on November 19, 1955, about 10 p. m., he locked the doors and set the alarm; there was nothing unusual about the premises when he left; when he returned the next morning about 5:30 o'clock he observed that holes had been cut in the roof and the ceiling, and that several holes had been bored in a counter; he had not given anyone permission to enter the store that night in his absence.

Police officers went to the drugstore on November 20, 1955, about 5 a. m., in response to a radio call. They heard someone running on the roof. Officer Kingston went upon the roof, found Pleasant hiding under a sign, and arrested him. Then they climbed from the roof to the ground.

Officer Lee went inside the store and arrested Johnson who was lying under boxes on top of the telephone booth.

A hole, about 20 inches by 20 inches, had been cut in the roof. A hole, about 1½ feet in diameter, had been cut in the ceiling. Several holes had been bored in a counter.

Officer Lee testified that when Pleasant had come from the roof to the ground, the officer asked him where his partner was, and he replied that "he was inside the last he saw of him, when he was going through the ceiling to the roof and he was about to enter when he heard the police car pull up."

Officer Tidyman testified that, in a conversation with Pleasant on November 23, Pleasant said: that on November 20, about 2 a. m., he parked his car about a block from the drugstore, walked to the store, and climbed upon the roof by climbing a building that was being constructed next to the store; after he was on the roof Johnson handed him the tools that were in a canvas bag; Johnson made the hole in the roof and went inside, and he (Pleasant) was waiting to go inside when the officers arrived; he (Pleasant) expected to get narcotics from the store.

Pleasant did not testify and did not call any witness in his behalf.

Appellant argues, with reference to his contention as to insufficiency of the evidence, that there was no evidence that he entered the store or that he was a coconspirator or a principal or an agent of a person who did enter the store; and that since entry is an element of burglary, the corpus delicti was not proved.

[1] The court could infer from the evidence, irrespective of the statements of appellant, that someone had cut the holes in the roof and ceiling and had entered the store through the holes, without the permission of the owner of the store, and with the intent to commit theft at the counter therein where holes had been bored. The evidence was sufficient to prove the corpus delicti, irrespective of appellant's statements.

[2] When the corpus delicti is established by evidence other than extrajudicial statements of the defendant, the connection of the defendant with the crime may be proved by statements made by him. People v. Mainhurst, 67 Cal.App.2d 882, 884, 155 P.2d 843. "All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission * * * are principals in any crime so committed." Penal Code, § 31.

[3] At the time Pleasant was on the ground, after he had descended from the roof, he said that his partner was inside the store. At that time Johnson was in the store. A few days later, Pleasant said that he climbed upon the roof about 2 o'clock in the morning, that Johnson handed the tools to him, that Johnson made the hole in the roof and went inside, that he (Pleasant) was waiting to go inside when the officers arrived, and he expected to get narcotics from the store. It thus appears that Pleasant aided and abetted Johnson and was a principal in the commission of the burglary. The evidence was sufficient to support the judgment.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Paul J. DURONCELAY, Defendant and Appellant.*

Cr. 2672.

District Court of Appeal, Third District, California.

Nov. 16, 1956.

Rehearing Denied Nov. 27, 1956.

Hearing Granted Dec. 12, 1956.

Prosecution for causing personal injury while driving under influence of intoxicating liquor. The Superior Court, Merced County, Gregory P. Maushart, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, McMurray, J., held that where there was strong odor of alcohol in automobile which had been wrecked by defendant's failure to notice warning signs and there were beer cans on floor of automobile and, when defendant vomited some time thereafter, there was strong alcoholic odor to vomitus, taking of blood sample for purpose of performing blood alcohol test was not an unreasonable search and seizure.

Affirmed.

1. Searches and Seizures ⟹7(25)

Where there was strong odor of alcohol in automobile which had been wrecked by defendant's failure to notice warning signs and there were beer cans on floor of automobile and, when defendant vomited some time thereafter, there was strong alcoholic odor to vomitus, taking of blood sample for purpose of performing blood alcohol test was not an unreasonable search and seizure.

2. Constitutional Law ⟹266

Where defendant was unconscious and made no verbal protest but drew arm away when nurse first attempted to insert needle to obtain blood for purpose of performing blood alcohol test and ambulance driver then held defendant's arm while nurse extracted blood, force used was not so shocking or brutal as to make use of result of test, in prosecution for causing personal injury while driving under influence of intoxicating liquor, violation of due process of law. West's Ann.Vehicle Code, § 501.

3. Arrest ⟹71

Criminal Law ⟹394

A reasonable search may be made incident to lawful arrest and product of that search is admissible in evidence.

4. Arrest ⟹71

Search may be made before or after arrest so long as reasonable grounds for making arrest existed at time of search.

Donald R. Fretz, Public Defender, Merced County, Merced, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier and J. M. Sanderson, Deputy Attys. Gen., for respondent.

McMURRAY, Justice pro tem.

The appellant, Paul J. Duroncelay, was convicted of a violation of section 501 of the Vehicle Code which consists of causing personal injury while driving under the influence of intoxicating liquor. At the trial, over timely objection, the results of a blood alcohol test were admitted into evidence. Appellant here contends that this was prejudicial error, because the taking of the blood sample from him constituted an unlawful search and seizure and a violation of due process of law under United States and California constitutional guarantees. He also contends that, excluding the evidence of that test, the evidence was insufficient to support the verdict. Between 10 and 10:30 p. m. on August 24, 1955, the defendant failed to make a required turn at a deadend street which was conspicuously posted. The car in which he was riding with two passengers continued on into a ditch, injuring one of the passengers and rendering the defendant unconscious. The defendant was taken in an ambulance to a hospital. The ambulance driver testified that at the time he came upon the scene of the accident the defendant and two other men were in the front seat of the defendant's vehicle; that each had alcohol on his breath; and that the man sitting on the right side of the car had a beer can in one hand and a wine bottle in the other and there were beer cans on the floor of the car; that the defendant was sitting under the wheel; and that all three men had blood on their faces. The defendant was carried into the hospital on a gurney, and shortly after his arrival he vomited matter which had a very strong alcoholic odor. The ambulance driver, who was also the coroner but did not act in that capacity during any of the matters here enumerated, requested the nurse to take a sample of the defendant's blood for the purpose of having a blood alcohol test performed. There is no evidence that the appellant consented to the taking of this test, nor is there any evidence that he made verbal protest against its being performed. There is evidence, however, that he drew his arm away when the nurse first attempted to insert the needle, and that the ambulance driver then held his arm while the nurse extracted the blood. The ambulance driver stated that in his opinion the defendant was intoxicated, but upon cross-examination it became apparent that this conclusion was reached only after the ambulance driver heard from an attending doctor that the defendant did not suffer a fractured skull, and it further appeared that the ambulance driver did not see the defendant while he was conscious but had merely seen him in his unconscious condition in the car, on the stretcher and while being violently nauseated at the hospital. It, therefore, is readily apparent that the appellant's conviction must rely upon the results of the blood alcohol test which showed a .22 percent blood alcohol content. The question presented here was considered in People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8, where the Supreme Court held that the taking of blood from an unconscious woman without her consent did not violate the due process guarantees of the California or the Federal Constitution. In that case the court distinguished the case of Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, on the ground that the basis there relied upon for determining whether or not due process of law was shown was whether or not the facts showed that brutal or shocking force was used to acquire evidence. In the opinion in People v. Haeussler, it is said, 41 Cal.2d at page 258, 260 P.2d at page 11:

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* Opinion vacated 312 P.2d 690.

> "More pertinent to the present inquiry is the prohibition against unlawful searches and seizures stated in the Fourth Amendment to the federal Constitution and in the California Constitution. Article I, section 19. In Wolf v. People of [State of] Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, the applicability of the due process clause of the Fourteenth Amendment to that prohibition was considered. Freedom from unlawful intrusion was held to be basic to a free society and, being implicit in the concept of ordered liberty, enforceable against the states through the due process clause."

By this language it would appear that the learned author of that opinion considered that in the Haeussler case the real question involved in taking a blood sample was directed toward a search and seizure rather than toward a testimonial compulsion. It is also true that immediately following the quoted portion of the Haeussler case the court continued with a discussion of the admissibility of evidence improperly obtained.

[1–4] Since the Haeussler decision was rendered prior to that in the case of People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, we are confronted with a question as to whether or not such conduct as is here revealed renders the evidence obtained inadmissible as being an unreasonable search and seizure. From the record it appears that the ambulance driver requested the nurse to take the blood sample since he had been requested by a highway patrolman to obtain the same. This is not an ideal method of arranging for or conducting the extraction of blood for such tests. However, in view of the testimony here that there was a strong odor of alcohol in the car which had been wrecked by the operator's failure to notice proper warning signs; that there were beer cans on the floor of the car; and that when defendant vomited at some time after 10 p.m. there was a strong alcoholic odor to the vomitus, it is not necessary to say that this is an unreasonable search and seizure. The appellant's own story that he had had two beers at some time prior to 6:30 in the evening would not explain the strong alcoholic odor which seems to have been noted by everyone who came in contact with the appellant the night of the incident here involved. The force used here was not so shocking or brutal as to bring the case within the doctrine of the Rochin case and was indeed somewhat less severe than the force which was used in the case of People v. Woods, 139 Cal.App.2d 515, 293 P.2d 901. A reasonable search may be made incident to a lawful arrest, and the product of that search is admissible in evidence. People v. Simon, 45 Cal.2d 645, 290 P.2d 531; People v. Boyles, 45 Cal.2d 652, 290 P.2d 535; People v. Martin, 46 Cal.2d 106, 293 P.2d 52. It is also clear that the search may be made before or after the arrest so long as reasonable grounds for making an arrest existed at the time of the search. People v. Simon and People v. Boyles, supra. Here it does not appear when the arrest was made, but as appellant was unconscious for most of a 48-hour period, it may be assumed that the arrest took place after that period of time.

Having held as we did that the evidence here was admissible, it is not necessary to consider the second point raised by the appellant on this appeal.

The judgment appealed from is affirmed.

VAN DYKE, P. J., concurs.

PEEK, Justice.

I concur with the conclusion of the majority but solely because of the holding of the Supreme Court in the Haeussler case. Although that case was decided prior to the Cahan decision, it was decided after the U. S. Supreme Court decision in the Rochin case.

While it is true that the majority in the Haeussler case appeared to place the question presented within the field of search and seizure, it is also true that the court further held that "[w]ithout deviation, this court has held that competent evidence, although improperly obtained, is admissible in a criminal prosecution against the person from whom the evidence is taken." 41 Cal.2d 252, 258, 260 P.2d 8, 12. There can be little question but that the Cahan case disposed of that concept. Also there can be little question but that the Supreme Court in the Rochin case rejected, under the circumstances therein set forth, any difference between "real" evidence as distinguished from that obtained by "testimonial compulsion." If my understanding of the cases mentioned be correct, then since the question in the present case does not appear to have been considered at the time of the Cahan decision, such question could well be considered and re-evaluated now in light of the rules enunciated in the Cahan and Rochin cases.

Marion B. GIDEON, Plaintiff and Respondent,

v.

George H. GIDEON, 3d, Defendant and Appellant.*

Civ. 21756.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1956.

Rehearing Granted Dec. 26, 1956.

Action by a wife for divorce. From an order of the Superior Court of Los Angeles County, Victor R. Hansen, J., modifying a pendente lite order granting fees to wife's attorney by increasing amount thereof, and an order denying defendant's motion to quash execution on such modified order, defendant appealed. The District Court of Appeal, Doran, J., held that pendente lite order was not merged in subsequent interlocutory judgment granting plaintiff divorce or invalidated by vacation of such judgment on defendant's motion for new trial, so that modifying order was not in excess of court's jurisdiction.

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* Opinion vacated 310 P.2d 90.

Order denying motion to quash execution affirmed, and appeal from order modifying pendente lite order dismissed.

1. Divorce ⚷229

In wife's divorce suit, pendente lite order granting her attorney a fee payable in ten monthly installments was not merged in interlocutory divorce judgment, entered within five months after such order, nor invalidated by vacation of such judgment on defendant husband's motion for new trial, so that subsequent order, modifying pendente lite order by increasing amount of fee, was not in excess of court's jurisdiction. West's Ann.Civ.Code, § 137.3.

2. Divorce ⚷229

On husband's appeal from superior court's order modifying pendente lite order for payment of fee to wife's attorney by increasing amount thereof after vacation of interlocutory divorce judgment for wife on husband's motion for new trial because of court's failure to make findings on issues of provocation and recrimination, husband's contentions that attorney should not be paid more fees for her lack of skill in drafting findings and that trial court failed to determine issue of such attorney's misconduct were without substantial merit, where trial judge, in granting motion for new trial, found that affidavits showed no irregularity in proceedings.

3. Divorce ⚷283

Where notice of husband's appeal from superior court's order for payment of fee to wife's attorney in her divorce suit was not filed until over 60 days after entry of order, attempted appeal must be dismissed.

George H. Gideon, 3rd, in pro. per.

Hahn, Ross & Saunders, Los Angeles, for respondent.

DORAN, Justice.

In respondent's divorce action an order pendente lite was made granting attorney fees of $275 to the wife's attorney. Thereafter, an interlocutory divorce in the wife's favor was set aside on a motion for a new trial on the ground that the trial court failed to make finding on the material issues of provocation and recrimination. Thereafter, on an order to show cause in re modification, an additional order for attorney fees of $300 was made which the appellant husband refused to pay, whereupon a writ of execution was issued. The defendant's motion to quash the execution was denied, and it is from this order that defendant appeals.

It is appellant's contention that the trial court's order modifying the original attorney order, "was in excess of the court's jurisdiction", for the reason that "the original pendente lite order becomes merged in the Interlocutory Judgment and is thereafter void", the interlocutory judgment having been set aside on a motion for new trial.

Section 137.3 of the Civil Code provides that "During the pendency of any action * * * for divorce * * * the court may order the husband * * * to pay such amount as may be reasonably necessary * * * for attorney's fees; and from time to time and before entry of judgment * * * the court may augment or modify the original award * * *. In respect to services rendered after the entry of judgment, * * * the court may award such costs and attorney's fees as may be reasonably necessary to maintain or defend any subsequent proceeding therein, and may thereafter * * * augment or modify any award so made. * * * Any such order may be enforced by the court by execution".

[1] As said in the respondent's brief, "appellant's contention that the pendente lite order for attorney fees merges in the

judgment would lead to an absurd result", since, if the attorney fee was ordered paid in ten monthly installments, and judgment was entered within five months, "the result would be that the attorney would receive only one-half of his fee". Such cannot have been the intent of the legislature.

In the instant case the vacation of the interlocutory judgment cannot be deemed to have invalidated the previous order made for the payment of attorney fees which, as in other cases, could be modified as required. Moreover, as respondent points out, the later order "was not solely for the second trial, but was for other services rendered" by the wife's attorney, such as opposition to the motion for new trial, taking of depositions, etc.

[2] Appellant further contends that "where the wife has lost the judgment granted to her, * * * due directly, and only to the lack of skill of her attorney (in drafting the findings) it would certainly seem somewhat of an imposition upon the husband to compel him to reward said attorney with even more fees for her lack of skill". The appellant also argues that there was misconduct on the part of the wife's attorney, and that the trial court made no determination of this issue. This latter statement is not borne out by the record, for in granting the motion for a new trial Judge Praeger found that "The affidavits that have been filed do not show any irregularity in the proceedings". In respect to the findings, as pointed out in respondent's brief, these "are actually the findings of the court and not the findings of an attorney". There is no substantial merit in appellant's contentions, nor is any reversible error disclosed by the record.

[3] The notice of appeal states that appellant also appeals "from the prior order of said court dated March 3, 1955" ordering said defendant to pay $300 to the plaintiff's attorney. As noted in the respondent's brief, this order was entered March 7, 1955, while the notice of appeal was filed September 1, 1955, more than the 60 days allowed for the filing of an appeal.

The order of July 7, 1955, denying the motion to quash execution is affirmed, and the attempted appeal from the order of March 7, 1955, is dismissed.

WHITE, P. J., and FOURT, J., concur.

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146 Cal.App.2d 189

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Bill G. LOCKWOOD, Defendant and Appellant.

Cr. 1092.

District Court of Appeal, Fourth District, California.

Nov. 20, 1956.

Prosecution for armed robbery. The Superior Court of San Diego County, John A. Hewicker, J., determined that defendant was an habitual criminal and imposed sentence and defendant appealed. The District Court of Appeal, Barnard, J., held that the California Vocational Institution at Lancaster is not a state prison within the Habitual Criminal Statute.

Affirmed in part and reversed in part.

Criminal Law 🔑1202(1)

The California Vocational Institution at Lancaster is not a "state prison" within the habitual criminal statute, and service of terms under commitments to Youth Authority following two prior convictions for robbery did not constitute service of "terms in prison" within that statute and did not justify determination, following third conviction, that defendant was an habitual criminal. West's Ann.Pen.Code, §§ 644(a), 2036, 2037; West's Ann.Welfare & Inst.Code, §§ 1700, 1737.1, 1738, 1762, 1772, 1780–1782.

See publication Words and Phrases, for other judicial constructions and definitions of "State Prison" and "Term in Prison".

Leroy S. Hulden, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

BARNARD, Presiding Justice.

The defendant was charged in a complaint filed in the municipal court with having committed the crime of armed robbery on June 26, 1956. He was also charged with two prior convictions. As to the first, it was charged that on December 18, 1952, he was convicted in the superior court of San Diego County of the crime of robbery and "committed to the California Youth Authority at Lancaster." As to the second, it was charged that on February 4, 1955, he was convicted in the superior court of San Diego County of the crime of second degree robbery and "committed to the California Youth Authority at Lancaster." The defendant pleaded guilty in the municipal court and was certified to the superior court for further proceedings. In the superior court he again pleaded guilty to the main charge, admitted that he was armed at the time, and admitted the two prior convictions as charged. In its judgment sentencing the defendant to state prison the court found and adjudged that the degree of the offense was robbery in the first degree; that the defendant was armed at the time of its commission; that he had been previously convicted of the crime of robbery and had served time therefor in a state prison; that he had been previously convicted of robbery of the second degree and had served time therefor in a state prison; and that he is an habitual criminal.

The defendant has appealed from that part of the judgment which finds and adjudges him to be an habitual criminal. The question presented is as to whether or not the record with respect to the two prior convictions, as alleged and as admitted by the appellant, is sufficient to show that he is a person who has been twice convicted and has served separate terms therefor in a state prison, within the meaning of Section 644(a) of the Penal Code. Incidentally, it may be observed that while the record shows that he was twice committed to the Youth Authority at Lancaster there is nothing in the record to show that he was ever delivered to that institution or that he served any term there. The main question presented, however, is as to whether or not the California Vocational Institution at Lancaster is a state prison within the meaning of Section 644(a) of the Penal Code.

This particular question has never been decided although it has been held, with respect to certain institutions in other jurisdictions, that the fact that the institution was called a reformatory or the fact that it had some reformatory purpose was not controlling, and that a term served in that institution could be considered a term served in a prison within the meaning of our statute. In re Gilliam, 26 Cal.2d 860, 161 P.2d 793; People v. Stein, 31 Cal.2d 630, 191 P.2d 409, 413. In the first of these cases the court said that "it is the character of the institution and its inmates together with the nature of the proceedings leading to confinement therein which determine its status in relation to the language of" our statute, referring to Section 644 of the Penal Code. As to the second part of this test, the nature of the proceedings leading to confinement, the proceedings here in question were distinctly criminal in nature the appellant having been in each instance convicted of robbery and committed to the Youth Authority in the superior court and not in a juvenile court proceeding. The other part of this test, the character of the institution and its inmates, involves a consideration of our particular statutes in order to determine whether it was intended that a term served in this institution at Lancaster should be considered as a prison term within the meaning of Section 644(a).

Section 2036 of the Penal Code provides that this institution "shall be an intermediate security type institution. Its primary purpose shall be to provide custody, care, industrial, vocational and other training, guidance and reformatory help for young men, too mature to be benefited by the programs of correctional schools for juveniles and too immature in crime for confinement in prisons." Section 2037 provides that under certain circumstances persons may be transferred to this institution by the Director of Corrections or the Youth Authority, and that under certain circumstances the transfer of any person to this institution by the Youth Authority shall not be deemed to constitute a conviction of a crime. It then further provides that Section 644 of the Penal Code shall apply to any person who has served a term in this institution after transfer thereto by the Adult Authority. A distinction is thus made between a transfer to this institution made by the Adult Authority and one made by the Youth Authority. These sections have an important bearing on the character of this institution and strongly indicate that it was not intended to make the service of a term therein equivalent to a term in prison, except where the person was transferred thereto by the Adult Authority.

A similar intention is indicated by certain sections of the Welfare and Institutions Code in the division governing the organization and operation of the Youth Authority. Section 1700 provides that the purpose of that Authority is to protect society more effectively by substituting methods of rehabilitation for retributive punishment, in the case of young persons found guilty of public offenses. Section 1738 provides that a court may commit a person to the Authority generally, or to a particular place established by the Authority. Section 1762 provides that the Authority shall reexamine all persons within its control at least once a year for the purpose of determining whether existing orders and dispositions should be continued in force or modified. Section 1772 provides that every person honorably discharged from control by the Youth Authority who has not, during its period of control, "been placed by the Authority in a state prison", shall thereafter be released from "all penalties and disabilities" resulting from the crime for which he was committed. Sections 1780 to 1782 provide that under some circumstances a person who has been discharged from control by the Authority may be sentenced to prison by a court, with credit being given for the time he was under the control of the Authority. Section 1737.1 provides that whenever a person has been convicted of a public offense and committed to the Authority, and the Authority finds either then or later that he is an improper person to be retained in such an institution, the Authority may return him to the committing court and said court may then commit him to a state prison or a county jail, as the case may warrant. In People v. Scherbing, 93 Cal.App.2d 736, 209 P.2d 796, it was held that the Youth Authority has power under certain conditions and under other statutes to place such a person in a prison, and that the provision of Section 1737.1 that it "may" return him to the committing court for that purpose is not exclusive.

These various statutes indicate that it was not intended by the legislature that such a commitment to the Youth Authority as appears in the prior convictions here in question, and the service of a term thereunder in this institution, should constitute the service of a term in prison within the meaning of Section 644(a) of the Penal Code. It follows that the court erred in finding that this appellant had served a term in a state prison in connection with each of these prior convictions, and in finding that he is an habitual criminal.

No good reason appears for ordering a new trial of the matter of the prior convictions here involved, or for ordering the appellant returned to the trial court to be resentenced. People v. Morton, 41

Cal.2d 536, 261 P.2d 523; People v. Foster, 3 Cal.App.2d 35, 39 P.2d 271; People v. Arnest, 133 Cal.App. 114, 23 P.2d 812.

The judgment is reversed insofar as it adjudges that the appellant had twice served a term in a state prison on previous convictions of the crime of robbery and that he "is an habitual criminal." In all other particulars the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

146 Cal.App.2d 59

William C. THOMAS, Plaintiff and Appellant,

v.

Vivian MOORE, Defendant and Respondent.

Civ. 21867.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1956.

Hearing Denied Jan. 8, 1957.

Action for injuries to a carpenter falling to floor of defendant's kitchen in descending a ladder after installing a molding along top of a wall. From an order of the Superior Court of Los Angeles County, Clarence B. Runkle, J., granting defendant's motion for a new trial on ground of insufficiency of evidence to sustain jury's verdict for plaintiff, plaintiff appealed. The District Court of Appeal, Ashburn, J., held that evidence was sufficient to sustain a verdict for defendant, so that trial court did not abuse its discretion in granting new trial, though other inferences were permissible.

Order affirmed.

1. New Trial 🔑70

While finding of facts is jury's exclusive province, trial court owes duty to see that such function is intelligently and justly performed and, in exercise of its supervisory power over jury's verdict, the court, on motion for new trial, should consider probative force of evidence and satisfy itself that evidence as whole is sufficient to sustain verdict.

2. Appeal and Error 🔑977(3)

Granting of motion for new trial rests within trial judge's discretion to such extent that appellate court will not interfere, unless abuse of discretion clearly appears.

3. Appeal and Error 🔑854(6), 933(1)

All presumptions are in favor of trial court's order granting motion for new trial, and order will be affirmed on appeal, if sustainable on any ground.

4. New Trial 🔑71

The trial court, in considering motion for new trial, is not bound by conflict in evidence and does not abuse its discretion in granting motion when there is any evidence to support a judgment for moving party.

5. New Trial 🔑71

Where only conflict in evidence is opposing inferences deducible from uncontradicted probative facts, trial court, on motion for new trial after jury's verdict, may draw inferences opposed to those accepted by jury and thus resolve conflicting inferences in favor of moving party.

6. Appeal and Error 🔑1015(1)

An appellate court will reverse trial court's order granting motion for new trial only when there is no substantial evidence, as matter of law, to support contrary judgment.

7. New Trial 🔑70

In action for injuries to carpenter falling to floor of defendant's kitchen in descending a ladder after installing a molding along top of wall, evidence was sufficient to sustain a verdict for defendant, so that trial court did not abuse its discretion in granting defendant a new trial after jury's verdict for plaintiff, though other inferences were permissible.

8. Appeal and Error 🔑1015(1)

In action for injuries to carpenter falling to floor of defendant's kitchen in descending a ladder after installing a molding along top of wall, whether defendant told plaintiff after accident that defendant had forgotten to tell plaintiff that floor was waxed, made practice of placing a paper under chair when used by defendant to reach shelves above kitchen sink after waxing floor, and told plaintiff that he was protected, and whether plaintiff told defendant's neighbor that he missed his step, were fact questions for trial judge to decide on defendant's motion for new trial after jury's verdict for plaintiff.

9. New Trial 🔑72

In action for injuries to carpenter falling to floor of defendant's kitchen in descending a ladder after installing a molding along top of wall, evidence warranting assumption that ladder slipped or skidded out from under plaintiff was insufficient to make case for plaintiff and overthrow trial court's judgment as to weight of evidence in granting defendant's motion for new trial after jury's verdict for plaintiff.

10. Negligence 🔑48

To impose liability on building owner for injuries to invitee slipping and falling on floor in building existence of dangerous condition, of which owner knew or should have known, must be shown.

11. Negligence 🔑121(1)

While negligence of building owner may be inferred from existence of dangerous condition in building under some circumstances, burden rests on one suing owner for injuries sustained in building to show that such a condition existed and that owner knew or should have known thereof.

12. Negligence 🔑121(3)

No inference of building owner's negligence arises simply on proof of invitee's fall on floor of building; res ipsa loquitur doctrine being inapplicable.

13. Negligence 🔑44, 136(22)

The fact that floor was slippery does not necessarily show that it was dangerous to walk on, but degree of its slipperiness determines whether floor was in reasonably safe condition, and that is a question of fact.

◆

Melvin W. Miller, Los Angeles, for appellant.

Veatch, Thomas & Carlson, for respondent.

ASHBURN, Justice.

Plaintiff appeals from an order granting defendant's motion for new trial in a jury case upon the ground of insufficiency of the evidence to sustain the verdict.

Appellant's counsel asserts that "the evidence was sufficient to sustain the jury verdict although perhaps different minds might fairly come to a different conclusion thereon." Also, "that such evidence and the inferences to be drawn therefrom more than substantiated the decision of the jury, although it is admitted that perhaps different minds might naturally and fairly come to a different conclusion thereon." It is contended that the opinion in Perry v. Fowler, 102 Cal.App.2d 808, 229 P.2d 46, correctly and authoritatively declares "against the use of such discretionary power in cases where the evidence is nearly balanced or is such that different minds would naturally and fairly come to different conclusions thereon." Counsel relies upon the following language from Perry v. Fowler, supra, 102 Cal.App.2d at page 811, 229 P.2d at page 48. "The law, moreover, anticipates that 'when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon,' the trial judge will not disturb the verdict 'although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness.'" The quotations are taken from the case of Kansas Pac. Ry. Co. v. Kunkel, 17 Kan. 145, 172. They do not reflect the law of the state, at least so far as the rule of appellate review is concerned.

[1] In People v. Robarge, 41 Cal.2d 628, 262 P.2d 14, the trial judge was reversed because he had accepted the findings of the jury in preference to his own appraisal of the evidence and on that ground had denied the motion for new trial. At page 633 of 41 Cal.2d, at page 17 of 262 P.2d it is said: "While it is the exclusive province of the jury to find the facts, it is the duty of the trial court to see that this function is intelligently and justly performed, and in the exercise of its supervisory power over the verdict, the court, on motion for a new trial, should consider the probative force of the evidence and satisfy itself that the evidence as a whole is sufficient to sustain the verdict. * * * In passing upon a motion for a new trial the judge has very broad discretion and is not bound by conflicts in the evidence, and reviewing courts are reluctant to interfere with a decision granting or denying such a motion unless there is a clear showing of an abuse of discretion. In the present case it clearly appears that the trial court misconceived its duty under the foregoing authorities and, for that reason, failed to give defendant the benefit of a proper review of the evidence."

[2–6] The applicable rule is clearly stated in Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465, 467: "This court has recently reiterated the settled rule that the granting of a motion for a new trial rests within the discretion of the trial judge to such an extent that an appellate court will not interfere unless an abuse of discretion clearly appears. All presumptions are in favor of the order and it will be affirmed if it is sustainable on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal.2d 165, 169, 153 P.2d 338, and cases cited. The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. [Citations.] The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party, for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' [Citations.]"

[7] Plaintiff, an experienced carpenter who had reached the age of 82, was engaged in installing a molding along the top of the wall in defendant's kitchen. To that end he placed a collapsible four-foot ladder next to the sink and drainboard, climbed up on that level and proceeded to work. As he was returning to the floor he placed his left foot on the step of the ladder, the second from the top, and was placing the right foot on the step below it when something happened that precipitated him to the floor, thus breaking his hip. He says the ladder skidded right out from under him; that he thinks one leg of it skidded in a circle. But the only skid marks seen on the floor extended in a straight line. Plaintiff was wearing bifocal glasses and was somewhat cramped and stooped as he undertook to descend. While still lying on the floor he told Mr. Hager, a neighbor of defendant, that he "missed his step," a quite logical explanation of a fall by one who wears bifocals.

Plaintiff's claim in court was and is that the fall was due to an unsafe condition of the kitchen floor; that the defendant knew or should have known of same, and that she failed to warn him. In other words, the claim is that the floor was slippery from waxing. It was covered with a linoleum which had been waxed by defendant at some unknown date, certainly not on the day of the accident, and it does not appear how recently that had been done. In doing that work defendant used Johnson's floor wax and a buffer. The kitchen was well lighted on the occasion in question. No one saw any slick or shiny appearance to the floor. Plaintiff did say that it looked polished, but later testified that it had a dull finish. There is no evidence of any lumps or spots of wax or of any other substance on the floor, no water or other foreign material, no holes or worn places or tears in the linoleum. The floor was clean and the ladder was level. Plaintiff had looked at the floor when setting the ladder and had seen nothing wrong. He had walked on it and had not slipped. Manifestly, the evidence would have sustained a verdict in favor of defendant. There was no abuse of discretion in the granting of a new trial.

[8] The fact that other inferences were permissible is of no moment for it was the duty of the judge to weigh and accept or reject the various items of evidence which respective counsel stressed. It may be that defendant told plaintiff after the accident that she had forgotten to tell him the floor was waxed; he says she did, but she does not recall doing so. If it be true that defendant made a practice of placing a paper under a chair when she used one to reach the shelves above the sink but did so only after the floor had been waxed, that would present but one facet of a many-sided factual problem to the trial judge. It may be that defendant told plaintiff he was "protected" but that would not reflect any light upon the cause of an accident which occurred in her absence. Perhaps plaintiff did not tell Mr. Hager that he missed his step, but that was a matter for the trial judge to decide.

[9–12] It may be assumed that the ladder did slip or skid out from under plaintiff. That fact does not make a case, much less overthrow the judgment of the trial court as to the weight of the evidence. Vaughn v. Montgomery Ward & Co., 95 Cal.App.2d 553, 213 P.2d 417, is pertinent. Plaintiff had slipped and fallen in defendant's department store and sued for injuries. In reversing a judgment for plaintiff the court said, 95 Cal.App.2d at pages 556–557, 213 P.2d at page 419: "In order to impose liability on the owner it must be shown that a dangerous condition existed, and that the defendant knew or should have known of it. While under some circumstances, negligence may be inferred from the existence of a dangerous condition, the burden rests upon the plaintiff to show the existence of a dangerous condition, and that the defendant knew or should have known of it. No inference of negligence arises based simply upon proof of a fall upon the owner's floor. The doctrine of res ipsa loquitur is not applicable to such cases. * * * Interpreted most strongly in favor of plaintiff, as it must be, the evidence shows that plaintiff slipped and fell, and, that after she fell, there was a greasy substance on her stocking, coat and skirt. There is no evidence of any foreign substance on the floor. There is no evidence that the floors were recently oiled or waxed. There is no evidence, in fact, that the floor was slippery. * * * The only way the present judgment could be sustained would be to hold that the happening of the accident raises an inference of negligence or that the doctrine of res ipsa loquitur is applicable. That is not the law."

[13] As above indicated it does not appear that defendant's floor was slippery. But if the fact be assumed to have existed, the language of Mr. Justice Shinn in Nicola v. Pacific Gas & Elec. Co., 50 Cal.App.2d 612, 615, 123 P.2d 529, 531, would be apposite: "Of course slipperiness is an elastic term. From the fact that a floor is slippery it does not necessarily result that it is dangerous to walk upon. It is the degree of slipperiness that determines whether the condition is reasonably safe. This is a question of fact." See also, Harpke v. Lankershim Estates, 103 Cal.App.2d 143, 145–146, 229 P.2d 103.

The order granting a new trial is affirmed.

MOORE, P. J., and FOX, J., concur.

145 Cal.App.2d 683

The PEOPLE of the State of California, acting by and through the Department of Public Works, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY OF LOS ANGELES, Respondent.

Bank of America, National Trust and Savings Association, Real Party in Interest.

Civ. 22052.

District Court of Appeal, Second District, Division 1, California.

Nov. 8, 1956.

Rehearing Denied Nov. 29, 1956.

Hearing Denied Jan. 4, 1957.

The People of State of California, acting by and through the Department of Public Works, brought mandamus proceeding against the Superior Court, in and for the County of Los Angeles. The District Court of Appeal, Nourse, J. pro tem., held that the State, which unsuccessfully appealed from judgment in condemnation proceeding, was liable to owner of realty for damage sustained by owner of realty because of the State's delay in paying the judgment, and, in absence of any other evidence, court properly adopted the legal rate of interest as the measure of damage.

Writ denied.

1. Appeal and Error ⚷77(1)

A judgment in condemnation is a "final judgment" within meaning of section of the Code of Civil Procedure dealing with appeals from the Superior Court, and either party may take an appeal therefrom. West's Ann.Code Civ.Proc., § 963.

See publication Words and Phrases, for other judicial constructions and definitions of "Final Judgment".

2. Eminent Domain ⚷258

A judgment in a condemnation proceeding lacks finality in the sense that when an appeal is taken, the action remains pending, and its effect as a judgment is suspended until appeal is disposed of by the filing of the remittitur from the reviewing court. West's Ann.Code Civ.Proc., § 1049.

3. Appeal and Error ⚷77(1)

Section of the Code of Civil Procedure providing that plaintiff in condemnation must, within thirty days after final judgment, pay sum of money assessed by judgment except that where it appears by affidavit that bonds of condemning agency must be issued and sold in order to pay sum assessed, then judgment may be paid at any time within one year, does not affect the finality of the judgment in a condemnation proceeding, and the effect of the provisions of the statute are merely to grant a statutory stay of execution, for on expiration of the periods of time fixed by the statute, the defendant may have execution. West's Ann.Code Civ.Proc., §§ 1251, 1252.

4. Eminent Domain ⚷160

The obligation on part of the condemner to pay amount of award is fixed by judgment in condemnation proceeding and is not subject to diminution or modification by lapse of time, whether that period of time be the thirty-day or the one-year period mentioned in Section of the Code of Civil Procedure providing that plaintiff in condemnation must, within thirty days after final judgment, pay the sum of money assessed by the judgment, except that where it appears by affidavit that bonds of condemning agency must be issued and sold in order to pay the sum assessed, then judgment may be paid at any time within one year. West's Ann.Code Civ.Proc., § 1251.

5. Interest ⚷22(1)

Section of the constitution dealing with interest rates, does not limit the right to interest on money to those instances where the judgment is based on a loan or forbearance of money, goods, or things in action, or on accounts after demand. West's Ann.Const. art. 20, § 22.

6. Eminent Domain ⚷148

The State, which unsuccessfully appealed from judgment in condemnation proceeding, was liable to owner of realty for damage sustained by owner of realty because of the State's delay in paying the judgment, and, in absence of any other evidence, court properly adopted the legal rate of interest as the measure of damage. West's Ann.Code Civ.Proc., §§ 963, 1049, 1251, 1252, 1255a, 1264.7; West's Ann. Const. art. 20, § 22.

7. Eminent Domain ⚷70

Section of the state constitution dealing with eminent domain and just compensation and the Fifth Amendment to the federal constitution express a principle of fairness and not a technical rule of procedure. West's Ann.Const. art. 1, § 14; U.S.C.A.Const. Amend. 5.

◆

George C. Hadley, R. B. Pegram, John N. McLaurin, Thomas M. Dankert, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel; Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Holbrook, Tarr, Carter & O'Neill, Francis H. O'Neill, Los Angeles, for real party in interest.

NOURSE, Justice pro tem.

Petitioner here is the plaintiff in an action by which it sought to condemn for highway purposes the title in fee simple to the upper one hundred feet of an unimproved parcel of real property situate in the County of Los Angeles, which was the property of the Bank of America, real party in interest here.

By the answer filed to the petitioner's complaint in the condemnation action, the only issues of fact joined were the value of the property sought to be taken and the severance damage caused by the taking. These issues were submitted to a jury, which by its verdict found that the fair market value of the property taken was $111,930 and that the damage to the property, of which the parcel taken was a part, was in the sum of $31,114—or a total sum of $143,044.

On February 7, 1955, judgment in condemnation was entered by which it was decreed that upon the payment into court for the benefit of Bank of America of the sum of $143,044 "there shall be condemned in fee to plaintiff" the real property hereinbefore referred to. On April 2, 1955, plaintiff filed its notice of appeal from the judgment awarding the sum of $143,044 to the Bank.

Upon the appeal judgment was affirmed, and on August 10, 1956, the remittitur of the Appellate Court was filed with the clerk of the superior court. People v. S. & E. Homebuilders, 142 Cal.App.2d —, 298 P.2d 53.

On August 20, 1956, petitioner deposited with the County Clerk of the County of Los Angeles for the benefit of the Bank the sum of $144,038.49, consisting of the principal sum of the judgment plus the Bank's costs on appeal in the sum of $994.49. Petitioner then moved the respondent court to sign and enter a final order of condemnation. This motion was resisted by the Bank upon the ground that petitioner was not entitled to a final order of condemnation until petitioner had deposited with the clerk of the court not only the principal amount of the judgment plus the costs on appeal, but also interest upon the principal amount of the judgment.[1] Respondent court sustained the Bank's objections and denied petitioner's motion solely upon the ground that the amount deposited by petitioner was insufficient inasmuch as it did not include interest upon the amount awarded by the judgment. Petitioner here seeks a writ of mandate directing the respondent court to sign and enter the final order of condemnation.

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[1] No order of possession was issued in the course of the condemnation proceeding and there was no physical taking of the possession of this unimproved parcel of land by petitioner, but the Bank has remained in physical possession thereof. Petitioner did not prove nor offer to prove on the hearing of the motion that the Bank had received any rents or profits from the land after the entry of the judgment.

The parties to this proceeding agree that if the Bank was entitled to interest upon the principal of the judgment, the writ sought here should be denied, but that if it was not entitled to interest, the writ should be granted. Therefore, the sole question presented here is, "Was the petitioner liable for interest upon the principal of the judgment?"

While petitioner states its reason for the contention that the judgment does not bear interest in several different ways, the gist of its argument is that the judgment in condemnation is not a personal judgment for the payment of money but only a judgment fixing a price at which the condemner may acquire the property, and therefore fixes no principal sum to which interest can be an incident. Petitioner grounds its contention on sections 1251, 1255a, and 1264.7 of the Code of Civil Procedure.

In substance section 1251 provides that the plaintiff in condemnation must, within thirty days after final judgment, pay the sum of money assessed by the judgment; except that where it appears by affidavit that bonds of the condemning agency must be issued and sold in order to pay the sum assessed, then the judgment may be paid at any time within one year. Section 1255a provides in substance that the plaintiff may abandon the proceedings at any time after filing the complaint and before the expiration of thirty days after final judgment, but upon such abandonment judgment shall be entered dismissing the proceedings and awarding the defendant his costs and disbursements including all necessary expenses and reasonable attorney's fees. Section 1264.7 defines the words *judgment* and *final judgment*. It defines *judgment* as meaning the judgment determining the right to condemn and fixing the amount of compensation to be paid; and the term *final judgment* as "such judgment when all possibility of direct attack thereon by way of appeal, motion for a new trial, or motion to vacate the judgment has been exhausted."

It is petitioner's contention that as under section 1264.7 there was no final judgment during the time that the action was pending by reason of its appeal from the judgment, both its right to pay the judgment and its right to abandon the proceedings were extended to thirty days after the filing of the remittitur from the Appellate Court affirming the judgment, and that until the expiration of that time the defendant, real party in interest here, had no enforceable rights under the judgment and therefore it did not create any liability on the part of petitioner, and that the right to interest could not attach until the expiration of that thirty-day period.

[1, 2] There is no doubt that petitioner is correct in its contention that the time within which it might pay the judgment did not expire until thirty days after the filing of the remittitur affirming the judgment, and that it is also correct in its contention that it might abandon the proceeding at any time prior to the expiration of thirty days from the filing of the remittitur. Southern Public Utility Dist. v. Silva, 47 Cal.2d 163, 301 P.2d 841. It does not follow, however, that the judgment does not have the characteristics of a money judgment to which the right to interest will attach. A judgment in condemnation is a final judgment within the meaning of section 963, Code of Civil Procedure, from which either party may take an appeal. California S. R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 7 P. 123; Lincoln Northern Ry. Co. v. Wiswell, 8 Cal.App. 578, 97 P. 536. It lacks finality, however, in the sense that when an appeal is taken the action remains pending, Code Civ.Proc. sec. 1049, and its effect as a judgment suspended until the appeal is disposed of by the filing of the remittitur from the Appellate Court. When it is affirmed on appeal it is the judgment as entered in the trial court which fixes and determines the rights of the parties.

[3, 4] The provisions of section 1251, Code of Civil Procedure, do not affect the finality of the judgment. The effect of its

provisions are merely to grant a statutory stay of execution, for upon the expiration of the periods of time fixed by the section the defendant may have execution. Code Civ.Proc. sec. 1252; Vallejo N. R. Co. v. Reed Orchard Co., 177 Cal. 249, 251, 170 P. 426; City of Los Angeles v. Aitken, 32 Cal.App.2d 524, 529, 90 P.2d 377, 94 P.2d 1045. The obligation on the part of the condemner to pay the amount of the award is fixed by the judgment and "is not subject to diminution or modification by the lapse of time," whether that period of time be the thirty-day period or the one-year period mentioned in the section, Southern Public Utility Dist. v. Silva, supra, 47 Cal. 2d at page 163, 301 P.2d 841.

When the judgment entered on February 7, 1955, was affirmed and the remittitur of the Appellate Court filed, that judgment finally determined the rights of the parties to the subject action. It was by the provisions of that judgment that petitioner attained the right to take the property in question, and it was by that judgment that the Bank had the right to receive its compensation for the property taken. It is true that the defendant's right to receive its fruits from the judgment were subject to be defeated by the occurrence of a condition subsequent—that is, the exercise by the plaintiff of its right to abandon the proceeding under the provisions of section 1255a. But when the time within which that privilege might be exercised elapsed, or the right to exercise the privilege was waived by the plaintiff's asserting the rights granted it by the judgment, the defendant's right became absolute and sprang not from the failure of the plaintiff to exercise its privilege but from the judgment. In other words, the judgment from its inception gave the defendant the right to receive the amount awarded to it and the plaintiff in the action the right to take the property, and to this judgment the right to receive interest and the obligation to pay interest attached as it would attach to any other money judgment; and it was the obligation of this judgment—that is, the obligation to pay principal plus interest—that the plaintiff, petitioner here, was given the right to avoid and to assume a new and different obligation, by section 1255a of the Code of Civil Procedure. When petitioner waived the right or privilege granted to it by section 1255a, that section ceased to have any effect and the situation then was no different than if the right or privilege had never existed.

Petitioner cites and relies upon the decision of the District Court of Appeal in Colusa H. R. Co. v. Superior Court, 31 Cal.App. 746, 161 P. 1011, in which it was held that prior to the expiration of the time within which the plaintiff in condemnation might pay the judgment pursuant to the provisions of section 1251, Code of Civil Procedure, that the judgment amounted to no more than one fixing the price at which the plaintiff, condemner, might or might not take the property.

We do not believe that that decision is controlling here. There the court had for determination the question as to whether or not an appeal taken by the condemner during the thirty-day period tolled the running of the thirty days within which the condemner might pay the judgment rendered. The court was not considering the question here presented—to-wit, the right of the condemnee to interest after the judgment became final and after the condemner had waived its rights under section 1255a. Rather we think the matter here is controlled by the decision of the Supreme Court in Vallejo etc. R. R. Co. v. Reed Orchard Co., supra. In this case the condemner had been awarded a judgment condemning the land of the defendant, which judgment awarded the defendant damages in a very substantial amount. After the judgment was rendered the defendant paid into court the full amount of the judgment plus the sum of $25,000 to cover further damages and costs, and was permitted to take possession of the property. From this judgment the defendant appealed, and upon the judgment being affirmed sought to have awarded to it not only the principal amount of the judgment but interest thereon. In holding that the deposit made by the plaintiff into court for the benefit of the defendant operated as the tender of the payment of *an obligation* and therefore discharged the obligation and stopped the running of interest, the Supreme Court said:

> "In such proceedings the award constitutes a judgment in favor of defendant and against the plaintiff for the amount thereof, payment of which, unless the proceeding within the time be abandoned by plaintiff as provided in section 1255a, Code of Civil Procedure, shall be made within 30 days after final judgment (Section 1251, Code Civ.Proc.), and in the absence of such payment of the money awarded or deposit thereof made in court, defendant may have execution to enforce the judgment as in civil cases. (Section 1252, Code Civ. Proc.) In this respect the rights of defendant are substantially identical with those of a plaintiff recovering a money judgment against a defendant in a civil action." [177 Cal. 249, 170 P. 427.]

Petitioner asserts that section 22 of article XX of the Constitution of this state does not give the right to interest on a money judgment unless that judgment is based upon a loan or forbearance of money, goods or things in action, or on accounts after demand. It bases this contention upon the omission of the article *a* before the word *judgment* in the section.[2]

[5] While a literal construction of the constitutional amendment as it is worded gives color to petitioner's argument, a consideration of the statutory provisions for interest which have existed for over sixty years, and the effect of section 22, article XX, of the Constitution upon the statute fixing the right to interest and the rate of interest upon judgments, makes it clear that petitioner's contention is not sound. Under the Practice Act and prior to the adoption of the codes, interest was allowed upon judgments although not allowed at common law. From 1874 until the adoption, through the initiative, of the Usury Act, Deering's General Laws, act 3757, West's Ann.Civ. Code, § 1916–1 et seq., section 1290 of the Civil Code provided for the payment of interest on judgments at the rate of 7 per cent per annum. This section was repealed by the Usury Act, and the first section of *that act* provides that "The rate of interest upon the loan or forbearance of any money * * * or judgments * * * shall be seven dollars upon the one hundred dollars for one year" but that the parties may contract for a rate not to exceed 12 per cent per annum. In 1934 section 22 of article XX was adopted. The effect of this section was not to repeal the Usury Act except insofar as that act was in conflict with the provisions of section 22. Penziner v. West American Finance Co., 10 Cal.2d 160, 173, 74 P.2d 252; Nuckolls v. Bank of California, 10 Cal.2d 278, 74 P.2d 271. The first paragraph of this section deals with the same subject-matter as does section 1 of the Usury Act, and its only effect upon section 1 was to reduce the rate of interest that may be fixed by contract from 12 to 10 per cent. Otherwise the provisions of section 1 of the act and the first paragraph of the constitutional provision are wholly consistent. Penziner v. West American Finance Co., supra, 10 Cal.2d at page 173, 74 P.2d 252. The Bank's right to interest upon the judgment, therefore, is granted not only by the provisions of the Constitution but by those of the Usury Act.

It would not be rational to hold that by reason of the slight change in phraseology between the wording of section 1 of the Usury Act and paragraph 1 of the constitutional provision it was intended to take away the right to interest upon any judgment other than one founded upon a contract, express or implied.

[6] Irrespective, however, of the question of whether the judgment of condemnation here is a money judgment to which interest attaches as an incident, it seems to us that petitioner was not entitled to have

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[2] The section is misquoted and the article *a* supplied in City of Los Angeles v. Aitken, supra.

its motion granted without offer of compensation to the Bank for the damage sustained by it due to the delay in paying the judgment, and that in the absence of any other evidence the respondent court properly adopted the legal rate of interest as the measure of that damage. Metropolitan Water Dist. v. Adams, 16 Cal.2d 676, 678, 107 P.2d 618.

Petitioner was not entitled to take the defendant's property except upon the payment of just compensation.

[7] The judgment fixed the just compensation to which the Bank was entitled as of the time of the entry of judgment, and the amount awarded by it did not include compensation for any further damage that might be sustained. While the entry of the judgment did not, in and of itself, operate to vest title in petitioner or give it the right to immediate entry, it effectually took from the Bank many elements which gave value to the land. After the entry of the judgment the Bank could not rent or sell the land except subject to the right of petitioner to take it at will; it could not improve it without in effect dedicating the improvement made to petitioner. The result is that payment being delayed, the Bank had neither use of the money to which it was entitled nor full use of the property which petitioner, under the judgment, had the right to take. To hold that petitioner would have the right, by an appeal, to delay the payment of the price fixed for the land and then exercise its right to take without compensating the Bank for the damage suffered by it through the delay, would be to deprive the Bank of the right granted to it by article I, section 14, of the state Constitution. To paraphrase the language of Mr. Justice Frankfurter in United States v. Dickinson, 331 U.S. 745, 67 S.Ct. 1382, 91 L.Ed. 1789, 1794, section 14 of article I of our state Constitution, as well as the Fifth Amendment to the federal Constitution, express a principle of fairness and not a technical rule of procedure; yet if we support petitioner's contention here we deprive the Bank of just compensation by slavish adherence to technical rules of procedure.

Petitioner argues, however, that the Bank was fully recompensed for the damage suffered by the delay in payment because it had the right to use the land even though it had no real right to rent, sell, or improve it. This contention is fully answered by the decision of the District Court of Appeal in City of Los Angeles v. Aitken, supra, 32 Cal.App.2d at pages 533–535, 90 P.2d 377, 94 P.2d 1045; and it would be surplusage for us to repeat here what is said there. It is sufficient to say that on the hearing of petitioner's motion for the entry of final judgment it made no showing, nor did it offer to show, that the Bank had received any rents, issues, or profits from the land after the entry of the decree of condemnation.

The peremptory writ of mandate prayed for is denied.

WHITE, P. J., and FOURT, J., concur.

146 Cal.App.2d 310

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Aubry Ray ROBINSON, Defendant and Appellant.

Cr. 1081.

District Court of Appeal, Fourth District, California.

Nov. 27, 1956.

Defendant was charged with burglary and seven prior convictions. Judgment of conviction of burglary second degree in the Superior Court of San Diego County, Clarence Harden, J., and from the judgment and an order denying a new trial the defendant appeals. The District Court of

Appeal, Griffin, J., held that the evidence on question of identification sustained conviction and there were no reversible trial errors.

Judgment and order affirmed.

1. Burglary ⚷41(6)

Evidence of identification of defendant sustained conviction for burglary in the second degree.

2. Criminal Law ⚷318

Where defendant attempted to have his employment record changed to another date so it would coincide with testimony of another alibi witness, such indicated a guilty knowledge and justified the jury in disbelieving his claimed alibi in burglary prosecution.

3. Criminal Law ⚷741(2)

Whether witness is accurate in his description of an accused is a matter for the determination of the trier of facts.

4. Criminal Law ⚷730(3)

In burglary prosecution, that district attorney in examination of police officer about robbery stated facts not in evidence when he indicated that facts disclosed a certain license number did not disclose reversible error where objection was made to the question and the trial court immediately required proof of the facts which were sufficiently furnished.

5. Criminal Law ⚷855(3)

In burglary prosecution, defendant was not deprived of a fair trial on ground that a juror gave a traffic ticket to the clerk of court and that a police officer, who was a witness at the trial, agreed to take care of it for the juror on the ground that the officer was attempting to gain the favor of the juror where the officer testified he did not know the envelope contained a traffic ticket and that the envelope and ticket and money therein were still undelivered.

6. Criminal Law ⚷855(7)

In burglary prosecution, that one of two jurors in passing by officer standing in the courtroom in the morning stated that "it would not take very long this time" because defendant had a previous trial where the jury disagreed and that another juror stated that she had brought her toothbrush so that she knew she would not have to stay that night would not disclose error where it did not appear that the juror was influenced by any remark of the officer or that defendant did not have a fair due consideration of the evidence.

7. Criminal Law ⚷855(7)

Conversations between jurors and officers of the court does not per se amount to misconduct and a mere showing of a communication between jurors and officers does not raise a presumption that the jury was improperly influenced but prejudice must be shown.

Thomas Whelan, San Diego, for appellant.

Edmund G. Brown, Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for the People.

GRIFFIN, Justice.

Defendant and appellant was charged with burglary and seven prior convictions of felony (six burglary and one escape). He pleaded not guilty to the charge, admitted the prior convictions and a jury trial resulted in a verdict of guilty (burglary, second degree). A motion for new trial was denied.

The principal contentions on appeal are that the evidence is legally insufficient, particularly as to the identification of the defendant; that the district attorney and jury were guilty of misconduct; and the court erred in decisions on questions of law.

On July 14, 1955, the complaining witness was sun-bathing in her back patio. About 3 p. m. she walked to her bedroom and saw a man about to leave it through an opposite doorway. She could see his face but was unable to positively identify him at the trial. She described him as a dark individual with long straight hair. He had taken her wallet and change purse. She followed him across the street, screaming that she had been robbed. A Papermate pen, inscribed "General Cleaning Co.", showing evidence of wear, fell from his pocket. Defendant was employed by that company from November, 1954, to May, 1955, and pens of this type were available to defendant and his customers. A Lieutenant Commander Fogg saw the complaining witness and pursued the defendant in his car around the corner where he entered a parked 1949–51 green Pontiac. He took the license number and turned it over to the complaining witness. He saw defendant's full face and he was later shown defendant's photograph obtained from the police records and was asked if this resembled the burglar and he replied: "Resemble him—this is the man". At the trial he testified that defendant "resembles him more than anyone I've ever seen". The officers subsequently took the license number given to them by the complaining witness and checked by teletype with the Motor Vehicle Department to determine the ownership of the car and found it was registered to one Miss Lorene Lee, and gave her address. The next day the officers went there and saw a 1951 green two-door Pontiac in front of her house. They questioned her and discovered she lived with defendant at that address and that on occasions defendant used this car. She stated at the time that it was possible defendant did use this car on the day of the claimed burglary, although at the trial she testified it was not out of her possession on that day. Defendant furnished other witnesses who also claimed they saw the car there during the period in question. Defendant was arrested and was asked if he committed the burglary described. He did not deny the accusation but stated: "No, I'm not denying it but I'm not admitting it." He did not testify at the trial. His defense was an alibi. He presented an employee of the General Cleaning Company who testified that defendant was driving a 1936 Ford panel truck on the afternoon of July 14, 1955, around 4 p. m. "as near as I can recall * * * I cannot exactly remember". He attempted to describe defendant's dress at the time, which he claimed was different from that described to him by the complaining witness when she inquired as to whether defendant was employed by that concern. Another such employee corroborated this testimony. Another witness, who was a fellow member with defendant in Alcoholic Anonymous, testified that defendant parked his truck at his place of business on *July 14th,* nearly all day, removed it at lunch hour and returned it; that it remained there until about 3:45 p. m. when defendant left and took the truck with him. He testified he gave defendant a card of introduction to Marvin K. Brown Company about seeking employment on that day.

In rebuttal, an employee of the Marvin K. Brown Company was called. He testified that on Wednesday, *July 13*, defendant came in, about noon time, filled out an application for employment and was interviewed and came to work the following Saturday. He then testified that after defendant's arrest in September, 1955, defendant came to that office and asked to change the date on the application to read July 14, instead of July 13. He was asked why, and defendant said that "if that date on there was as it was, that he had been in too much trouble, that it would definitely hang him".

[1–3] Defendant concedes the evidence shows that a burglary was committed, but contends the evidence of his identification is so weak as to constitute no evidence at all. The testimony of the Lieutenant Commander does show some identification of defendant as the one who entered the green Pontiac with the license number indicated. The fact that the number taken turned out to be the number of the green Pontiac owned by Miss Lee, where defendant was staying, and the finding of a pencil dropped by him bearing the name of his former employer, are circumstances corroborating this identification. Defendant's undenied statement, when accused, that he was not denying the commission of the crime but was not admitting it, might well be considered in connection with other evidence of defendant's guilt. His attempt to have the record, as to the date of employment, changed to another date so it would coincide with the testimony of another alibi witness, might well indicate a guilty knowledge and justify the jury in disbelieving his claimed alibi. Whether a witness is accurate in his description of an accused person is a matter for the determination of the trier of facts. The evidence of defendant's participation in the crime charged was sufficient. People v. Alexander, 78 Cal.App.2d 954, 956, 178 P.2d 813.

[4] It is claimed the district attorney in the examination of the police officer about the robbery, stated facts not in evidence when he indicated it disclosed a certain license number. Objection was made to the question. The trial court immediately required proof of the facts which were sufficiently furnished. No prejudicial misconduct is indicated. People v. Kirkes, 39 Cal.2d 719, 726, 249 P.2d 1.

[5] At the conclusion of the evidence counsel for defendant, out of the presence of the jury, moved for a mistrial, based upon certain testimony of defendant who was sworn for that particular purpose. He testified in general that on this last morning of trial he came early, and before court took up he saw a certain lady juror give a traffic ticket, which she had been handed the day before by a traffic officer, to the clerk of the court; that he heard her say, in effect, "I would like to have you do something with it", and the clerk said he did not have time but would get someone to take care of it for her; that she gave him $6 bail money and then they talked to a police officer, a witness in the case, and he agreed to take care of it for her and defendant then accused the officer of currying favor of this juror. The clerk testified the juror did hand him a traffic ticket and $6 as bail money; that she said it was the last day to deposit bail and since she was on the jury she could not get away to deposit it; that he put the ticket in an envelope with the money and she asked to buy a stamp to mail it, but he could not sell her a stamp; that he volunteered to have someone take it to the traffic office for her and out of the presence of the juror he asked the police officer to deliver it to the traffic desk. The officer corroborated this story and testified he did not know it was a traffic ticket of a juror until he later opened it and found the name of the juror on the ticket; and that at the time the motion was made the envelope, ticket and money were still undelivered. The trial court denied the motion. The claim is that by this conduct the officer was attempting to gain the favor of this juror, and since he was a witness, defendant did not have a fair and impartial trial.

We may well assume, from the testimony of the clerk and officer, that the juror was not apprised of the fact that the officer was in fact performing a favor for her. A request to the clerk alone to perform this service for her could not be said to be objectionable.

[6] Further complaint was then made by defendant that he noticed the officers standing in the courtroom that morning and one or two jurors passed by them and remarked "that it will not take very long this time", or words to that effect, and one officer said "I don't think so either", meaning, as defendant construed it, that defendant had a previous trial where the jury disagreed and this time it would not take as long. The officer did say that one juror passed by him on this occasion and did remark that she had brought her toothbrush so she knew she would not have to stay that night; that he felt this was only a passing remark and he placed no meaning to it. The remark may well have been understood to mean the colloquial one: "I have brought my rain coat so of course it will not rain". It does not appear that the juror was influenced by any such remark, that the defendant did not have a fair and due consideration of

the evidence, or that he was prejudiced by it.

[7] Mere conversations between the jurors and officers of the court do not *per se* amount to misconduct. Such conduct, although often unfortunate, does not in every case militate to the determination that a mistrial must be declared. The mere showing of such a communication does not raise a presumption that the jury was improperly influenced. Prejudice must be shown. People v. Woods, 35 Cal.2d 504, 512, 218 P.2d 981; People v. Dunne, 80 Cal. 34, 36, 21 P. 1130; People v. Cobb, 45 Cal.2d 158, 161, 287 P.2d 752; People v. Phelan, 123 Cal. 551, 567, 56 P. 424.

Judgment and order affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

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146 Cal.App.2d 350

N. E. YOUNGBLOOD, Plaintiff and Respondent,

v.

Robert C. HIGGINS, Defendant and Appellant.

Civ. 21890.

District Court of Appeal, Second District, Division 1, California.

Nov. 28, 1956.

Hearing Denied Jan. 23, 1957.

Action by attorney against his client for fees allegedly due under contingent fee contract. The Superior Court, Los Angeles County, Edward R. Brand, J., entered judgment for attorney, and client appealed. The District Court of Appeal, Fourt, J., held that evidence was sufficient to sustain trial court's finding that it had not been agreed that, in event contemplated action was settled prior to trial, the $500 paid by client to attorney would constitute full payment of amount due attorney.

Judgment modified and, as modified, affirmed.

1. Appeal and Error ⇨1011(1)

Conflicts of evidence are to be weighed and to be determined by the trial court.

2. Attorney and Client ⇨166(5)

In action by attorney against client for fees allegedly due under written contingent fee agreement, evidence was sufficient to sustain trial court's finding that it had not been agreed that, in event contemplated action was settled prior to trial, the $500 paid by client to attorney would constitute full payment of amount due attorney.

3. Attorney and Client ⇨147

Question whether contingent fee contract is unconscionable is to be determined from the facts and situation as it appeared to the parties at time the contract was entered into, not as later developments may unfold.

4. Attorney and Client ⇨147

Contingent fee contract negotiated, made, and entered into before attorney undertook to represent client was not excessive merely because the fee was to be $500 plus one-third of the gross recovery.

5. Attorney and Client ⇨148(3)

Where, after entry into contingent fee contract with attorney, client attempted to settle his own case, without knowledge or consent of attorney, and contract which settled the controversy, called for profit to client of 10% of $93,313.61 and was result of attorney's efforts in client's behalf, attorney was entitled to one-third of the 10%, rather than one-third of the net fee.

6. Attorney and Client ⇨150

Where position in which client found himself when he attempted to settle his own case, without knowledge or consent of his attorney, after entering into contingent fee contract with attorney, was one specially created for himself by himself, client would be estopped from raising, in bar of attorney's recovery under contingent fee contract between attorney and client, issues whether, upon settlement of claim, the $500 paid attorney would be full payment, whether the contingent fee contract was inequitable, or whether attorney's recovery should be limited to one-third of net fee under settlement contract which preceded final settlement contract.

7. Appeal and Error ⚿1151(1)

Where trial court apparently made an error mathematically calculating amount of the judgment, the District Court of Appeal would modify the judgment to read correctly.

Simon, Brown & Arnold, by Merrill Brown, Palm Springs, for appellant.

N. E. Youngblood, Beverly Hills, in pro. per., for respondent.

FOURT, Justice.

This is an appeal by the defendant from a judgment in favor of the plaintiff in an action based upon a written fee agreement.

Appellant, who is in the construction business in the Palm Springs area, conferred with the respondent, who is and was an attorney at law, with reference to a controversy between appellant and Mary K. and Adolph Bremer, Jr., over a building contract. Appellant and respondent thereupon entered into a written contract of employment on a contingent fee basis. The contract is set forth in full in the footnote hereto.[1]

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[1] "Mr. Robert C. Higgins,
Palm Springs, California,
Re: Higgins vs. Bremer.

"My dear Mr. Higgins:

"In accordance with our verbal agreement it is my understanding and it is our agreement that I shall represent you in an action upon a written contract dated March 20, 1954 with Adolph Bremer, Jr. and Mary K. Bremer, husband and wife, under the terms of which you were to construct five buildings on designated land adjacent to Highway 111, Palm Springs, California, for the total sum of $77,500.

"From information derived by me from you it is my understanding that concurrently with the execution of this building construction contract you received from Adolph Bremer, Jr. a check payable to your order in the sum of $5,000 dated March 20, 1954 and drawn upon the Commercial State Bank, St. Paul, Minnesota, which check was deposited by you for bank clearance, and upon submission to the Commercial State Bank was returned marked 'Payment Stopped.'

"As explained to you, by reason of the fact this contract was entered into in Palm Springs it will be necessary that action thereon be filed in the Superior Court in Riverside, California. You shall have sole determination of any offer of settlement made by the defendants herein, upon which I, of course, will give to you my recommendations.

"Although the contract provides that if owner fails to pay any sum in full when due and payable, owner promises to pay in addition all costs of collection and reasonable attorney's fees incurred by you, whether or not suit be instituted, my fees in this connection will be a retainer or $500, payable forthwith, plus a sum equivalent to thirty-three and one-third (33⅓%) of the 'gross recovery' (exclusive of attorney's fees allowed), either by settlement or otherwise.

"This does not mean that I do not intend to ask that the defendants pay fees on this obligation, but it does mean that whatever they are ordered to pay will be credited against whatever is due me under the above formula and you will be required to make up the difference, if any. You are to advance and pay any and all court costs and expenses as they become necessary from time to time.

"It is also understood and agreed that I shall have a lien against said cause of action, settlement, judgment, amount due, to be paid or to become due for my fees, and any and all costs and expenses advanced by me.

"In the event this corresponds with your understanding of our agreement please sign the original of this letter, return it to me for my files, and we shall proceed accordingly.

"Very truly yours,
"/s/ N. E. Youngblood

"Read and approved:
"/s/ Robert C. Higgins
"Robert C. Higgins
NEY:LC"

Pursuant to the contract, appellant paid respondent $500, but failed to pay anything further. The respondent instituted an action against the Bremers on behalf of appellant and prepared, filed and caused to be served upon the Bremers copies of the proper pleadings and documents. The respondent advised the appellant not to discuss the case with the Bremers. However, appellant did not follow this advice, and without consulting the respondent, entered into another contract with the Bremers. Respondent first learned of the latter agreement some twelve days after its execution, and thereafter respondent made several calls and wrote several letters in an attempt to protect the interests of the appellant under the agreement.

Two months later, and again without the knowledge of respondent, appellant executed a new and further agreement with the Bremers involving construction of buildings on the same premises to which the prior dispute had related. The latter contract called for a profit to the appellant of ten percent of the basic cost of the construction, plus costs of extras installed. The basic cost was $90,880.27, plus $2,433.34 extras, or a total of $93,313.61.

After the construction was completed, appellant again became involved in a dispute with the Bremers involving the amounts due to him.

The respondent brought the instant action in three counts, one on the contingent fee contract and two common counts. Judgment was rendered in favor of the respondent in an amount equal to one-third of 10% of $93,313.61.

[1, 2] Appellant contends that there was a conversation with the respondent upon the execution of the contingent fee contract, in which it was agreed that in the event the contemplated action against the landowner was settled prior to the trial by completing the first contract, the $500 paid would be full payment. The trial court found against the appellant on that contention, upon conflicting evidence. Conflicts of the evidence are to be weighed and to be determined by the trial court, and in this instance there was ample evidence to sustain the finding.

[3, 4] Appellant further contends, in substance, that the contingent fee contract was not fair and equitable. Whether a contingent fee contract is unconscionable is to be determined from the facts and situation as it appeared to the parties at the time the contract was entered into, and not as later developments may unfold. Swanson v. Hempstead, 64 Cal.App.2d 681, 688, 149 P.2d 404. Furthermore, a fee agreement negotiated, made and entered into before the time an attorney undertakes to represent the client is not excessive merely because the fee is to be $500 plus one-third of the gross recovery. Swanson v. Hempstead, supra.

[5, 6] Appellant asserts that if the respondent was to recover anything under the contract it was necessarily limited to one-third of the net fee derived from the second contract, not the gross fee. In this particular case the appellant himself brought about a large part of the difficulty in proceeding as he did. He attempted to settle his own case without the knowledge or consent of the respondent—and the appellant himself testified that his new contract with the Bremers, which "settled his controversy with the landowner" called for a profit to himself of ten percent of $93,313.61. The new contract was the result of respondent's efforts in appellant's behalf, and therefore the respondent was entitled to one-third of the "gross recovery", either by settlement or otherwise, namely, one-third of $9,331.36, or $3,110.45. The position the appellant found himself in was specially created and made for him by no one other than himself. He is, of course, estopped from raising the issues attempted in bar of the respondent's recovery. Safway Steel Products, Inc., v. Lefever, 117 Cal.App.2d 489, 491, 256 P.2d 32; Merry v. Garibaldi, 48 Cal.App.2d 397, 401, 119 P.2d 768.

[7] The trial court apparently made an error in the mathematical calculation since

the judgment should have been for the sum of $3,110.45, rather than the sum of $3,112.03. The judgment is modified to read as follows: "that plaintiff have and recover judgment against the defendant, Robert C. Higgins, for the sum of $3,110.45, together with interest thereon at the rate of 7% per annum from and after August 29, 1955, and for the further and additional sum of $113.93, together with interest thereon at the rate of 7% per annum from and after April 14, 1954, together with costs herein amounting to the sum of $116.70." As so modified the judgment is affirmed, the respondent to recover his costs on appeal.

DORAN, Acting P. J., and NOURSE, Justice pro tem., concur.

47 Cal.2d 374

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

James Harlan ROBERTS, Defendant and Appellant.

Cr. 5950.

Supreme Court of California.
In Bank.

Nov. 23, 1956.

Defendant was convicted of second degree burglary. The Superior Court, San Mateo County, Murray Draper, J., entered judgment and order denying new trial, and defendant appealed. The Supreme Court, Gibson, C. J., held that where officers entered apartment without search warrant for purpose of looking for someone in distress, entry was lawful and radio which was in plain sight in apartment, and which fitted general description of property known by officers to be stolen, was properly picked up and examined by one of the officers for purpose of dispelling or confirming his suspicions and seizure of said radio upon determination it was stolen and issuance of search warrant on basis of such information was lawful.

Judgment and order denying new trial affirmed.

Opinion 299 P.2d 313, vacated.

1. Searches and Seizures 🔑3(2)

If conduct of officers in entering or searching premises is unlawful, search warrant subsequently obtained based on their observation in the apartment during search, is invalid.

2. Trespass 🔑26

Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose.

3. Searches and Seizures 🔑7(28)

Entry of premises obtained by trickery, stealth or subterfuge renders a search and seizure invalid.

4. Criminal Law 🔑394

In prosecution for second degree burglary, wherein defendant contended information upon which search warrant was obtained was product of illegal search of apartment and that evidence seized in such search should therefore have been excluded from evidence, evidence was sufficient to support finding that officers had reasonable cause to enter apartment initially without search warrant for purpose of aiding person apparently in distress.

5. Arrest 🔑71

Searches and Seizures 🔑7(27)

The privilege to enter upon premises to render aid does not justify a search of premises for some other purpose and an arrest may not be used as a pretext to conduct a general search of one's premises for incriminating evidence.

6. Searches and Seizures 🔑7(27)

Where right to conduct a search is obtained ostensibly for one purpose it may not be used in reality for another.

7. Searches and Seizures 🔑3(2)

Where officers justifiably entered apartment without search warrant, for purpose of looking for some one in distress, and radio, which fitted general description of property known by officers to be stolen, was in plain sight, officers were justified in picking up radio and examining it for purpose of dispelling or confirming their suspicions and, upon determination that it was stolen, in obtaining search warrant based on such observations.

William John Scammon, Burlingame, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and William M. Bennett, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant appeals from a judgment of conviction entered on a verdict of guilty of second degree burglary and from the order denying his motion for a new trial.

About 10 p. m. on August 5, 1955, a police officer observed defendant standing in front of the display window of the Wollmer Music Company in Burlingame. He saw defendant get in an automobile and drive away, and he noted the license number of the car. The next night the music company was burglarized, and merchandise including five table model radios was taken.

Burlingame officers learned that the car defendant had been seen driving was registered to Margaret Higgins, 771 Turk Street, San Francisco, and two of them went to that address in the morning of August 8th with a San Francisco police officer. They were informed that Margaret Higgins had moved to an apartment house, at 761 Turk Street, and they went there and interviewed the manager. She told them that Mrs. Higgins lived there, that a man, later identified as defendant, also lived in the same apartment and that he had not worked often and was sickly.

The officers went to the apartment and knocked on the door but received no response. They heard several moans or groans that sounded as if a person in the apartment were in distress, and the manager let them into the apartment at their request. They looked in the bedroom, bathroom and kitchen for the person they thought had made the sounds. No one was there. One of the officers, noticing a table model radio in the kitchen that "stood right out as being a new radio," picked it up, turned it over, and noted the serial number. The officers were not in the apartment more than two or three minutes. After leaving they ascertained that the serial number of the radio in the apartment was the same as that of one of the radios reported stolen. On the basis of this information a search warrant was obtained, and the officers returned later in the day, served the warrant on Mrs. Higgins and seized the radio. She testified that defendant had given her the radio the day after the burglary.

[1] Defendant contends that the information upon which the search warrant was obtained was the product of an illegal search of the apartment and that the radio should therefore have been excluded from evidence. It is, of course, settled that if the conduct of the officers in entering or searching was unlawful, the search warrant subsequently obtained based on their observation in the apartment was invalid. See Silverthorne Lumber Co. v. U. S., 251 U.S. 385, 392, 40 S.Ct. 182, 64 L.Ed. 319; People v. Berger, 44 Cal.2d 459, 462, 282 P.2d 509.

The entry of the officers cannot be justified on the ground that they reasonably believed in good faith that the manager had authority to consent thereto. The situation here is entirely unlike that in People v. Gorg, 45 Cal.2d 776, 291 P.2d 469, and People v. Caritativo, 46 Cal.2d 68, 292 P.2d 513. In both of those cases the premises searched were part of a private home, it was unclear whether the defendant was a guest, tenant or servant, and the officers had the consent of the owner who purported to have authority to authorize the search. In the present case Mrs. Higgins was a tenant of an apartment, and there is no evidence that the officers had reason to believe that the manager had authority to consent to their entry. The manager testified that she had neither authority nor permission from Mrs. Higgins to enter her apartment, and in admitting the officers she acted solely at their request on the assumption that they were entitled to enter. Moreover, although the burden is on the prosecution when it seeks to justify an entry on the ground that the officers reasonably believed in good faith that they had the consent of an authorized person, People v. Gorg, supra, 45 Cal.2d 776, 782, 291 P.2d 469, no attempt was made to establish such a belief, and it is clear from the record that the trial court did not base its decision on that ground.

[2, 3] The trial court found that the officers reasonably believed that some one inside the apartment was in distress and in need of assistance and that they entered for the purpose of giving aid. Necessity often justifies an action which would otherwise constitute a trespass, as where the act is prompted by the motive of preserving life or property and reasonably appears to the actor to be necessary for that purpose. Ploof v. Putnam, 81 Vt. 471, 71 A. 188, 189, 20 L.R.A.,N.S., 152; Metallic Compression Casting Company v. Fitchburg R. Co., 109 Mass. 277, 280–281; see Restatement, Torts, § 197; Prosser on Torts [2d ed.], 84, 97. The trial judge was fully aware that an entry obtained by trickery, stealth or subterfuge renders a search and seizure invalid. See Gouled v. U. S., 255 U.S. 298, 41 S.Ct. 261, 65 L. Ed. 647; Fraternal Order of Eagles v. U. S., 3 Cir., 57 F.2d 93. He stated, "I recognize that this opens the way to subterfuge, and I think it rests with the trier of fact to see to it that * * * no subterfuge creeps in, but I don't think I am justified in making that finding here. * * I think [the officers] were telling the truth and I so find * * *."

[4] Defendant contends that the evidence is insufficient to support a finding that the officers had reasonable cause to enter the apartment. The officers were informed that the man who was living in the apartment with Mrs. Higgins had not worked lately and that he was sickly. After they knocked on the door they heard moaning sounds as if a person inside the apartment was in distress. Unless the testimony of the officers is rejected, the evidence is clearly sufficient. Defendant argues, however, that their testimony is too improbable to be believed. He calls attention to the fact that no one was found in the room and points out that one of the officers when asked on cross-examination to give his present opinion as to where the sounds might have come from said, "Well, it could be pigeons, pigeons moan. There are pigeons in that area." Defendant asserts that a competent police officer could not honestly confuse the sound of a moaning pigeon with that of a person in distress. The witness, however, was only giving his opinion as to a possible source of the sounds the officers heard, and moreover we cannot say that it is impossible in any circumstances to confuse the moan of a pigeon with that of a human being. The trial court was not required to reject the testimony of the officers as being unworthy of belief.

[5, 6] The privilege to enter to render aid does not, of course, justify a search of the premises for some other purpose. An arrest may not be used as a pretext to conduct a general search of one's premises for incriminating evidence, and it has been repeatedly said that where the right to conduct a search is obtained ostensibly for one purpose it may not be used in reality for another. See Harris v. U. S., 331 U.S. 145, 153, 67 S.Ct. 1098, 91 L.Ed. 1399; Love v. U. S., 4 Cir., 170 F.2d 32, 33. Thus the officers in the present case could properly make only that kind of search reasonably necessary to determine whether a person was actually in distress somewhere in the apartment. They could not, for example, ransack the premises or rummage through desk drawers. On the other hand, in the course of conducting a reasonable search they did not have to blind themselves to what was in plain sight simply because it was disconnected with the purpose for which they entered. Love v. U. S., 4 Cir., 170 F.2d 32 [officers entered the defendant's house lawfully for purpose of searching for another man; in course of search they discovered a distillery in operation]; Paper v. U. S., 4 Cir., 53 F.2d 184 [officers entered lawfully for purpose of finding and arresting defendant on one charge; in searching for defendant they discovered an illegal supply of liquor, constituting another offense, in the basement]. The court in the Paper case said, "Where the entry and search are rightful and there is

present no element of trespass or fraudulent invasion of the rights of the citizen, there is no reason for excluding evidence of crime discovered in the course of the search. If the officers * * * had discovered in the cellar a counterfeiting plant in operation, would it have been their duty to ignore it? If they had come upon the body of a murdered man, would their testimony as to finding the body be excluded?" Paper v. U. S., 4 Cir., 53 F.2d 184, 185.

In formulating the rules governing lawful searches and seizures the United States Supreme Court has repeatedly recognized a distinction between the seizure of evidence which was readily visible and accessible to the officers and that which was uncovered only after a general, unreasonable ransacking of the premises. See United States v. Lefkowitz, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877; Go-Bart Importing Co. v. U. S., 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374; cf. Harris v. U. S., 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399, where an intensive search was held reasonable under the circumstances. The decisions also make a sharp distinction between the seizure of property which is stolen or contraband and property which is unoffending of itself and merely evidentiary. Harris v. U. S., 331 U.S. 145, 154, 67 S.Ct. 1098; United States v. Lefkowitz, 285 U.S. 452, 465, 52 S.Ct. 420, 76 L.Ed. 877; Weeks v. U. S., 232 U.S. 383, 392–393, 34 S.Ct. 341, 58 L.Ed. 652; Gouled v. United States, 255 U.S. 298, 309–310, 41 S.Ct. 261, 65 L.Ed. 647; Boyd v. U. S., 116 U.S. 616, 623, 6 S.Ct. 524, 29 L.Ed. 746.

[7] Applying these principles and distinctions to the facts of the present case we are satisfied that the officers did not act unreasonably or in violation of defendant's constitutional rights. The trial court found on substantial evidence that the entry was lawful for the purpose of rendering aid, hence the officers were justified in entering each room of the apartment to look for some one in distress. The radio was in plain sight, and it fitted the general description of property known by the officers to be stolen. Under the circumstances, there appears to be no reason in law or common sense why one of the officers could not pick up the radio and examine it for the purpose of dispelling or confirming his suspicions. The fact that abuses sometimes occur during the course of criminal investigations should not give a sinister coloration to procedures which are basically reasonable.

The judgment and order denying a new trial are affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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47 Cal.2d 327

Hugh H. DANNER and Maxine Danner, husband and wife, Plaintiffs and Appellants,

v.

William ATKINS, Alex Bischel, Chester Bischel, Insured Transport, Inc., a corporation, Defendants and Respondents.

L. A. 24176.

Supreme Court of California.
In Bank.
Nov. 21, 1956.

Cafe operators brought action against truck driver, his employer, and owner of truck under the res ipsa loquitur doctrine for personal injuries and property damage sustained when truck, which had been parked near garage to have mechanic look at the motor, rolled into the cafe, to which the truck driver had gone a few minutes before. The Superior Court, Kern County, Warren Stockton, J., entered a judgment adverse to the cafe operators, and they appealed. The Supreme Court, Schauer, J., held that question whether negligence of truck driver had been established under the res ipsa loquitur doctrine was for the Superior Court sitting without a jury.

Judgment affirmed.

Carter, J., dissented.

Opinion, 294 P. 1021, vacated.

1. Negligence ⚷136(6)

Ordinarily, it is a question for fact finder whether facts which give rise to res ipsa loquitur inference of negligence actually exist and, if the inference arises, whether it prevails or is overcome.

2. Negligence ⚷121(2)

The essential elements, which plaintiff must establish before inference of negligence under the res ipsa loquitur doctrine will arise, include showing that defendant had exclusive control of thing causing injury or, if he had relinquished control, then a showing that instrumentality had not been improperly handled by some third person or that its condition had otherwise changed after control was relinquished by defendant.

3. Automobiles ⚷242(2)

In action by cafe operators against truck driver, his employer, and owner of truck for personal injuries and property damage sustained by cafe operators when truck, which had been parked near garage to have mechanic look at motor, rolled into cafe, to which driver had gone a few minutes before, cafe operators had burden of establishing the elements which permitted the application of the res ipsa loquitur doctrine.

4. Evidence ⚷591

In action under the res ipsa loquitur doctrine by cafe operators against truck driver, his employer, and owner of truck for personal injuries and property damage sustained by cafe operators when truck, which had been parked near garage to have mechanic look at motor, rolled into cafe, to which driver had gone a few minutes before, testimony of mechanic, who was produced as a witness by cafe operators, was not binding on truck driver, his employer, and owner of truck.

5. Negligence ⚷121(2)

The res ipsa loquitur doctrine, even where applicable, does not give a plaintiff an absolute right to a judgment in every case.

6. Negligence ⚷136(6)

When defendant produces evidence to rebut inference of negligence under the res ipsa loquitur doctrine, it is ordinarily a question of fact whether the inference has the greater weight, or is evenly balanced, or has been dispelled or overcome.

7. Automobiles ⚷245(4)

In action by cafe operators against truck driver, his employer, and owner of truck for personal injuries and property damage sustained by cafe operators when truck, which had been parked near garage to have mechanic look at motor, rolled into cafe, to which driver had gone a few minutes before, question whether negligence of truck driver was established under the res ipsa loquitur doctrine was for the trial court, sitting without a jury. West's Ann. Code Civ.Proc., § 1957.

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Deadrich, Bates & Stewart and Kenneth H. Bates, Bakersfield, for appellants.

Baker, Palmer, Wall & Raymond, Conron, Heard & James, Oran W. Palmer and Calvin H. Conron, Jr., Bakersfield, for respondents.

SCHAUER, Justice.

Plaintiffs appeal from an adverse judgment of the court, sitting without a jury, in their action to recover for personal injuries and property damages sustained when a truck, allegedly as the result of negligence of the driver, defendant Atkins, rolled into a cafe plaintiffs operated. We have concluded that plaintiffs' contention that by reason of the res ipsa loquitur doctrine negligence of the driver was established as a matter of law, is without merit, and that the judgment should be affirmed.

From the record it appears that at about 8:30 on an evening in October, 1952, a truck being driven by defendant Atkins, as the employe of defendants Bischel and belonging to defendant Insured Transport, Inc., developed motor trouble. Atkins pulled off the highway and stopped the truck at the Wheeler Ridge Garage. At the garage he asked a mechanic, McElyea, to look at the motor, while he, Atkins, went to a nearby cafe to telephone to his employer. Atkins, who then left the truck while the mechanic was checking the engine, testified that at that time he had the equipment in double low gear with the vacuum brakes on and the mechanical hand emergency brake set. In Atkins' six to eight years of experience as a truck driver there is no more effective way to apply braking power on such equipment, and it was parked in a safe manner. Atkins then walked some 250 feet to the cafe, which plaintiffs operated, and was making his telephone calls when the truck struck the cafe building; about seven to nine minutes had elapsed since he had left the truck. During a part of that time the mechanic was working in or about the truck. Atkins had been driving this particular rig about two and one-half months and had had no previous brake trouble; on the day of the accident he had applied the brakes many times always successfully. When he parked the truck, after being told by the mechanic that "it would be all right to set the truck there," both the truck and the front wheels were facing parallel to the highway, and *the truck would not have collided with the cafe if the steering wheel had not been turned;* the area where he parked the truck appeared level to him and he did not put blocks under the truck wheels, although the truck carried blocks. There was evidence that the slope of the ground from the point where the truck was parked, to the cafe, was about 2.7 per cent, but that the slope was so general that the ground appeared level.

The mechanic, McElyea, *who was not named as a defendant,* testified as a *witness for plaintiffs* that when Atkins had left the truck to go to the cafe he, the mechanic, asked whether the brakes were on and Atkins replied that they were; that Atkins said that he would make a telephone call and then come back and "we would check it out more"; that *the witness spent another two to four minutes looking at the motor,* during which time he did not "have the motor running," and *then followed Atkins to the cafe* and had just ordered or was about to order coffee when the truck struck the building; that the witness then went outside and looked into the cab of the truck and determined that the transmission was in gear as to one gear box although he had not looked inside the cab before going to the cafe; that he did not look at more than one gear box; that the "general lay of the land in the vicinity of where the truck stopped" is such that *"Quite a few think it is level there * * The grade is very deceiving"* (italics added); that some truck drivers use blocks under the wheels when they stop there and some do not, and *the witness did not caution Atkins to use blocks on this occasion, nor did he himself put blocks under the truck before he left it* to go to the cafe; that the truck was "absolutely dead stationary" when the witness left it and *had been stationary for at least two to four minutes after Atkins had stopped the motor;* that he did not remember whether at the time he left the truck and went to the cafe there were any other people in the general area, although commonly there are people "around there all hours of the night."

The trial court found that it was not true that Atkins negligently handled the truck and proximately caused the accident. Plaintiffs contend, however, that the accident was "unexplained" and that because it was unexplained the res ipsa loquitur doctrine applies and thereby establishes Atkins' negligence as a matter of law, while defendants urge that the doctrine does not apply as against them because the truck was under the control of the mechanic rather than of Atkins just before the accident (see Druzanich v. Criley (1942), 19 Cal.2d 439, 444 [3], 122 P.2d 53) and that in any event the testimonies of Atkins and the mechanic are sufficient to support the court's finding against negligence by Atkins.

[1, 2] It is ordinarily a question for the fact finder, first, whether facts which give rise to the res ipsa loquitur inference of negligence actually exist and, second, if the inference arises, whether it prevails or is overcome. Here, the evidence would support a finding that the inference as to Atkins never arose. The essential elements which plaintiff must establish before the inference will arise have often been stated, and include the showing that defendant had exclusive control of the thing causing the injury or, if he had relinquished control, then a showing that the instrumentality had not been improperly handled by some third person or its condition otherwise changed after control was relinquished by defendant. (Burr v. Sherwin Williams Co. (1954), 42 Cal.2d 682, 691–692 [10], 268 P.2d 1041; Zentz v. Coca Cola Bottling Co. (1952), 39 Cal.2d 436, 444 [6], 247 P.2d 344; Escola v. Coca Cola Bottling Co. (1944), 24 Cal.2d 453, 457, 150 P.2d 436.)

[3, 4] The evidence in this case, as above noted, shows that the driver, defendant Atkins, had left the truck, in double low gear and with the brakes locked, in the care of the mechanic McElyea, who was inspecting the motor, and that Atkins had himself been absent from the truck for seven to nine minutes before the accident occurred. During a substantial portion of that time McElyea was working on or about the truck. Plaintiffs, who have the burden of establishing the elements which permit application of the res ipsa doctrine, produced McElyea as their witness. His testimony was not binding on defendants. From the facts that McElyea was not named as a party defendant and was in a sense an interested party on plaintiffs' behalf and, in his own interest, adverse to defendants, the court could well have concluded that the unexplained part of the accident, insofar as credible testimony was concerned, was what happened to the truck after Atkins had left it in McElyea's care. That is, the court could well have believed, as it impliedly did, that Atkins' explanation of his own conduct was fully satisfactory and excluded negligence on his part but that as to McElyea's testimony either it was unacceptable, and that some act of the latter was actually the sole proximate cause of the accident, or that it was acceptable and indicated that the act of some unidentified person must have intervened and caused the accident. As already noted, McElyea himself testified that he was aware of the grade, that it was "very deceiving," but that he did not caution defendant Atkins concerning it, or himself put blocks under the wheels, and that he left the truck unattended although commonly there were people "around there all hours of the night." Since McElyea was asked to give his attention to the motor trouble and was trying to "check it out" it would seem reasonable that he might try to start the motor; he had asked Atkins, as the latter started for the cafe, if the brakes were on. If he tried to start it, it would be reasonable to disengage the gears. Since the trial court impliedly found that the truck was securely parked with the brakes locked and with the front wheels headed away from the cafe building when Atkins left it, but rolled away and turned toward the building only after McElyea had given it his attention and then left it unattended, it would be logical to conclude that McElyea or some unidentified person must have changed its condition, and that the res ipsa doctrine was not applicable as against defendants.

[5, 6] If, however, the trial court did conclude that facts existed which gave rise to the res ipsa inference, nevertheless, as commented in Druzanich v. Criley (1942), supra, 19 Cal.2d 439, 444 [4], 122 P.2d 53, that doctrine even where applicable does not give a plaintiff an absolute right to a judgment in every case, and when the defendant produces evidence to rebut the inference of negligence it is ordinarily a question of fact whether the inference has the greater weight, or is evenly balanced, or has been dispelled or overcome. Thus,

in Scott v. Burke (1952), 39 Cal.2d 388, 398–401, 247 P.2d 313, it was held that the presumptions of due care and innocence (Code Civ.Proc. § 1963, subds. 1, 4) may be weighed by the fact finder and constitute sufficient evidence to support a finding that the res ipsa loquitur inference has been overcome, and that "it is the function of the trier of facts to determine in the light of all the evidence in the case, including the opposing inferences and presumptions, whether the proof preponderates in favor of one party and against another, or is evenly balanced, and thereupon to resolve the issues in accordance with the rules relating to the burden of proof." (At page 399 of 39 Cal.2d, at page 319 of 247 P.2d.)

[7] Thus even though we assume that the court could have concluded here, as in the Scott case, that the cause of the accident remained unexplained, nevertheless the testimony of both Atkins and the mehanic, McElyea, provided direct evidence (as distinguished from the indirect evidence provided by the presumption of due care involved in the Scott case, see Code Civ. Proc. § 1957) that Atkins had used due care in his handling of the truck, evidence which if believed by the trier of facts is sufficient to rebut the inference of negligence raised by the res ipsa loquitur doctrine. Atkins' testimony that when he had left the truck in care of the mechanic it was in such a position and was so headed that "if the steering wheel had not been turned" it would not have collided with the cafe even if it rolled ahead, and that it was in "double low gear," "the combination making the compression most effective," and with both mechanical and vacuum brakes on and locked, coupled with testimony of the mechanic that the truck had remained "absolutely dead stationary" for several minutes after Atkins had stopped the motor and before the mechanic had himself left the truck completely unattended, and that following the accident the mechanic had looked at one gear box and determined that as to it the transmission was in gear, and the further facts that the mechanic was not named as a defendant but instead testified on behalf of plaintiffs, obviously provide evidence sufficient to support the trial court's finding that Atkins was free from negligence proximately causing the accident. Price v. McDonald (1935), 7 Cal.App.2d 77, 81, 45 P.2d 425, and Harlow v. Standard Improvement Co. (1904), 145 Cal. 477, 78 P. 1045, cited by plaintiffs, involve the applicability of the res ipsa doctrine in providing supporting evidence for judgments for plaintiffs and are not in point where, as here, sufficiency of the evidence to support a judgment for defendants is the matter at issue.

Plaintiffs further suggest that the findings as to their damages are contradictory in that, according to plaintiffs' construction, the court found both that plaintiffs suffered no damages and that certain damage inflicted upon the cafe building was caused to be repaired. Without reciting the findings in detail, it is apparent that the finding that plaintiffs suffered no damages referred to damages proximately resulting from negligence of the defendants. Further, the finding, also attacked by plaintiffs, that plaintiffs were guilty of misrepresentation which induced defendants to cause the building to be repaired in such a manner as to enhance its value in excess of $2,800 is immaterial in view of the finding of lack of negligence by defendants, and no useful purpose would be served by discussing the contentions of the parties in this respect.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

The basis for the application of the doctrine of res ipsa loquitur is found in the everyday experience that certain kinds of accidents do not occur in the absence of negligent conduct by the person in control of the instrumentality causing the accident.

A showing of the occurrence of such an accident, then, raises an inference that the one in control was negligent and it becomes incumbent upon him to satisfactorily explain the cause of the mishap in order to avoid liability, Burr v. Sherwin Williams Co., 42 Cal.2d 682, 691, 268 P.2d 1041.

An examination of the facts in this case shows that they are particularly susceptible to the application of the res ipsa loquitur doctrine. The defendant driver, Atkins, left the truck, which weighed several tons, unattended while he went to a cafe. The uncontradicted testimony of the mechanic, not a party to the action, shows that the condition of the truck was not changed after Atkins left. A few minutes after Atkins left the scene, the truck crashed through the side of the cafe which was some 250 feet downgrade from where the truck was parked. Clearly, parked vehicles do not roll downhill unless the operator was negligent, either in parking the vehicle or in maintaining its braking equipment in proper mechanical order. Price v. McDonald, 7 Cal.App.2d 77, 45 P.2d 425. The first question that arises, then, is whether the trier of fact can refuse to draw the inference that Atkins was negligent. In discussing this problem in Burr v. Sherwin Williams Co., supra, this court said in 42 Cal.2d at page 689, 268 P.2d at page 1045 that "In some types of situations because of the nature of the particular accident, an inference of negligence upon the part of the defendant may be so strong that no reasonable man could fail to accept it in the absence of explanatory evidence." Put another way, "* * * if the inference is sufficiently strong to persuade the court, and the obvious conclusion is that the defendant has been negligent, no perverse jury should be permitted to refuse to draw it. If the thing speaks for itself, why not accept what it says?" Prosser, Res Ipsa Loquitur in California [1949], 37 Cal.L.Rev. 183, 220. Surely, then, when a large truck is left unattended, and for no known reason, rolls down a grade, "the obvious conclusion is that the defendant has been negligent" and this inference is "so strong that no reasonable man could fail to accept it."

The effect of this inference is also examined in Burr v. Sherwin Williams Co., supra, 42 Cal.2d at page 690, 268 P.2d at page 1045, where Mr. Chief Justice Gibson, speaking for a unanimous court, said that "A few decisions have criticized instructions to the effect that res ipsa loquitur imposes a mandatory burden upon the defendant to rebut the inference of negligence and have apparently proceeded on the theory that the doctrine creates an inference which is enough to avoid a nonsuit but which the trier of fact may accept or reject as it sees fit, even though the defendant offers no evidence. [Citations.] This view, which is inconsistent with most of the California decisions, is very difficult to apply, and there are substantial reasons why we should hold that in every type of res ipsa loquitur case the defendant should have the burden of meeting the inference of negligence. * * *

"It is our conclusion that *in res ipsa loquitur situations the defendant must present evidence sufficient to meet or balance the inference of negligence, and that the jurors should be instructed that, if the defendant fails to do so, they should find for the plaintiff.*" (Emphasis added.)

In regard to what a defendant must show in order to meet the burden imposed by the inference of negligence, the court in Talbert v. Ostergaard, 129 Cal.App.2d 222, 228, 276 P.2d 880, 883, said: "Procedurally, it is incumbent on defendant to rebut the inference by a showing ' "either (1) of a satisfactory explanation of the accident, that is, an affirmative showing of a definite cause for the accident, in which cause no element of negligence on the part of the defendant inheres; or (2) of such care in all possible respects as necessarily to to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented."' Dierman v. Providence Hospital, 31 Cal.2d 290, 295, 188 P.2d 12. In short, the 'explanation which the defendant is required to make is an explanation of his conduct and, to be complete, it must be as broad as the inference.' Hinds v. Wheadon, 67 Cal.App.2d 456, 464, 154 P.2d 720. The question of the sufficiency of a defendant's explanation of the accident or the sufficiency of his evidence of due care is ordinarily one of fact for the jury. [Citations.] But if, in explaining his conduct, the defendant fails to produce substantial evidence of the use of due care, as where he fails adequately to disclose the nature of an inspection he was required to make, his defense may be held insufficient as a matter of law. [Citations.]"

Applying these standards here, it seems abundantly clear that defendant has not offered evidence sufficient to overcome the inference of negligence. Obviously, there was no explanation of the cause of the accident. It appears equally obvious that there is insufficient evidence of "due care in all possible respects." Defendant's only explanation is that he left the gears engaged and the brake locked. This does not amount to "an explanation as broad as the inference." Except for the mechanic's testimony that *one* of the gear boxes was in gear (no braking power would be afforded unless *both* gears were engaged), there was no evidence as to the condition of the gears and brakes after the accident. Such evidence would certainly be of assistance in determining the cause of and responsibility for the accident, and, presumably, such evidence was within defendant's power to produce as he drove the truck after the accident. Yet, no such evidence was offered. Under similar circumstances, it was said in Talbert v. Ostergaard, supra, 129 Cal.App.2d at page 229, 276 P.2d at page 884, that "The failure of a defendant to produce evidence explaining a circumstance of importance in the case, if such evidence is available, justifies an inference that such evidence, if given, would redound to his prejudice. [Citations.] This principle applies with particular force where, as here the circumstance to be explained arises in relation to defendant's burden of meeting an inference of negligence." The only conclusion, then, that can be drawn is that defendant has not done all within his power to explain the accident and, therefore, it should be held that he has failed to overcome the inference of negligence. For these reasons, I would reverse the judgment.

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47 Cal.2d 362

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Burton W. ABBOTT, Defendant and Appellant.

Cr. 5901.

Supreme Court of California.
In Bank.

Nov. 23, 1956.

Rehearing Denied Dec. 19, 1956.

Prosecution for murder and kidnapping. The Superior Court, Alameda County, Charles Wade Snook, J., entered judgments of conviction upon both counts and imposed death sentence. Appeal came before Supreme Court automatically under statute. The Supreme Court, Gibson, C. J., held that evidence sustained convictions and where charges of both kidnapping and murder were involved and arose out of acts occurring in more than one county, statute defining proper jurisdiction of criminal action for murder should be read in connection with statute defining jurisdiction of criminal action for kidnapping so that court of county out of which victim was taken had jurisdiction not only of the kidnapping charge but also of the murder offense.

Affirmed.

1. Homicide 🔑253(1)
Kidnapping 🔑5

Evidence was sufficient to support judgments of conviction for kidnapping and first degree murder. West's Ann.Pen.Code, §§ 209, 1239, subd. (b).

2. Criminal Law 🔑112(1)

Where victim was taken out of Alameda County and murdered in another county, Superior Court of Alameda County had jurisdiction to try offense of kidnapping. West's Ann.Pen.Code, §§ 209, 691, 784.

3. Criminal Law 🔑112(6)

Statute defining jurisdiction of criminal action for murder to be in the county where the fatal injury was inflicted, or the party died, or his body was found, is not intended to exclude application of other statutory provisions relating to territorial jurisdiction in criminal cases. West's Ann. Pen.Code, § 790.

4. Criminal Law 🔑112(1)

Under statute relating to jurisdiction of criminal actions where a public offense is committed in part in one jurisdictional territory and in part in another, county in which preliminary arrangement for commission of a crime are made is a proper county in which to prosecute completed offense although the acts performed there do not constitute essential element of the crime. West's Ann.Pen.Code, § 781.

5. Criminal Law 🔑112(1, 6)

Where both charges of kidnapping and murder were brought against defendant arising out of acts occurring in more than one county, statute defining jurisdiction of criminal action for murder would be read in connection with statute defining jurisdiction of criminal action for kidnapping so that court of county out of which victim was taken had jurisdiction not only of kidnapping but also of the murder offense. West's Ann.Pen.Code, §§ 209, 691, 781, 784, 790.

6. Jury 🔑149

Under statute providing that court may discharge unfit or incapacitated juror during trial and draw the name of an alternate, the taking of sworn testimony under the rules of evidence is not necessary to establish unfitness of juror where facts upon which action is taken are uncontroverted. West's Ann.Pen.Code, §§ 1089, 1123.

7. Jury 🔑149

In prosecution for murder and kidnapping where trial court during course of trial learned for first time that one of the jurors worked in the same office as the defendant's brother and following a hearing in chambers in presence of counsel, discharged juror in open court and drew the name of an alternate, there was no abuse of discretion in determining that there was good cause for discharging such juror. West's Ann.Pen.Code, §§ 1089, 1123.

8. Jury 🔑79(3)

A defendant is not entitled to be tried by a jury composed of any particular individuals.

9. Criminal Law 🔑636(1)

The presence of a defendant in a criminal trial is required only where it has a reasonably substantial relation to the fullness of his opportunity to defend against the charges.

10. Criminal Law 🔑636(3)

In prosecution for murder and kidnapping, where trial court learned during trial that one of the jurors worked in the same office as the defendant's brother and questioned such juror in chambers in the presence of counsel, absence of defendant during proceeding, in chambers could not have affected his right to a fair trial and did not constitute error. West's Ann.Pen, Code, §§ 1089, 1123.

11. Criminal Law 🔑696(5)

Where it is apparent from the face of the question that the evidence sought to be elicited will necessarily be inadmissible, a motion to strike is not available unless there has been a preliminary objection.

12. Criminal Law ⚷1036(1)

Where during course of trial defense counsel moved to strike all testimony as to defendant's reactions to accusatory statements made by police when they interrogated him following his arrest, even though some of the evidence had been admitted without objection, but in ruling on motion court chose to pass upon admissibility of all the evidence whether objected to or not, under circumstances, Supreme Court would treat the question of whether there was error in admitting evidence as properly before it for review.

13. Criminal Law ⚷407(1, 2)

Where a statement accusing a defendant of a crime or tending to connect him with its commission has been made to him and he has remained silent or has given an equivocal or evasive reply, evidence of the statement and of his conduct is admissible, but where defendant remains silent under a claim of right to which he is legally entitled, inference of acquiescence in truth is not justified and evidence may not be admitted.

14. Criminal Law ⚷407(2), 1186(4)

In prosecution for murder and kidnapping, admission of testimony as to defendant's reactions to accusatory statements made by police when they were interrogating him following his arrest, was erroneous where statements of police and responses of defendant were made after defendant had told police he was refusing to answer on advice of his attorney, but error did not result in miscarriage of justice where defendant explained circumstances under which he was interrogated and showed that no inference unfavorable to him could properly be drawn from his conduct during interrogation. West's Ann. Cal.Const. art. 6, § 4½.

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Leo A. Sullivan, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., Dale Stoops and John C. Baldwin, Deputy Dist. Attys., Oakland, for respondent.

GIBSON, Chief Justice.

Burton W. Abbott was charged by the grand jury of Alameda County with the kidnaping and murder of Stephanie Bryan. Following denial of a motion to set aside the indictment, Abbott petitioned this court for a writ of prohibition on the ground that the Superior Court of Alameda County did not have territorial jurisdiction of the offenses charged. We denied the petition, and he pleaded not guilty to each of the counts. The trial jury, after finding that Abbott was guilty of kidnaping in violation of section 209 of the Penal Code * and that the victim had suffered bodily harm, fixed the penalty at death. It also found him guilty of first degree murder and made no recommendation as to punishment. His motion for a new trial was denied, and he was sentenced to death on both counts. This appeal comes before us automatically. Pen.Code, § 1239, subd. (b).

Stephanie Bryan, who was a shy, fourteen-year-old honor student at Willard

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* Section 209 of the Penal Code reads in part:

"Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison for life with possibility of parole in cases where such person or persons do not suffer bodily harm."

Junior High School in Berkeley, disappeared on April 28, 1955, while walking home from school. She left school about 3:15 p. m. and met a girl friend with whom she walked south to Ashby Avenue and then east along that street to the point where it is intersected by College Avenue. After stopping at a branch of the public library and two shops in the vicinity of that intersection, the girls continued eastward together on Ashby for several blocks. They parted about 4 p. m., and, when she was last seen by her friend, Stephanie was near the grounds of the Claremont Hotel. From that point she usually followed a road through the hotel grounds, took a pathway that entered the street on which she lived, and then walked a distance of several hundred feet to her home. This part of her route was relatively secluded.

Stephanie was carrying several books, including a French textbook, and a purse which contained a wallet and a pair of glasses. She was wearing, among other garments, a navy blue cardigan sweater over a white slip-on sweater, a blue cotton skirt, several petticoats, nylon panties and a brassiere.

About 4:15 p. m. on the day Stephanie disappeared, several motorists saw a man struggling with a young girl in a car which had stopped suddenly at the side of a road in Contra Costa County, near the Broadway Tunnel, a few miles north of the Claremont Hotel. The girl appeared to be very frightened and was screaming. She was in the back seat of the car, and the man, who was leaning over the front seat, was beating her and pulling her down and away from the rear window. She was wearing a navy blue cardigan garment over something white.

On May 2, four days after Stephanie's disappearance, her French textbook was found beside Franklin Canyon Road in Contra Costa County. Except for the fact that its cover was slightly dampened by dew, the book was clean and dry, although it had rained in the area on April 29 and 30.

Nothing further regarding Stephanie's disappearance was learned until July 15, when her purse and wallet were found in Alameda at the home of defendant Abbott. His wife discovered the articles in a cardboard box in the basement, and, upon reading the identification cards which were in the wallet, she went upstairs and excitedly asked her husband and others who were present if Stephanie Bryan was not the name of the girl whose disappearance had been reported in the newspapers. Abbott said that the purse probably belonged to some friend of Mrs. Abbott. A guest suggested that the police be called, and this was done. As a result of a search conducted by the police in Abbott's home on the following day, Stephanie's glasses, brassiere and the rest of her books were found buried in the basement in eight inches of sand.

When questioned by the police, Abbott said that, on April 28, the day of Stephanie's disappearance, he left his home in Alameda in the morning and drove to a mountain cabin in Trinity County which was owned by his wife's family. He said that he arrived at the cabin sometime after 8:30 on that evening and remained there until May 1.

At the time of these events Abbott was 27 years old and was attending the University of California in Berkeley. He was a regular customer at a doughnut shop which was located less than a block from the school Stephanie attended. This shop was frequented by pupils from that school, and Stephanie occasionally made purchases there. A witness testified that he saw Abbott at the shop on the afternoon in question and that he saw him leave about 3:20 p. m. and enter his car, a 1949 Chevrolet sedan. At 3:30, a car resembling Abbott's and driven by a man who looked like him went through a red light at the intersection of Ashby and College Avenues, traveling about 40 miles an hour, and continued in an easterly direction on Ashby toward the Claremont Hotel. As we have seen, Stephanie walked eastward on Ashby for several blocks and disappeared in the vicinity of the hotel.

Five persons testified that they witnessed the struggle between a man and a young girl on Tunnel Road near the Broadway Tunnel. One of them identified Abbott as the man in the car, another stated that a picture of Abbott published in a newspaper resembled the man, and a third said that the man was about 30 years of age and had a receding hairline like Abbott's. The other two witnesses described the car in which the incident occurred as similar to Abbott's. Tunnel Road leads to the "Orinda Crossroads," and from this point several roads lead to Highway 40 which may be used to reach the area in Trinity County in which the mountain cabin is located.

On July 20, a search party discovered Stephanie's body in a shallow grave about 300 feet from the cabin in Trinity County. Her panties, which had been "cut or torn" through the left side and the crotch, were knotted around her neck. The rest of the clothing Stephanie was wearing on the day of her disappearance was on the body, except for her brassiere, which, as we have seen, was found in Abbott's basement. Because of extensive decomposition, it was impossible to determine by a physical examination whether she had been sexually attacked. The body had been buried while in a state of rigor mortis, and the victim's arms and hands were raised in front of her face. There were multiple compound fractures of the skull and two holes about two inches in diameter through the skull. The head injuries were the principal cause of Stephanie's death. Particles of soil had become enmeshed in her cardigan sweater, and it could be inferred that the soil was wet when she was buried. It had rained and snowed near the cabin for several days prior to April 30, but there had been very little rain in the area during May, June or July.

Abbott was seen near the cabin on the morning of April 29, and he was at Wildwood Inn, a nearby tavern, from 2 p. m. until midnight of that day. Abbott's brother and sister-in-law joined him at the cabin about 3 a. m. on April 30. They all left at the same time on the afternoon of May 1, Abbott driving alone in his car. Their return route took them over Franklin Canyon Road where Stephanie's French textbook was discovered about 7:30 a. m. the next morning. During this portion of the trip, Abbott's car was behind the one in which his brother and sister-in-law were riding. Abbott arrived home about 8 or 9 o'clock that evening.

On May 2 Abbott returned to the area in Contra Costa County through which he had traveled the day before on his way home from the mountain cabin. The records of an oil company showed that he purchased gasoline at a station located near the place where Stephanie's book had been found earlier that morning. Abbott admitted being in the vicinity between 11 a. m. and 1 p. m., and said he had gone there to purchase used tires. He was unable to name or describe a place where he had stopped to look at tires, and he did not purchase any. The area is about 12 miles north of the campus of the university where Abbott had classes scheduled at 10, 11 and 1 o'clock.

A search of Abbott's car led to the discovery of two hairs which were indistinguishable from Stephanie's and six which were very similar to her hair. Eighteen fibers matching those in four of her garments were also found. There was blood deep in the floor mat in the back of the car, and the absence of blood on the surface indicated that the mat had been washed. The cardboard box in which Stephanie's purse and wallet were found contained old clothes which Abbott usually wore at the mountain cabin. His boots were encrusted with red mud which was the same as a sample of soil taken from Stephanie's grave at a point nine inches below the surface. Several fragments of bloodstained cleansing tissue which had been carried by a pack rat from the grave site to a nearby nest were of the type used by Abbott.

When first questioned by the police, Abbott described in detail the route he said he had taken from his home in Alameda to the cabin in Trinity County. The route which he described would not have taken him through Sacramento. Abbott's brother told the police that Abbott had told him that he had stopped in Sacramento en route to the cabin. Upon being informed by the police of his brother's statement, Abbott changed his story and said that he had stopped there at the office of the "State Bureau of Land Management" about 4 p. m., gave a description of the office and drew a diagram of it. The next day he said that, although he had gone to Sacramento, he had not been able to find the office.

At the trial, Abbott testified that he was not in Berkeley on April 28, that he started for the cabin from his home about 10:45 a. m. and that, after stopping to say goodbye to his wife at the beauty shop where she was employed, he proceeded to Sacramento, where he made an unsuccessful search for the land office. He said that he then drove north toward Trinity County and stopped at a restaurant about 3 p. m., where he was served by a waitress who had dusty blonde hair and was 25 or 30 years old. He testified that he also stopped at the Wildwood Inn for a drink about 8:30 p. m. and that he then drove two miles to the mountain cabin, built a fire and went to bed.

Abbott's account of his activities on April 28 was in conflict not only with the evidence connecting him with Stephanie's disappearance and death which is set forth above but with other testimony as well. He was seen at the state controller's office in Oakland at 1:30 p. m. and at the beauty shop where his wife worked about 2:30 p. m. There was no waitress on duty between 2 and 10 p. m. in the restaurant north of Sacramento in which he claimed to have stopped at 3 o'clock, and no waitress who looked like the one described by him had been employed there during April of 1955. The manager of the Wildwood Inn and his wife, both of whom knew Abbott, testified that Abbott was not at the inn on the night of April 28. A man who drove past the cabin shortly after 10 o'clock said that he did not smell any smoke and saw no tire tracks, light or other sign of life there.

[1] The evidence is clearly sufficient to support the judgment. Abbott contends, however, that the judgment should be reversed, claiming that the Superior Court of Alameda County did not have territorial jurisdiction of the offenses of which he was convicted, that the court erred in discharging a juror and substituting an alternate, that error was committed in the admission of evidence, and that the trial judge and the district attorney were guilty of prejudicial misconduct.

[2] The jurisdiction of a criminal action for kidnaping is in the county in which the offense was committed or out of which the victim was taken or in which an act was done by the defendant in promoting or aiding in the commission of the offense. Pen.Code, § 784. For definition of the terms used in § 784 see Pen.Code, § 691. Stephanie was taken out of Berkeley, which is in Alameda County, and there can be no doubt that the superior court of that county had jurisdiction to try the offense of kidnaping.

[3–5] Section 790 of the Penal Code provides that the jurisdiction of a criminal action for murder is in the county where the fatal injury was inflicted or the party died or his body was found. Stephanie's body was not found in Alameda County, and there is no evidence that either fatal injury or death occurred there. We are of the view, however, that section 790 was not intended to exclude the application of other statutory provisions relating to territorial jurisdiction in criminal cases. Section 781 of the Penal Code provides, "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory." Under this section, the county in which preliminary arrangements for the commission of a crime are made is a proper county in which to prosecute the completed offense, although the acts performed there did not constitute an essential element of the crime. People v. Gerundo, 112 Cal.App.2d 863, 869, 247 P.2d 398; People v. Anderson, 90 Cal.App.2d 326, 330, 202 P.2d 1044; see People v. Buffum, 40 Cal.2d 709, 717, 256 P.2d 317. We are satisfied that, where, as here, charges of both kidnaping and murder are involved and arise out of acts occurring in more than one county, section 781 is to be read as complementing section 790 so that the court of the county out of which the victim was taken has jurisdiction of the offense of murder. Cf. State v. Wilson, 38 Wash.2d 593, 231 P.2d 288.

After evidence had been received for about 11 days, the judge called counsel for both sides into chambers and stated that he had some question as to juror Rettig's qualifications, that he had requested the sheriff to investigate the matter and that, according to the sheriff's report, Rettig worked in the same office as Abbott's brother and used a desk 25 feet away from him. The judge then read portions of the report which set forth statements made by Rettig's fellow employees to the effect that Abbott's brother had been pointed out to Rettig and that, before being selected for jury service, Rettig had discussed the case with three employees and had expressed the opinion to one of them that Abbott was being framed.

The judge informed the attorneys that he intended to question Rettig in chambers and that, while counsel could seek to clarify the facts, there should be no cross-examination. Defense counsel protested that the proceeding to disqualify Rettig was not proper, that the examination of the juror should be conducted in open court, and that they reserved "any objections and any motions of any possible character."

Rettig was called into chambers and was questioned by the judge in the presence of counsel. He said that he worked in the same office as Abbott's brother at a desk 25 feet away and that he had never talked to the brother and did not know who he was until he was pointed out in court. Rettig said that he had not discussed the case, with the possible exception of some remark about the chances of being selected as a juror, and that, although he realized that his service might result in some hardship, he felt that he could render an impartial verdict and did not wish to be relieved. Rettig was discharged by the judge in open court in the presence of the jury. The judge stated that he had decided to discharge the juror because of Rettig's proximity to Abbott's brother in the office where they worked and in order to save Rettig from embarrassment or criticism and that, although there was nothing in the record showing that Rettig knew Abbott's brother or had discussed the case with him, there were people in the office who knew both men. Abbott's motion for a mistrial was denied, and the court seated the first of two alternate jurors who had been selected and sworn at the beginning of the trial.

[6] Section 1089 of the Penal Code provides, in part, "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his duty * * * the court may order him to be discharged and draw the name of an alternate * * *." (See also Pen.Code, § 1123.) There is no statutory provision regarding the procedure to be followed in applying section 1089, but it seems clear that the taking of sworn testimony under the usual rules of evidence is not necessary where the facts upon which action is taken are uncontroverted. See People v. Lanigan, 22 Cal.2d 569, 577–578, 140 P.2d 24, 148 A.L.R. 176; People v. Hess, 107 Cal.App.2d 407, 424–425, 237 P.2d 568; People v. Kobey, 105 Cal.App.2d 548, 559–560, 234 P.2d 251; People v. Burns, 84 Cal.App.2d 18, 28 et seq., 189 P.2d 868. The discharge of Rettig was based on the admitted fact that he worked in the same office as Abbott's brother, using a desk only 25 feet away.

[7–10] The trial court did not abuse its discretion in determining that there was good cause for discharging Rettig. That determination, therefore, cannot now be disturbed. In re Devlin, 139 Cal.App.2d 810, 813, 294 P.2d 466; cf. People v. Daugherty, 40 Cal.2d 876, 889–890, 256 P.2d 911; People v. Craig, 196 Cal. 19, 25, 235 P. 721. Moreover, there is no showing that Abbott was prejudiced. He was not entitled to be tried by a jury composed of any particular individuals. People v. Howard, 211 Cal. 322, 324–325, 295 P. 333, 71 A.L.R. 1385. The juror who was substituted for Rettig was examined fully by both sides on voir dire, accepted as a qualified alternate and served as such from the start of the trial until seated as a regular juror. There is no claim that he was unable to render a fair verdict. It was not error to conduct the proceedings in chambers in Abbott's absence. No objection based on this ground was made until after Rettig was discharged in open court, but even if we assume that Abbott is now in a position to raise the point, it is settled that the presence of a defendant is required only where it has a reasonably substantial relation to the fullness of his opportunity to defend against the charge. Snyder v. Massachusetts, 291 U.S. 97, 105–108, 54 S.Ct. 330, 78 L.Ed. 674; People v. Isby, 30 Cal. 2d 879, 893–894, 186 P.2d 405. The absence of Abbott during the proceeding in chambers could not have affected his right to a fair trial. The cases upon which he relies are readily distinguishable because they involved the original selection of a jury in such a manner that jurors unacceptable to the defendant either participated in the trial or may have done so. Lewis v. U. S., 146 U.S. 370, 13 S.Ct. 136, 36 L.Ed. 1011; Hopt v. People of Territory of Utah, 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed. 262.

[11, 12] It is contended that the court erred in receiving, as admissions by conduct, evidence of Abbott's reactions to accusatory statements made by the police when they interrogated him following his arrest. Some of the evidence was admitted without objection, but a motion to strike all of it was later made and fully argued. The court granted the motion as to some of the evidence and denied it as to the remainder. The stricken matter included some evidence to which no objection had been made, and there is no indication that the partial denial of the motion was based on the absence of objections. The general rule is that, when it is apparent from the face of a question that the evidence sought to be elicited will necessarily be inadmissible, a motion to strike is not available unless there has been preliminary objection. People v. Scalamiero, 143 Cal. 343, 345, 76 P. 1098. It appears, however, that, in ruling on Abbott's motion, the court chose to pass upon the admissibility of all of the evidence, whether objected to or not. Under the circumstances, we shall treat the question of whether there was error in admitting the evidence as properly before us for review.

[13] The principles to be applied in determining the admissibility of this type of evidence are clearly defined and fully set forth in People v. Simmons, 28 Cal.2d 699, 711 et seq., 172 P.2d 18. See also People v. Davis, 43 Cal.2d 661, 669–672, 276 P.2d 801. In general, where a statement accusing a defendant of a crime or tending to connect him with its commission has been made to him, and he has remained silent or has given an equivocal or evasive reply, evidence of the statement and of his conduct is admissible on the theory that the natural reaction of an innocent man would have been to make a denial and that, therefore, his failure to deny may be regarded as giving rise to an inference of acquiescence in the truth of the statement or as indicating a consciousness of guilt. However, where the defendant remains silent under a claim of right to which he is legally entitled, such an inference is not justified and the evidence may not be admitted.

[14] The statements of the police and Abbott's responses were made after he had told the police that he was refusing to "talk" on the advice of his attorney. Although he answered some questions, none of his replies indicated a consciousness of

guilt, and, when he did not answer a question, the record shows that he was acting on the advice of counsel and standing on his right to refuse to reply. Under the circumstances, it was error to admit the evidence. People v. McGee, 31 Cal.2d 229, 238–239, 187 P.2d 706; People v. Simmons, 28 Cal.2d 699, 711 et seq., 172 P.2d 18.

We have concluded, however, that the error does not require a reversal of the judgment. The interrogation by the police consisted largely of a recitation of the facts with respect to finding Stephanie's belongings in the basement of Abbott's home and the discovery of her body near the mountain cabin, together with the assertion that, unless Abbott had been "framed," these facts showed that he was guilty. Abbott told the police that he did not know of anyone who would "frame" him and that he could not explain how Stephanie's belongings and her body came to be where they were found. The questions which Abbott refused to answer covered much the same ground as those he answered. When examined on the witness stand concerning his responses to questions asked by the police, Abbott took good advantage of the opportunity to explain the circumstances under which he was interrogated and to show that no inferences unfavorable to him could properly be drawn from his conduct during the interrogation. There is abundant evidence of Abbott's guilt, and an examination of the entire record shows that the error did not result in a miscarriage of justice. (See Cal.Const. art. VI, § 4½.)

Finally, Abbott complains of asserted prejudicial misconduct on the part of the judge and the district attorney during the course of the trial. We have carefully examined all of his claims and find no merit in any of them.

The judgment and the order denying a new trial are affirmed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

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47 Cal.2d 337

Amelia PANOPULOS, Plaintiff and Appellant,

v.

Gussie MADERIS, Defendant and Respondent.

Catherine FITTS, Plaintiff and Appellant,

v.

Gussie MADERIS, Defendant and Respondent.

Beatrice SCHUNKE, Plaintiff and Appellant,

v.

Gussie MADERIS, Defendant and Respondent.

Elizabeth HODENSON, Plaintiff and Appellant,

v.

Gussie MADERIS, Defendant and Respondent.

S. F. 19514–19517.

Supreme Court of California.
In Bank.

Nov. 21, 1956.

As Modified on Denial of Rehearing
Dec. 19, 1956.

Automobile accident case. The Superior Court, Santa Clara County, John D. Foley, J., rendered judgments adverse to plaintiffs, and they appealed. The Supreme Court, Shenk, J., held that where automobile owner stepped out of automobile without applying emergency brake and leaving motor running and automatic shift lever in such position that slight push on it would start automobile, when she invited her guests to step out, but when one of them attempted to slide across driver's seat, automobile began to move forward and crashed into wall, injuring guest, owner had not lost status as "driver" within meaning of statute depriving guests of actions for civil damages against driver in absence of wilful misconduct or intoxication.

Judgments affirmed.

Carter, J., dissented.

Opinion 293 P.2d 121 vacated.

1. Automobiles ⚷181(1)

Guest statute providing that no guest who accepts ride without giving compensation has right of action for civil damages against driver, unless driver was intoxicated or guilty of wilful misconduct is a limitation on liability of driver of vehicle in cases where rules of ordinary negligence would otherwise apply. West's Ann.Vehicle Code, § 403.

2. Automobiles ⚷244(20)

In passengers' actions against automobile owner for injuries they sustained when owner stepped out of automobile without applying emergency brake, leaving motor running and leaving automatic shift in such position that a slight push on it would start automobile in motion, for injuries sustained when one of the passengers attempted to slide by the driver's seat and the automobile started and ran into wall, evidence supported jury's finding on special interrogatories that plaintiffs were guests and not paying passengers. West's Ann.Vehicle Code, § 403.

3. Appeal and Error ⚷171(1)

It is general rule that party may not for first time on appeal change theory of action, but there are exceptions where theory newly presented involves controverted questions of fact or mixed questions of law and fact, and if question of law only is presented on facts appearing in record, change may be permitted, but if theory contemplates factual situation, consequences of which are open to controversy and were not put in issue at trial, the theory may not be permitted.

4. Automobiles ⚷181(1), 245(24)

For purposes of guest statute providing that persons riding in vehicle on highway without giving compensation have no right of action for civil damages against the "driver" in absence of his intoxication or wilful misconduct, a person does not under all circumstances, as matter of law, lose status as "driver" merely because he vacates driver's seat and is out of automobile at time of accident, and whether he is or is not driver at particular time depends on facts of each case. West's Ann.Vehicle Code, § 403.

5. Automobiles ⚷181(1)

In amending guest statute to deprive of action for civil damages guests in any vehicle "upon a highway" instead of "moving upon any of the public highways" as the statute formerly provided, it was intention of legislature to broaden scope of statute so as to include situations where vehicle was not moving and guest was not riding so that it would not be imperative that, at time, driver be actually at wheel of vehicle. West's Ann.Vehicle Code, § 403.

6. Automobiles ⚷181(1)

Where automobile owner stepped out of automobile without applying emergency brake and leaving motor running and automatic shift lever in such position that slight push on it would start automobile, when she invited her guests to step out, but when one of them attempted to slide across driver's seat, automobile began to move forward and crashed into wall, injuring guest, owner had not lost status as "driver" within meaning of statute depriving guests of actions for civil damages against driver, in absence of wilful misconduct or intoxication. West's Ann.Vehicle Code, §§ 69, 403, 482–484, 595.

◆

James F. Boccardo and Edward J. Niland, San Jose, for appellants.

Campbell, Custer, Warburton & Britton, Frank L. Custer, San Jose, and W. R. Dunn, Burlingame, for respondent.

SHENK, Justice.

These are appeals by the plaintiffs Amelia Panopulos, Catherine Fitts, Beatrice Schunke and Elizabeth Hodenson from judgments on verdicts for the defendant Gussie Maderis in four separate actions for personal injuries arising out of an automobile accident which occurred while the plaintiffs were riding in the defendant's automobile. The causes were consolidated and tried together.

The plaintiffs and another lady accompanied the defendant in her automobile from San Jose to Mountain View where they attended a public card party, as they had done or other occasions. On the return trip Mrs. Fitts sat in the front seat next to the defendant who was in the driver's position, and Mrs. Schunke sat on the extreme right of the front seat. The other three ladies sat in the back. Upon arriving in San Jose the defendant stopped her automobile in front of Mrs. Fitts' home on level ground, stepped out of the car and stood at the side thereof. The automobile was equipped with automatic transmission and the defendant left the shift lever in neutral position with the motor running. From the neutral position very little force was required to move the gear shift lever to drive or low positions, whereas had it been left in the park position it would have been first necessary to lift the lever before changing its position. In the park position the rear wheels would be locked and the car could not be moved without skidding. From either the low or drive, but not in neutral position the automobile would proceed forward if the speed of the motor was advanced beyond the idling speed, except when the emergency brake was properly engaged.

After alighting the defendant invited Mrs. Fitts to leave the car on the driver's side. This she proceeded to do. She was elderly and infirm and had never driven an automobile. In attempting to slide across the seat she apparently caused the gear shift lever to be moved to either the low or drive position and touched the accelerator, although there is no direct evidence to that effect. The car went forward, jumped a curb and crashed against a wall some 300 feet from where the defendant alighted. All four plaintiffs were injured.

[1] The evidence was conflicting as to whether the plaintiffs were paying passengers or guests within the meaning of the guest law as incorporated in section 403 of the Vehicle Code. That section is a limitation on the liability of the driver of a vehicle in cases where the rules of ordinary negligence would otherwise apply. McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P.2d 909; Walters v. Du Four, 132 Cal.App. 72, 22 P.2d 259, 23 P.2d 1020. It provides in its pertinent parts: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride * * * has any right of action for civil damages against the driver of such vehicle * * * for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver."

[2] At the trial the plaintiffs sought to show the inapplicability of section 403 solely upon the theory that they were paying passengers and not guests of the defendant driver. The defendant acquiesced in that theory and in response to a special interrogatory the jury found that the plaintiffs were guests and not paying passengers. That finding is supported by substantial evidence and there is no contention to the contrary. It thus established the relationship contemplated by the statute and on the theory on which the causes were tried foreclosed liability on the part of the defendant. There was no evidence of intoxication or wilful misconduct.

The judgments might well be affirmed on the theory on which the causes were tried without further discussion were it not for another theory advanced by the plaintiffs for the first time on appeal to the effect that section 403 is not applicable to the facts of this case for another and independent reason. The plaintiffs now contend that section 403 is not applicable because, as a matter of law, the defendant was not the "driver" of the vehicle at the time of the accident as contemplated by section 403.

[3, 4] In reply the defendant asserts that where a cause has been tried on a theory acquiesced in by the parties, an appellant cannot seek a reversal on an entirely new theory. See Durkee v. Chino Land and Water Co., 151 Cal. 561, 569, 91 P. 389; Merrill v. Kohlberg, 29 Cal.App. 382, 386, 155 P. 824. It is the general rule that a party to an action may not, for the

first time on appeal, change the theory of the cause of action. Ernst v. Searle, 218 Cal. 233, 240, 22 P.2d 715; Gray v. Janss Investment Co., 186 Cal. 634, 641, 200 P. 401. There are exceptions but the general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted. See Schirmer v. Drexler, 134 Cal. 134, 66 P. 180. But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal. See Gibson Properties Co. v. City of Oakland, 12 Cal. 2d 291, 299, 83 P.2d 942; Anderson v. Derrick, 220 Cal. 770, 777, 32 P.2d 1078; Shumate v. Johnson Publishing Co., 139 Cal. App.2d 121, 130, 293 P.2d 531; Townsend v. Wingler, 114 Cal.App.2d 64, 68, 249 P.2d 613. It may not properly be said that the person manually directing the operation of an automobile in the course of making a trip therein would, under all circumstances, and as a matter of law, lose his status as a driver of the car as contemplated by section 403 merely because he vacates the driver's seat and is out of the car at the time of an accident. Whether he is or is not the driver of the car at that particular time would seem to depend on the facts of each case. In that event the party seeking to avoid liability by establishing his status as the driver should have the right to present evidence on the subject at the trial in response to appropriate allegations and proof and have the questions passed upon by the jury under appropriate instructions.

However, when as here the facts with reference to the contention newly made on appeal appear to be undisputed and that probably no different showing could be made on a new trial it is deemed appropriate to entertain the contention as a question of law on the undisputed facts and pass on it accordingly.

The question whether section 403 is applicable when the host driver is outside of the automobile at the time of the accident is claimed to be a novel one in this state. But such is not the case. In Frankenstein v. House, 41 Cal.App.2d 813, 107 P.2d 624, 626, it appeared that during the course of a ride the plaintiff was a guest. The defendant parked and temporarily left the automobile on a steep hill. The plaintiff remained in the car. It rolled down the hill and the plaintiff was injured. The court held that where the complaint alleged merely ordinary negligence a demurrer without leave to amend was properly sustained. The question discussed in the opinion was whether the guest relationship continued to exist while the driver was temporarily just outside of the automobile. The court concluded that the plaintiff was a guest "to the same extent as if the defendant, in a moment of frenzy, had leaped from the car as it rolled down the precipitous street. * * * As long as a person, without compensation to the driver, has entered a car upon the invitation of such driver and remains 'in the vehicle upon a highway', 'during such ride' (sec. 403) he is a guest and cannot recover damages for the simple negligence of the host." The plaintiffs here attempt to distinguish that case on the ground that the only point discussed by the court was the status of the plaintiff as a guest. The court did not discuss the status of the defendant as a driver at the moment of injury. But obviously one cannot be a guest except in relationship to another, namely, the driver as contemplated by section 403. It is apparent that the court in the Frankenstein case, in determining that section 403 was applicable, deemed it necessary to conclude only that the plaintiff continued in the guest status while the defendant absented himself from the automobile. The case properly held that the relationship between the parties of driver and guest satisfied the requirements of section 403. On its facts it cannot be distinguished in theory from the present case. See also Castle v. McKeown, 327 Mich. 518, 42 N.W. 2d 733.

The plaintiffs would require that the defendant be actually driving the automobile or be "in a position to drive" in order to become or remain within the provisions of the statute. They rely on section 69 of the Vehicle Code which provides that a "'Driver' is a person who drives or is in actual physical control of a vehicle." The language of that section is not helpful. It is significant that the statute defines driver to be one "who drives" as distinguished from one "who is driving." One who is driving is, of course, also a driver and falls within the category of those who are "in actual physical control of a vehicle." Since the statute contemplates both as drivers it must be assumed that the Legislature intended that one not at a particular moment in actual control of a vehicle may also be deemed to be a driver. See Prager v. Isreal, 15 Cal.2d 89, 93, 98 P.2d 729. Other code provisions impose on a driver the duty of furnishing aid and information when a vehicle is involved in an accident immediately prior thereto. They do not require that the driver be then in actual control of the vehicle. §§ 482, 483, 484, of the Vehicle Code. Section 595 of the same code provides that "No person driving, or in control of, or in charge of, a motor vehicle shall permit it to stand on any highway unattended without first effectively setting the brakes thereon and stopping the motor thereof." It is argued by the defendant that she could not successfully contend that she had not violated that section because she was outside of the car when the brakes were not set and the motor left running. Attention has been called to the fact that in some jurisdictions it is made a penal offense for the driver of an automobile to leave the ignition key in place when the car is unattended. It is argued that it would be futile for the person responsible for such a condition to resist prosecution because he was outside of the car when cited for violation and therefore was not the driver as contemplated by law. It is asserted by the defendant that the present situation is in legal effect the same as those above referred to and that by a parity of reasoning she is entitled to the status of a driver within the meaning of section 403. Without deciding the effect of other laws under the circumstances stated, references thereto appear to be pertinent.

[5] Prior to 1935 the contention that section 403 did not apply to the driver who had temporarily left the automobile could have reasonably been advanced. The statute then provided that a guest must have accepted a ride in a vehicle "moving upon any of the public highways" and that he must have been injured "while so riding as such guest." Stats.1929, ch. 787, § 1, p. 1580. An amendment in 1935 contains the present language. The Legislature there substituted the phrase "in any vehicle upon a highway" for "moving upon any of the public highways," and "during such ride" for "while so riding." The significance of the amendment cannot be disregarded. The legislative intent to broaden the application of the section (see Prager v. Isreal, supra, 15 Cal.2d 89, 94, 98 P.2d 729) to include situations where the vehicle was not "moving" and the guest was not "riding" would not make it imperative that the driver be actually at the wheel at the time of the accident. In commenting on the amendment the court in Smith v. Pope, 53 Cal.App.2d 43, stated at page 47, 127 P.2d 292, 295: "In other words, it was not necessary, as it was before under the former section, to show that the vehicle was 'moving upon any highway * * *,' but only to show that the injury occurred 'during the ride' which would include in that category all the time elapsed from the time of entering the vehicle, and while so continuing such occupancy, until the journey's end. This construction receives support in Frankenstein v. House * * *."

[6] The situation in the present case is to be distinguished from that where a guest has temporarily left the vehicle. It was held in Boyd v. Cress, 46 Cal.2d 164, at page 167, 293 P.2d 37, 39, after reviewing numerous cases that "This consistent line of authority establishes the rule that the protection of the guest statute extends only to injuries suffered 'during the ride' in the

sense that the plaintiff [guest] remained in or upon the vehicle at the time of the accident. After the guest steps out of the automobile, he enters into a pedestrian or other nonguest status. He no longer occupies the host's property or enjoys his hospitality." But in a case where the driver steps out and the guest remains in the vehicle the latter still occupies the host's property, enjoys his hospitality and continues in the relationship contemplated by section 403. It is obvious that the limitation on liability provided for therein relates to those acts of ordinary negligence performed pursuant to that relationship. Ruel v. Langelier, 299 Mass. 240, 12 N.E.2d 735.

It is concluded that the record supports the judgments on the theory on which the causes were tried, and also that the contention first made by the plaintiffs on appeal that the defendant was not the driver of the car at the time of the accident is not supported by the record. Other contentions have been urged by the plaintiffs in support of their appeals. They have been considered and are deemed to be without merit.

The judgments are affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

In deciding that Vehicle Code section 403, the California "guest law," is applicable to a situation where the person who had been driving the automobile was outside of the automobile when the accident causing the injury occurred, the majority has concluded that the term "driver," as used in the code section, comprehends something more than one actually in control of a vehicle. In support of this conclusion, the majority relies upon the case of Frankenstein v. House, 41 Cal.App.2d 813, 107 P.2d 624, and upon an interpretation of the term "driver" in the light of other sections of the Vehicle Code. It is submitted that an examination of section 403, its background and cases interpreting it and other so-called "guest statutes" demonstrates that this conclusion is erroneous.

At common law, a guest had a right of action against a driver for injuries received as a result of the ordinary negligence of the driver, Callet v. Alioto, 210 Cal. 65, 69, 290 P. 438. With the growth of automobile usage and the resultant increase in accidents and litigation arising therefrom, California, along with many other states, enacted a statute (now section 403) preventing recovery for ordinary negligence by a guest who has accepted the hospitality of the driver. See Kruzie v. Sanders, 23 Cal.2d 237, 242, 143 P.2d 704. Because the section deprives the plaintiff of his common law action against his driver-host, it has been held repeatedly that the section must be strictly construed. In Prager v. Isreal, 15 Cal.2d 89, 93, 98 P.2d 729, 731, we stated that: "It is well settled in this and other states that the so-called 'guest laws' are in derogation of the common law and must be construed strictly. See McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P.2d 909; Callet v. Alioto, 210 Cal. 65, 290 P. 438; Rocha v. Hulen, 6 Cal.App.2d 245, 254, 44 P.2d 478; Hunter v. Baldwin, 268 Mich. 106, 255 N.W. 431. Furthermore, as stated in Rocha v. Hulen, supra (6 Cal.App.2d 245, 44 P.2d 483), 'The common-law right of having redress for injuries wrongfully inflicted, being lessened by such statutes, necessitates strict construction, and also *that cases be not held within the provisions of such statutes unless it clearly appears that it should be so determined.*' (Emphasis ours.)"

In this light, then, the question here is whether the term "driver" is to be interpreted as denoting one who is actually operating or in a position to operate a motor vehicle, or, as the majority has concluded, as meaning anyone who is capable of operating a vehicle regardless of where he may be at the time in question. The pertinent portions of section 403 read: "No person who as a guest accepts a ride * * * has any right of action * * * against the driver of such vehicle * * * on account of personal injury to * * * such guest during such ride * * *." According to the plain import of these words, it cannot be said that the defendant, after leaving the automobile unattended, was "the driver of such vehicle." Yet the majority has adopted a contrary definition, pointing to Vehicle Code sections 69 (defining "driver" as one "who drives or is in actual physical control of a vehicle"), 482, 483, 484 (imposing a duty under criminal sanctions upon a driver involved in an accident to furnish aid and information) and 595 (prohibiting the leaving of unattended vehicles without locking the brakes and stopping the motor but not using the term "driver"). These sections are of doubtful assistance here in view of the strict construction to which section 403 is subject. Moreover, an examination of the sections does not lead unerringly to the conclusion that the term "driver" was intended to include one not actually driving or in a position to drive the vehicle.

In one sense, of course, anyone who has learned to operate a motor vehicle might be called a "driver." By the same token, anyone to whom the hospitality of another is extended is a "guest" of the other. However, this broad meaning of the term "guest" is not employed in determining the application of section 403, for as this court recently held in Boyd v. Cress, 46 Cal.2d —, 293 P.2d 37, one is not a "guest" within the purview of the section unless he is in or upon the vehicle at the time of the accident. That the converse is true, that is, that one is not a "driver" within the purview of the section unless he is operating the vehicle, is indicated in the case of Puckett v. Pailthorpe, 207 Iowa 613, 223 N.W. 254, 256. Interpreting a statute similar to section 403, the Iowa Supreme Court said: "Manifestly, Section 5026-b1, supra [I.C.A. § 321.494], contemplates a person on such journey in a motor vehicle, *driven or operated by some one* [emphasis added.] * * * Entrance must be made into an automobile then in the operation of a driver so that a journey can be taken. *There can be no trip without a driver.* [Emphasis added.] Thus a person in such motor car without a driver operating it is not a passenger, within the meaning of the section under consideration; for, in the absence of the necessary operator, there can be no journey, and consequently no riding. Without the driver, the journey, and the riding, there is no passenger in the case at bar. If then, under the provisions of the statute in question, *there is no driver, there can be no passenger.*" (Emphasis added.)

It is clear that the court interpreted "driver" as meaning one actually operating the automobile. By analogy, this interpretation is in accord with the California cases which have defined "guest" as one actually in the vehicle for the reason that otherwise there is no "ride." In the Puckett case, we see that there is another requisite for a "ride," or a "trip" as that case called it, namely, a "driver." Furthermore, the Frankenstein case is doubtful authority for the position adopted by the majority here for the court in that case relied upon two cases, Nemoitin v. Berger, 111 Conn. 88, 149 A. 233, and Head v. Morton, 302 Mass. 273, 19 N.E.2d 22, which do not support the conclusion there reached. Both of those cases involved situations in which the driver was in his driving position behind the steering wheel, which was not the case in Frankenstein v. House or here. Moreover, in the Head case, which was decided in Massachusetts which has no guest statute but which restricts a guest's recovery under its common law, Ruel v. Langelier, 299 Mass. 240, 243, 12 N.E.2d 735, the guest was not yet in the vehicle when the mishap occurred, a situation in which section 403 would clearly not apply in California, Boyd v. Cress, supra.

The reasoning advanced in the majority opinion that the 1935 amendment of section 403 precludes the necessity of the driver being at the wheel is not borne out by the opinion of this court in the Boyd case. There, a unanimous court, speaking through Mr. Justice Shenk, said, 46 Cal.2d at page 167, 293 P.2d at page 39: "The defendant construes the 1935 amendment as extending the guest statue to injuries occurring during or incidental to the 'journey,' notwithstanding that the plaintiff is entirely outside of the automobile when the injury is sustained. But this construction would involve the reading of new and different language into the statute." If the 1935 amendment leaves intact the requirement that the guest be in the vehicle, it likewise leaves intact the requirement enunciated in Puckett v. Pailthorpe, supra, that there be a driver in control of the vehicle. To hold otherwise is to read "new and different language into the statute."

Clearly then, as section 403, in restricting a guest's cause of action arising "during such ride," requires that the guest be in the vehicle, consistent interpretation of the section demands that there also be a driver in the vehicle, for without a rider *and* a driver, there can be no "ride." For this reason, I would reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

47 Cal.2d 290

In re ESTATE of Isabella N. SKINKER, Deceased.

Nancy Skinker WEDDLE, Executrix, and R. M. Switzler, Attorney for said Executrix, Appellants,

v.

Robert C. KIRKWOOD, State Controller, Respondent.

L. A. 24036.

Supreme Court of California.

Nov. 20, 1956.

Proceeding wherein the Superior Court, San Diego County, L. N. Turrentine, J., entered an order overruling objections to a report of the inheritance tax appraiser and fixing an inheritance tax due by reason of the death of testatrix. The executrix and her attorney appealed. The Supreme Court, McComb, J., held that executrix' commissions and attorney's fees allowed as deductions in computation of inheritance tax should be the amount of the statutory commissions in effect at the time of testatrix' death and not increased fees allowed by a statutory amendment which became effective after date of death.

Order affirmed.

Carter, J., dissented.

Opinion, 299 P.2d 411, vacated.

1. Taxation 🔑895(7)

Executrix' commissions and attorney's fees allowed as deductions in computation of inheritance tax should be the amount of the statutory commissions in effect at the time of testatrix' death and not increased fees allowed by a statutory amendment which became effective after date of death. West's Ann.Prob.Code, § 901; West's Ann. Rev. & Tax.Code, § 13988.

2. Taxation 🔑895(6)

Deductions allowable for inheritance tax purposes are not necessarily those paid by the estate.

3. Taxation 🔑895(7)

Under statute permitting certain deductions for inheritance tax purposes, the federal estate tax deduction is not necessarily the actual tax paid, but is either that amount or a smaller amount based on approximate calculations. West's Ann.Rev. & Tax.Code, § 13989.

4. Taxation 🔑895(7)

Intent of legislature in enacting statute permitting deductions of commissions for inheritance tax purposes was not to allow as deductions the actual burden sustained by an estate, but a close approximation thereof, based on standards set up in the inheritance tax law. West's Ann.Rev. & Tax.Code, § 13988.

5. Taxation 🔑895(7)

Extraordinary expenses of administration although borne by an estate are not a deduction for inheritance tax purposes.

6. Taxation 🔑861

Inheritance taxes are fixed and determined in accordance with the law in effect at the date of transfer.

7. Taxation 🔑859(7)

The legislature cannot, by a subsequent act, increase or decrease the rate of inheritance taxation, remit such tax, or in any way surrender, impair or limit rights that have become fixed.

8. States 🔑119

Where a tax has become due, a subsequent act of the legislature reducing the tax by reason of a change in the exemptions, tax rates, or in any other manner, is a gift of state monies prohibited by the Constitution. West's Ann.Const. art. 4, § 31.

9. Constitutional Law 🔑48

When two alternative interpretations of a statute are presented, one of which would be unconstitutional, and the other constitutional, the court will choose that construction which will uphold the validity of the statute and will be constitutional.

10. Taxation 🔑859(7)

Statutory fees and commissions which are to be deducted in computation of inheritance tax are in the nature of fixed charges, and both from the standpoint of heirs, devisees, the personal representative, and the attorney, are substantive in character and not procedural, and therefore amendment in the amount of such fees and commissions cannot be made effective retroactively. West's Ann.Prob.Code, § 901; West's Ann.Rev. & Tax.Code, § 13988.

◆

R. N. Switzler, San Diego, for appellants.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Walter H. Miller, Chief Asst. Inheritance Tax Atty., and Vincent J. McMahon, Asst. Inheritance Tax Atty., Los Angeles, for respondent.

McCOMB, Justice.

This is an appeal by Nancy Skinker Weddle, executrix of the last will and testament of Isabella N. Skinker, and R. M. Switzler, attorney for said executrix, from an order overruling objections to the report of the inheritance tax appraiser and fixing an inheritance tax due by reason of the death of Isabella N. Skinker.

Chronology

i. Isabella N. Skinker died July 19, 1955.

ii. Decedent's will was probated August 5, 1955, and Nancy Skinker Weddle appointed as executrix.

iii. At the time of decedent's death section 901 of the Probate Code read in part as follows:

> "The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; and for all above fifty thousand dollars, at the rate of one per cent. * * *" St.1931, c. 281, p. 646, § 901.[1]

iv. By an amendment to section 901 of the Probate Code effective September 7, 1955, the fee schedule was increased as follows:

Size of Estate	Former Rates	New Rates [2]
First $ 1,000	7%	7%
Next 9,000	4	4
Next 10,000	3	3
Next 30,000	2	3
Next 100,000	1	2
Next 350,000	1	1½
Over 500,000	1	1

v. The inheritance tax appraiser filed his inheritance tax report and allowed as deductions executor's and attorney's commissions based on the "old rates" which were in effect on the date of decedent's death.

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[1] Hereinafter the rates in effect pursuant to section 901 of the Probate Code at the time of decedent's death on July 19, 1955, will be referred to as the "old rates."

[2] The rates in effect pursuant to section 901 of the Probate Code effective on and after September 7, 1955, will be referred to as the "new rates."

vi. Pursuant to section 14509 of the Revenue and Taxation Code, objections were filed to the report by the executrix and her attorney, appellants.

Appellants contended that the deduction allowable for inheritance tax purposes should be computed on the new and higher rates as set forth in section 901 of the Probate Code effective September 7, 1955.

The objections were overruled, and an order was made approving the inheritance tax report as filed and fixing the inheritance tax on the basis of the "old rates."

The estate is not in condition for closing.

Question

[1] *In fixing the inheritance tax due by reason of the death of decedent, should there be permitted as a deduction the statutory commissions allowed the executrix and her attorney as set forth in section 901 of the Probate Code in effect at the time of decedent's death on July 19, 1955, or the increased fees as allowed by section 901 of the same code as amended and effective September 7, 1955?*

We are of the opinion that the commissions of the executrix and her attorney, allowed as deductions for inheritance tax purposes, should be the amount of the statutory commissions in effect at the time of decedent's death, to wit, July 19, 1955, and not the increased fees as allowed by section 901 of the Probate Code as amended and effective September 7, 1955.

The question here posed is clearly determined by the provisions of section 13988 of the Revenue and Taxation Code, which reads in part as follows:

> "The ordinary expenses of administration in the estate of any decedent are deductible from the appraised value of property included in any transfer subject to this part made by the decedent.
>
> "Included in 'ordinary expenses of administration' are the following:
>
> "(a) The ordinary commissions allowed executors and administrators under Section 901 of the Probate Code, computed on the value of the decedent's estate as of the date of the decedent's death.
>
> "(b) The ordinary fees allowed attorneys for executors and administrators under Section 910 of the Probate Code, computed on the value of the decedent's estate as of the date of decedent's death. * * *"

If the statute specifically stated that ordinary expenses of administration included executor's and administrator's fees "under section 901 and 910 of the Probate Code in effect as of the date of death" there would be no question but that the "old rates" should be used in computing the ordinary expenses of administration.

The code section is not that explicit. It does, however, restrict its operation to the date of death in that it allows ordinary commissions "* * * computed on the value of decedent's estate *as of the date of the decedent's death.*" (Italics added.) In view of such language, the reasonable assumption is the Legislature intended that in said computations those rate schedules in effect as of the date of decedent's death were to be used.

[2, 3] Deductions allowable for inheritance tax purposes are not necessarily those paid by the estate. Under section 13989 of the Revenue and Taxation Code, the federal estate tax deduction is not necessarily the actual tax paid. It is either that amount or a smaller amount based on the approximate calculations. (Cf. In re Estate of Slack, 86 Cal.App.2d 49, at page 53 [1], 194 P.2d 61; In re Estate of Guthman, 125 Cal.App.2d 408, at page 411[1 et seq.], 270 P.2d 875.)

This is also the situation with respect to section 13988 of the Revenue and Taxation Code. The actual commission paid in the probate proceeding pursuant to section 901 of the Probate Code is based "upon the amount of estate accounted for * * *." Section 13988 of the Revenue and Taxation Code allows as a deduction said commissions "computed on the value of the decedent's estate as of the date of the decedent's death."

[4] Often the commissions allowed for inheritance tax purposes are not the amount of the commissions actually paid in the probate proceeding. The evident intent on the part of the Legislature was not to allow as deductions the actual burden sustained by an estate, but a close approximation thereof, based on standards set up in the inheritance tax law.

[5] This is apparent from the provision in section 13988 of the Revenue and Taxation Code, which allows as a deduction only "ordinary expenses of administration." Extraordinary expenses of administration although borne by the estate are not a deduction for inheritance tax purposes.

The reasonable interpretation of section 13988 of the Revenue and Taxation Code based upon the examination of the statutory provisions is that there should be allowed as deductions for inheritance tax purposes commissions based upon the schedule of rates provided by section 901 of the Probate Code at the time of decedent's death, that is, in the instant case, the so-called "old rates."

Such an interpretation is in keeping with the whole tenor of the inheritance tax law, which keys everything to the date of decedent's death. Section 13311 of the Revenue and Taxation Code defines "market value" as to any transfer as the market value as of the date of decedent's death. Section 13402 assesses the tax upon that portion of the property "in excess of the exemptions allowable on the date of the transferor's death, and at the rates which are then in effect." Section 13408 provides that where there are several transfers, the tax is computed as if all the property had been transferred by a single transfer at the date of death. Section 13951 makes the date of death the valuation date. Section 13983 allows as deductions debts of the decedent at the date of death. Section 13987 allows as deductions certain taxes which are a lien at the time of death. Likewise, section 14102 makes every tax due and payable at the date of decedent's death.

These statutory provisions indicate a clear legislative intent to restrict the deductions for executor's and attorney's commissions to that computation in effect at the date of decedent's death, that is, in the present case, pursuant to the "old rates."

[6] The application of the "new rates" to the deductions for inheritance taxes allowable under section 13988 of the Revenue and Taxation Code would be unconstitutional as constituting a gift of public monies, and such construction should be avoided. It is established that inheritance taxes are fixed and determined in accordance with the law in effect at the date of the transfer, which in this case would be the date of death.

[7] The Legislature cannot by a subsequent act increase or decrease the rate, remit the tax, or in any way surrender, impair or limit rights that have become fixed. (In re Estate of Stanford, 126 Cal. 112, 118 et seq., 54 P. 259, 58 P. 462, 45 L.R.A. 788; In re Estate of Rossi, 169 Cal. 148, 149, 146 P. 430.)

[8] Where a tax has become due, a subsequent act of the Legislature reducing the tax by reason of the change in the exemptions, tax rates, or for that matter in any way, is held to be a gift of state monies and is prohibited by article IV, section 31, of the California Constitution.[3]

Retroactive effect of such legislation is therefore prohibited. (See In re Estate of

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[3] Article IV, section 31, of the California Constitution, in imposing restrictions upon the Legislature, declares: "* * nor shall it have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 22 of this article."

Stanford, supra, where it is stated, 126 Cal. at page 121, 58 P. at page 465:

> "We are, therefore, of the opinion that to give retroactive effect to the law of 1897 would conflict with the provisions of the constitution prohibiting the Legislature from making any gift or donation of any public money or thing of value."
>
> * * * * * *
>
> "We quite agree with the appellant's counsel that 'an heir or legatee must take his estate on such conditions as at the time the state may have imposed'; and that subsequent legislation could not affect such vested right. And this rule, as already held, applies equally to the state, whose right to the fund in question accrued under the act of 1893.")

The foregoing principles are applicable to the instant case.

On July 19, 1955, the date of decedent's death, the tax became due and owing in accordance with the inheritance tax law in effect at that time. Such law included section 13988 of the Revenue and Taxation Code, and the rates for executor's commissions applicable at that time were the "old rates." To read into section 13988 a change by virtue of section 901 of the Probate Code, as it became effective approximately two months thereafter, would be to read into the statute a construction which would result in the tax due at the date of death being reduced. Such a construction would constitute a gift of state monies and should be avoided.

[9] It is an established principle of statutory construction that when two alternative interpretations are presented, one of which would be unconstitutional and the other constitutional, the court will choose that construction which will uphold the validity of the statute and will be constitutional. (County of Los Angeles v. Legg, 5 Cal.2d 349, 353 [2], 55 P.2d 206.) The proper interpretation of section 13988 requires the application in the instant case of the "old rates."

In re Estate of Spires, 126 Cal.App. 174, 14 P.2d 340, and In re Estate of Parker, 200 Cal. 132, 251 P. 907, 49 A.L.R. 1025, relied on by appellants, are not applicable to the facts of the present case. Each of the cited cases dealt with fees for extraordinary services. Extraordinary commissions and fees are different from statutory commissions. Whether any extra fees or commissions should be allowed in a given case, and if so and how much, is committed to the discretion of the court. In the case of statutory commissions and fees, the determination is made by the Legislature. The court's function is limited to a ministerial computation.

[10] It follows that statutory fees and commissions, such as are involved in this case, are in the nature of fixed charges. The interest thus created, both from the standpoint of the heirs, devisees, the personal representative and the attorney, are substantive in character and not procedural. (Cf. In re Estate of Potter, 188 Cal. 55, 60 [5], 204 P. 826.)

The soundness of the above principles was recognized by this court in In re Estate of Parker, supra, where it is said, 200 Cal. at pages 141–142, 251 P. at page 911: "The amendment in question, to the extent that it removes all limitation upon the amount which may be allowed to executors and administrators as extra compensation for extraordinary services performed by them, has the effect of imposing new and additional liabilities upon estates in probate. A statute will not be given a retroactive construction by which it will impose liabilities not existing at the time of its passage. 'Laws which create new obligations, or impose new duties, or exact new penalties because of past transactions, have been universally reprobated by civil and common law writers, and it is to be presumed that no statute is intended to have such effect unless the contrary clearly appears.'"

The order is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

The majority opinion holds that the Legislature did not intend by the 1955 amendment to section 901 of the Probate Code, increasing the fees of administrators, which became effective after decedent's death, but was in effect to fix the executor's fees in the estate; see In re Estate of Johnston, 47 Cal.2d 265, 303 P.2d 1, to make such amendment applicable in computing the inheritance tax on estates of persons who died before its effective date; that such an application of the amendment would be a gift of public money in violation of the Constitution, Cal.Const., art. IV, § 31, in that under the prior law only the old allowances for executor's fees could be deducted from the value of the estate in computing inheritance taxes.

There is no gift of public money contrary to the Constitution when we consider the applicable law. This court held in In re Estate of Johnston, 47 Cal.2d 265, 303 P.2d 1, 5, that the 1955 amendment to section 901 of the Probate Code applied to persons who had died before its effective date but where the administrator's fees had not yet been fixed. We there said:

> "We are of the opinion that the commissions of the executor and his attorney should be the amount of the statutory commissions in effect at the time of the settlement of the account and making of the order allowing compensation, to wit, in the instant case in accordance with the provisions of section 901 of the Probate Code as amended and effective September 7, 1955. * * * '*On the other hand* [quoting from In re Estate of Spires, 126 Cal.App. 174, 177, 14 P.2d 340], *the right of the executor to a defined rate or standard of compensation is not vested as of the date of the decedent's death, nor even as of the date when he qualified as executor, but such right first accrues at the time when by appropriate order the amount of compensation payable to him is determined and allowed.* And since the right of an executor to compensation for extraordinary services is not established or vested until allowed by the court in the exercise of its discretion, it follows as a direct consequence that the law in force at the time when the order is made constitutes the only law by which the power of the court is to be governed.' (Italics added.)
>
> "The weight of authority in the United States is to the effect that the law in force at the time of the settlement of the account, and not at the date of death, governs the amount of compensation allowed executors, administrators and their attorneys."

In addition the same has been said: "The matter of allowance of conpensation to the personal representative * * * is generally made in and by the settlement of the final account. But the representative is not entitled to compensation until an allowance therefor has been made by the court, even where compensation is provided for by the will." 21 Cal.Jur.2d, Executors and Administrators, § 892. And further with reference to time of valuation for computing fees: "Though the inventory value is prima facie evidence of the value of the property, it is not conclusive. That is, if the value as shown by the inventory is not satisfactory to all parties concerned, it should be left open to inquiry. In such event, a reappraisement and evidence of market value may be given effect. It follows that where property is distributed in kind, or where the representative is charged with the appraised value of property taken from the estate under mortgage foreclosure and applied to payment of the debt against the estate, the valuation in the inventory, in the absence of objection or circumstances tending to induce suspicion that the appraised value is not fair and reasonable, is the basis of estimating the representative's commissions." 21 Cal.Jur.2d, Executors and Administrators, § 888. Therefore, *under section 901* the administrator's fees were properly computed on the basis of the law in effect at the time the order therefor was made rather than at the date of death. That was the law when the inheritance tax laws were adopted and still is. That law provided that the rates or amount of fees was determined as of such date rather than at the date of death. We must look therefore at the inheritance tax law. It provides that the "ordinary expenses of administration in the estate * * * are deductible *from the appraised value of property*"; included in such expenses are "The ordinary commissions allowed executors * * * *under Section 901* of the Probate Code, computed on the value of the * * * estate as of the date of * * * death." (Emphasis added.) Rev. & Tax.Code, § 13988. That is to say, the fees deductible for the computation of the tax are *those allowed by section 901.* Along with section 901 goes its construction when it is amended as to the applicability of the amendment to estates of persons already dead as above pointed out. In other words the inheritance tax law incorporates section 901 as creating a deductible item in computing the tax and that section when amended after a death still applies as seen from the foregoing authorities. The inheritance tax law, Rev. & Tax. Code, supra, § 13988, must be read as providing that administrator's fees may be deducted to the extent authorized by section 901 as properly construed and applied including the effect of amendments. So reading, the effect of section 901 on the inheritance tax law, it must follow that the law now is and *always has been that the deductible fees* are those applicable under section 901 at the time the fees are claimed and allowed. Hence there can be no gift of public money because the law (inheritance tax law) has always authorized a deduction based on the rate effective when the order for fees is made. As is said in In re Estate of Slack, 86 Cal.App.2d 49, 54, 194 P.2d 61, 64: "[It is] the intent of the Legislature that the deductions [from the value of the estate in inheritance tax computations] to be allowed are only those which have been paid or in which the liability has been attached so that they are actually due."

The majority opinion holds that because the fee deduction for inheritance tax purposes, § 901, must be on the value of the estate at the time of death, the rates must be those effective at that time. That does not follow because the fees *are not computed on* the *value* of the estate at death. They are computed upon the amount of the estate accounted for. The key words are "on" and "value." It has nothing to do with the amount of the deduction allowed, that is, from the standpoint of *rates* to be applied. It has only to do with the base to which the rates-percentages are to be applied. It is to be computed *"on"* the value at death which means nothing more than a mathematical computation using the value at that time. It says nothing about the *rates* to be applied in determining the fees, that is, those existing after death when the estate is accounted for and the fees are based upon the amount so accounted for.

It necessarily follows that the ascertainment of the *amount* of the taxes cannot be determined until the expenses of administration are known sometime during the estate proceedings even though the taxes are due on death under the inheritance tax law.[1] The determination of that amount depends on the deductions allowed and that in turn depends on the law in effect when the deductions are allowed. Allen v. Franchise Tax Board, 39 Cal.2d 109, 245 P.2d 297, is analogous. There it was held that an amendment to the income tax law which authorized the apportionment of a lump sum income over the years in which it was earned instead of allocating it all to one year, was applicable to income thus earned in prior years; that there was no gift of public money. It is there said, 39 Cal.2d at page 114, 245 P.2d at page 300:

> "It cannot be denied that the result is to reach all of the income received by the affected taxpayers and, as in the case of other taxpayers, at the rates

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[1] They are not delinquent until two years after they become due and payable. Rev. & Tax.Code, § 14103.

> applicable in the years in which it was earned. No income is freed from tax liability. Taxpayers in the situation of the plaintiff are in effect merely given the same opportunity as all other taxpayers to return their income for taxation in the year in which it was earned. The legislature has said that the tax produced at the rate so applicable is all that the state is entitled to and that the taxpayers affected by the change should be treated as are taxpayers who return compensation in the year in which it was earned. * * *
>
> "There can be no constitutional objection to the result which affects only the tax base as distinguished from a tax rate change where, as in this case, the provision was enacted prior to the time the tax should become due and payable. The provision was enacted and became effective prior to the time when the state's right to receive or collect the tax accrued. There is therefore no relinquishment of a vested state right."

Similarly in the instant case only the tax base, not the rate, is changed by the 1955 amendment of section 901. The amount of the tax is not known and it is not collectible until the expenses of administration are known including the authorized deductions such as administrator's fees.

The inheritance tax law must be examined realistically. Its basic theory is "'* * * that the inheritance tax is imposed upon the net clear * * * value of what the transferee receives, and that to ascertain this the value of what he does not receive, in contemplation of law, must be deducted from the value of what the decedent left.'" In re Estate of Knapp, 37 Cal.2d 827, 831, 236 P.2d 372, 374. And: "While the tax imposed by the act is not a tax on property as such, but a tax upon one for the privilege of succeeding to property, the amount of the tax as to any beneficiary is to be determined *according to the value of the 'net succession'; that is, the value of such property as remains for him after the satisfaction of such charges and burdens as may lawfully be satisfied in due course of administration.* It is only such property that can be properly said to actually pass to the beneficiary." Emphasis added; In re Estate of Hite, 159 Cal. 392, 394, 113 P. 1072, 1073, 32 L.R.A.,N.S., 1167; see, also, In re Estate of Miller, 184 Cal. 674, 195 P. 413, 16 A.L.R. 694. This fundamental basis will be thwarted if, as held by the majority, the estate must pay the increased executor's fees, In re Estate of Johnston, supra, 47 Cal.2d 265, 303 P.2d 1, but the beneficiary must pay taxes on that which he does not receive. Indeed, there is no recipient of the claimed gift of public money as the beneficiary does not get the extra compensation because it is paid to the executor who, under the law as properly interpreted, is entitled to it, In re Estate of Johnston, supra; it is not a gift to him.

Such cases as In re Estate of Martin, 153 Cal. 225, 94 P. 1053; In re Estate of Stanford, 126 Cal. 112, 54 P. 259, 58 P. 462, 45 L.R.A. 788; Trippet v. State, 149 Cal. 521, 86 P. 1084, 8 L.R.A.,N.S., 1210, and In re Estate of Potter, 188 Cal. 55, 204 P. 826, are not controlling for they involved an attempt to relieve an estate from a tax after death. Here, as seen, the only question is the method of arriving at the tax or the basis for the computation of the tax. Since this court has held that the fees allowable to executors, administrators and their attorneys must be determined according to the law in effect at the date of the allowance of such fees, and the inheritance tax law makes such fees deductible items in computing the tax, it must follow that any such fees so allowed are deductible items in computing inheritance taxes. The application of this rule may have the effect of increasing the amount of the inheritance tax as well as reducing it. For example, an estate consisting largely of securities which enjoyed a high price listing at time of death, but suffered severe deflation in price due to economic depression during the administration of the estate, so that the amount accounted for is far less than the value at the time of death, the fees allowable might be considerably less even though the rate may have been increased since the date of death. In such a case the value for inheritance tax purposes would be the higher value at the date of death while the fees would be computed on the lesser amount accounted for. In other words, the basis for computing the fees is not the same as the one used for computing the tax, hence the applicable law need not be the same.

I would therefore reverse the order.

47 Cal.2d 348

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
John Russell CROOKER, Jr., Defendant
and Appellant.
Cr. 5856.

Supreme Court of California.
In Bank.
Nov. 21, 1956.

Rehearing Denied Dec. 19, 1956.

Defendant was convicted in the Superior Court, Los Angeles County, Stanley Mosk, J., of murder in the first degree and he appealed. The Supreme Court, McComb, J., held, inter alia, that the evidence was sufficient to sustain conviction of murder in the first degree.

Judgment and orders affirmed.

Carter, J., dissented.

1. Criminal Law 🔑1144(13)

An automatic appeal from judgment of guilty of murder in first degree record will be viewed in light most favorable to the People.

2. Criminal Law 🔑517(1)

The applicable test as to admissibility of a confession is whether, considering circumstances, confession was freely and voluntarily made without any inducement held out to accused.

3. Criminal Law 🔑1158(4)

A jury's finding resolved against accused's contentions that confession had not been voluntarily made was binding upon Supreme Court.

4. Criminal Law 🔑666½

Evidence supported jury's determination that officers had not refused request of accused charged with murder to consult with an attorney upon demand being made that he be permitted to do so.

5. Constitutional Law 🔑268

To constitute deprivation of due process, denial of right of accused to be represented by counsel in every stage of the proceedings must have so fatally infected the regularity of his trial and conviction as to violate fundamental aspects of fairness and result in a miscarriage of justice. West's Ann.Const. art. 1, § 13; U.S.C.A. Const. Amend. 14.

6. Criminal Law 🔑1141(2)

The burden of showing unfairness and a miscarriage of justice by denial of defendant's right to counsel in some stage in proceeding against him rests upon defendant. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend 14.

7. Criminal Law 🔑531(3)

In murder prosecution, evidence supported jury's finding that confession had been freely and voluntarily made without duress or promise of reward, and that in the one instance in which accused requested an attorney officers' attitude thereto in no way affected voluntariness of confession nor resulted in any unfairness to accused at the trial. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

8. Criminal Law 🔑1158(4)

Where evidence fully supported finding of trial court and jury, their finding that confession was freely and voluntarily made and not in violation of any of accused's constitutional rights was binding upon Supreme Court.

9. Criminal Law 🔑531(1, 4)

At the time a confession is offered, it is incumbent on prosecution to lay the foundation for its introduction by preliminary proof, but before the confession is received the defendant, if he requests it, must be accorded opportunity to introduce evidence to overcome the prima facie showing, and if incrimination is dependent upon the confession, the refusal of court to permit such opportunity may constitute prejudicial error.

10. Criminal Law 🔑736(2)

It is the function of the court in the first instance to resolve any conflict in the evidence on question of whether confession is free and voluntary, and, if the court concludes that it was not, it has the duty to withhold it from jury's consideration.

11. Criminal Law 🔑736(2)

Where there is evidence that confession was free and voluntary, it is within trial court's discretion to permit it to be read to the jury and to submit to the jury for its determination the question whether under all the circumstances confession was made freely and voluntarily.

12. Criminal Law 🔑671

Where court submits to jury question whether under all circumstances confession of accused was made freely and voluntarily, court need not receive evidence out of hearing of jury for purpose of determining preliminarily question of admissibility of the confession.

13. Criminal Law 🔑781(4)

In murder prosecution, portion of instruction that if jury should find that accused made requests for counsel which were refused by officers who had accused in custody then written confession should be disregarded was properly stricken where accused did not contend that his confession was false, and when examined during trial as to statements in confession, admitted that he had made them but only denied that he had in fact killed decedent.

14. Criminal Law 🔑553

A jury may accept as true a portion of the testimony of the witness and disbelieve remainder or have reasonable doubt as to its correctness.

15. Criminal Law 🔑1141(2)

The burden is upon defendant to show that through wrongful conduct he was deprived of a fair trial.

16. Criminal Law 🔑1171(1)

Accused charged with murder was not prejudiced by anything that might have occurred in District Attorney's office, where upon accused's objection all that occurred in such office was excluded from the evidence.

17. Criminal Law 🔑304(2)

It is common knowledge that effect of consumption by jurors of "one drink apiece and no more" and consumption by one juror of a "double Manhattan" followed by a large meal, a night's sleep and breakfast would have been entirely dissipated and could have no influence upon mental operations of jury following breakfast.

18. Criminal Law 🔑926

Where evidence showed that after case was submitted to jury and prior to their evening meal 10 of 12 jurors had consumed "one drink apiece and no more" and one juror drank a "double Manhattan" and after having consumed such beverages jurors had dinner, slept the entire night and had breakfast the following morning and then resumed deliberations, had lunch sent to them, and reached a verdict in the afternoon, motion for new trial for jury's misconduct in consuming alcoholic beverages after submission of case was properly denied.

19. Criminal Law 🔑1159(2)

After conviction all intendments are in favor of judgment and a verdict will not be set aside upon ground of insufficiency of evidence unless record clearly shows that upon no hypothesis is there substantial evidence to support it.

20. Homicide ⚷253(1)

Evidence sustained conviction of murder in the first degree.

21. Homicide ⚷314

Where instruction in murder prosecution provided that if jury should fix penalty as confinement in state prison for life jury should so indicate in the verdict, but if jury should fix penalty as death jury should not specify the death penalty in the verdict and should say nothing about punishment in verdict, and jury's verdict found accused guilty of murder in the first degree without specifying the punishment, such verdict was not insufficient to impose penalty of death.

◆

Robert W. Armstrong, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Fred N. Whichello and Lewis Watnick, Deputy Dist. Attys. Los Angeles, for respondent.

McCOMB, Justice.

This is an automatic appeal from a judgment of guilty of murder in the first degree after trial before a jury.

[1] Viewing the record in the light most favorable to the People, it discloses that Norma McCauley on July 4, 1955, attended a barbecue dinner at which Mr. Baird was present. About 12:15 a. m., July 5, 1955, he accompanied Mrs. McCauley in her car to her home. Two other persons followed them in Mr. Baird's car. They arrived at Mrs. McCauley's home at 1100 Somera Road Los Angeles, around 12:30 a. m. Mr. Baird entered the house with Mrs. McCauley, said goodnight, walked out to his car and left in it with the persons who had followed him to Mrs. McCauley's residence.

Defendant, who had been employed as a houseboy in the deceased's home, freely and voluntarily wrote and signed a confession in which he stated that late in the evening of July 4, 1955, he went to the deceased's home, entered the house through the rear and hid in a closet in her children's room until they were asleep.

He stated in it that Mrs. McCauley came home about 12 or 1 o'clock and he waited until she was in her own bedroom. He then entered it and talked with her for over an hour in an endeavor to have her tell him "her reasons and feelings for leaving me." He said she would not talk about it.

Finally, being sleepy, she began to doze and was going to sleep, whereupon he found a kitchen knife about ten inches long with a blade about six inches. He then went back to the chaise lounge upon which she was reclining, put the knife in his coat pocket and knelt beside her for a long time. After she was asleep he took her throat in his hands and she choked and started to scream.

Hearing the maid, he reached for the knife and pushed and pushed on it, but Mrs. McCauley still made sounds and struggled. He then choked her with some clothes which he put around her throat. After this he left the house, returned to his apartment and fell asleep until shortly before noon.

After trial the jury returned a verdict reading: "We, the Jury in the above entitled action, find the Defendant, John Russell Crooker, Jr., guilty of murder, a felony, as charged in * * * the * * * information and find it murder of the first degree."

Defendant relies for reversal of the judgment on these grounds:

First: That he was denied due process of law because of the refusal of the investigating officers to allow him to consult with an attorney upon demand being made that he be permitted to do so.

This contention is without merit. Defendant testified that he made repeated requests for an attorney from the time of his arrest and throughout his questioning by the officers. Officer Gotch testified that the first time defendant asked to call an attorney was at the Central Station, when the following occurred:

"Q. When he made the request for an attorney, what did you tell him? A. I asked him who did he want for an attorney.

"Q. And he said what? A. He stated he didn't know.

"Q. What else did he say on this subject? A. I stated to him that after our investigation was concluded he could call an attorney, and if he didn't have funds to hire an attorney, when he went to Court a public defender would be assigned to handle his case.

"He then stated that he had a friend who had been an instructor at Pepperdine College that would probably handle the case for him. I asked him who the name was, and he said it was a man by the name of Simpson, who lived in Long Beach.

"Q. He asked you if he could call an attorney at that time, and you told him that he could call after your investigation was completed, is that right? A. I told him, after I was through with the investigation, he could make a call."

Several other officers denied they ever heard defendant ask for an attorney and testified that defendant was told he did not have to say anything if he didn't want to. They also testified that no force was used against him and that his confession was freely and voluntarily made.

[2] The applicable test as to the admissibility of a confession is whether, considering the circumstances, the confession was freely and voluntarily made without any inducement held out to the accused. (Rogers v. Superior Court, 46 Cal.2d 3, 291 P.2d 929.)

An examination of the record discloses conflicting testimony, that of the officers denying any force or that promises were made to defendant in consideration of the confession he made, and defendant's statement that he was slapped on one occasion and struck in the stomach on several occasions. In addition, when he took the stand, defendant was examined in detail as to his confession by the deputy district attorney and in each instance he admitted the officers had not told him what to say or write in his confession.

[3] The conflict in the testimony was thus squarely placed before the jury, whose finding was resolved against defendant's contentions, and it is binding upon this court. (People v. Mehaffey, 32 Cal.2d 535, at pages 548 [7], 553 [11], 197 P.2d 12.)

The trial court instructed the jury as follows: "You are instructed that a defendant in a criminal case has a constitutional right to counsel at all stages of the proceedings. Refusal to grant a prisoner's request for counsel constitutes a denial of fundamental rights. Whether or not the defendant asked for counsel, and if he did, whether he was or was not denied an opportunity to consult with counsel, are circumstances you may consider, among others, in determining whether the written confession was voluntary or involuntary."

[4] Thus the question was presented to the jury for its determination as to whether defendant's request for an attorney and the officers' conduct relative thereto resulted in a denial of defendant's fundamental rights, and the jury found against defendant's contention. In view of the evidence, we are of the opinion the jury's determination was amply supported.

[5] The due process clause of the Fourteenth Amendment of the Federal Constitution and article I, section 13, of the California Constitution guarantee a defendant the right to be represented by counsel in every stage of the proceedings, and deprivation of this guarantee may be a violation of the due process clause of the Fourteenth Amendment. To constitute deprivation of due process, however, the denial of the right of the accused to be represented by counsel in every stage of the proceedings must have so fatally infected the regularity of his trial and conviction as to violate the fundamental aspects

of fairness and result in a miscarriage of justice. (Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166; cf. Stroble v. State of California, 343 U.S. 181, at page 197, 72 S.Ct. 599, 96 L.Ed. 872.)

[6] The burden of showing unfairness and a miscarriage of justice by the denial of defendant's right to counsel in some stage in a proceeding against him rests upon the defendant. (Stroble v. State of California, supra, 343 U.S. at page 198, 72 S.Ct. at page 607.)

The Supreme Court of the United States in Stroble v. State of California, supra, quotes with approval from Adams v. United States ex rel. McCann, 317 U.S. 269, at page 281, 63 S.Ct. 236, at page 242, 87 L. Ed. 268, where it said: "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

[7] From an examination of the record and the statements of fact set forth above, it appears the police officers' conduct relative to defendant's request for an attorney in no way affected the voluntariness of defendant's confession. On the contrary, the record discloses ample evidence to support the jury's finding that it was freely and voluntarily made without duress or the promise of reward.

In the one instance in which defendant requested an attorney the officers' attitude thereto in no way affected the voluntariness of the confession nor did it in any way result in any unfairness to defendant at the trial. There was no miscarriage of justice.

Second: That defendant's confession was obtained in violation of his constitutional rights and therefore was inadmissible in evidence.

[8] This contention is likewise devoid of merit. As pointed out above, there was a conflict in the evidence as to whether the confession was voluntary. There was also a conflict in the evidence as to the facts upon which the conclusion was necessarily based that the confession was free and voluntary, by the court in the first instance and finally by the jury to whom the matter was submitted on proper instructions. Since the evidence fully supports the finding of the trial court and the jury, their finding that the confession was freely and voluntarily made and not in violation of any of defendant's constitutional rights is binding upon this court. (People v. Mehaffey, supra.)

[9–12] In People v. Gonzales, 24 Cal.2d 870, at page 876 [4], 151 P.2d 251, at page 254, Mr. Justice Shenk thus states the rule: "The procedural steps in the matter of receiving confessions in evidence are outlined in the decisions. At the time the confession is offered, it is incumbent on the prosecution to lay the foundation for its introduction by preliminary proof showing that it was freely and voluntarily made. (Citing authorities.) Before the confession is received, however, the defendant if he requests it must be accorded the opportunity to introduce evidence to overcome the prima facie showing, and if incrimination is dependent upon the confession a refusal of the court to permit such opportunity may constitute prejudicial error. (Citing authorities.) It is the function of the court in the first instance to resolve any conflict in the evidence on the subject (citing authorities), and if the court concludes that the confession was not free and voluntary it has the power and is in duty bound to withhold it from the jury's consideration. However, if there is evidence that the confession was free and voluntary, it is within the court's discretion to permit it to be read to the jury, and to submit to the jury for its determination the question whether under all the circumstances the confession was made freely and voluntarily. (Citing authorities.) In such a case the court passes preliminarily on the question of the voluntary nature of the confession and its admissibility and although it may determine that the confession is voluntary and admissible, its ruling is not binding on the jury; and it is for that body 'to determine in the last analysis whether a confession is freely and voluntarily made.' (Citing authorities.) The jury determines the issue of the nature of the confession, that is, whether it is voluntary or involuntary, on all the evidence on the issue; and the court is not required to receive evidence out of the hearing of the jury for the purpose of determining preliminarily the question of admissibility. (Citing authorities.)"

[13–15] *Third: That the trial court erred in striking from the instruction relative to defendant's constitutional right to have counsel at all stages of the proceedings, which is set forth above, the following: "Should you find from the evidence in this case that the defendant made requests for counsel which were refused by the officers who had him in custody, then, in that event, I instruct you that People's Exhibit 18 in evidence, the written confession of the defendant, should be absolutely disregarded by you in the determination of this case."*

There was no error in the omission from the instruction which the court gave. The jury may accept as true a portion of the testimony of a witness and disbelieve the remainder or have a reasonable doubt as to its correctness. (People v. Hill, 126 Cal. App.2d 378, at page 380 [3], 272 P.2d 113.) The burden is upon defendant to show that through wrongful conduct he was deprived of a fair trial. (People v. Guarino, 132 Cal.App.2d 554, at page 558 [3], 282 P.2d 538; Stroble v. State of California, supra.)

Defendant does not contend that his confession was false. On the contrary, as pointed out above, when he was examined during the course of the trial as to the statements in the confession he admitted he had made them and only denied he had in fact killed the decedent.

[16] *Fourth: That certain action which took place in the district attorney's office constituted prejudicial error.*

It did not. In the afternoon of July 6 defendant was taken to the office of the district attorney, who asked defendant to repeat the confession he had previously written. Defendant asked the district attorney if he would let him have an attorney. Mr. Roll, the district attorney, had Mr. Simpson, the attorney suggested by defendant, called on the telephone, and when defendant, while talking with Mr. Simpson said that they were making him answer their questions, Mr. Roll interrupted the conversation and told the attorney there was no coercion used at all and everything defendant said was free and voluntary.

Upon objection of defendant, all that occurred in the district attorney's office was excluded from the evidence. It is therefore obvious that no prejudice resulted to defendant from anything that might have occurred at that meeting.

Fifth: The trial court erred in denying defendant's motion for a new trial because of misconduct of the jury in consuming alcoholic beverages after submission of the case to them.

This contention is not sound. It was stipulated that after the case was submitted to the jury and prior to their evening meal on December 8, 1955, ten of the twelve jurors had consumed "one drink apiece and no more" and that one juror drank a double Manhattan. After having consumed the alcoholic beverages the jurors had dinner, slept the entire night and had breakfast the following morning. They then resumed their deliberations, did not go out to lunch but had lunch sent in to them, and reached a verdict at about 1:30 in the afternoon on December 9, 1955.

[17] It is a matter of common knowledge that the effect of the quantity of alcohol consumed in the instant case, followed by a large meal, a night's sleep and breakfast, would have been entirely dissipated and could have had no influence

upon the mental operations of the jury. In passing upon a similar question in People v. Van Horn, 119 Cal. 323, at page 333, 51 P. 538, at page 542, this court said: "To set aside a verdict on account of these facts would be preposterous." (Cf. People v. Leary, 105 Cal. 486, at page 491 et seq., 39 P. 24; People v. Sansome, 98 Cal. 235, at page 239, 33 P. 202; People v. Bemmerly, 98 Cal. 299, at page 301, 33 P. 263; People v. Deegan, 88 Cal. 602, at page 605, 26 P. 500; People v. Romero, 12 Cal.App. 466, at page 470, 107 P. 709.)

[18] In the present case the trial court passed upon the question here presented on a motion for a new trial and held that the consumption of the intoxicant had not prejudiced defendant, nor had it resulted in a miscarriage of justice. The evidence amply supports this conclusion.

Sixth: The evidence was insufficient to support the judgment.

[19] This proposition is untenable. After conviction all intendments are in favor of the judgment and a verdict will not be set aside upon the ground of insufficiency of the evidence unless the record clearly shows that upon no hypothesis is there substantial evidence to support it. (People v. Lindley, 26 Cal.2d 780, at page 791 [7], 161 P.2d 227.)

[20] Applying this rule to the facts in the instant case the record discloses the corpus delicti was amply proven by the finding of decedent's body which had been strangled and stabbed and the testimony of the doctor that decedent's death was due to the stab wounds and strangulation. Therefore, the confession of defendant was admissible to show he had been lying in wait for the decedent and had stabbed and choked her, with the result that she died.

[21] Seventh: *That the "silent verdict" of the jury as to punishment was to impose the penalty of death.*

In the circumstances of the record before us this contention is likewise untenable. The trial court instructed the jury relative to the penalty as follows: "The law of this state provides that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life, at the discretion of the jury that finds him guilty. If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life. If you should fix the penalty as confinement in the state prison for life, you will so indicate in your verdict, using a form that will be handed to you when you retire to deliberate, but if you should fix the penalty as death, you will not specify the death penalty in the verdict and you will say nothing about punishment in the verdict. In determining which punishment shall be inflicted, you are entirely free to act according to your own judgment."

It is urged that the form of verdict submitted to the jury under the foregoing instruction does not adequately permit the jury to express in the verdict its intention as to the penalty when the death penalty is imposed. As noted, the instruction provides that "If you should fix the penalty as confinement in the state prison for life, you will so indicate in your verdict." The argument seems to be that this court should also require that the trial court give an instruction providing that "If you should fix the penalty at death you should so indicate in your verdict," and accordingly provide such a form. It is sufficient to note that the form of verdict which it is urged that this court now require was furnished to the jury and returned with the death penalty imposed in the case of People v. Green, 217 Cal. 176, 177, 17 P.2d 730. (See also People v. Orcalles, 32 Cal.2d 562, 567, footnote 1, 197 P.2d 26; People v. Hall, 199 Cal. 451, 456 [4], 249 P. 859; People v. Green, 47 Cal.2d 209, footnote 3, 302 P.2d 307.)

The judgment, order denying defendant's motion to set aside the verdict, and the order denying the motion for a new trial are each affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and SPENCE, JJ., concur.

CARTER, Justice.

I dissent.

I disagree with the underscored portion of the following statement from the majority opinion: "The due process clause of the Fourteenth Amendment of the Federal Constitution and Article I, section 13, of the California Constitution guarantee a defendant the right to be represented by counsel in every stage of the proceedings, and deprivation of this guarantee may be a violation of the due process clause of the Fourteenth Amendment. *To constitute deprivation of due process, however, the denial of the right of the accused to be represented by counsel in every stage of the proceedings must have so fatally infected the regularity of his trial and conviction as to violate the fundamental aspects of fairness and result in a miscarriage of justice.* (Lisenba v. People of State of California, 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 66; cf. Stroble v. State of California, 343 U.S. 181, at page 197, 72 S.Ct. 599, 96 L.Ed. 872.)"

Part of the underscored statement is found in the Lisenba case. However, it affirmatively appears in the opinion in the Lisenba case, 314 U.S. 230, 231, 62 S.Ct. 287, that defendant had the advice of counsel at all times. The Supreme Court was there speaking of an allegedly coerced confession. It is said, 314 U.S. at pages 236, 237, 62 S.Ct. at page 290: "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Such unfairness exists when a coerced confession is used as a means of obtaining a verdict of guilt. We have so held in every instance in which we have set aside for want of due process a conviction based on a confession."

In the Stroble case an allegedly coerced confession was also involved. There counsel was denied the privilege of consulting defendant during his interrogation by the district attorney. The Supreme Court said, 343 U.S. at pages 197 and 198, 72 S.Ct. at page 607, citing the Lisenba case, that "Upon the facts of this case, we cannot hold that the illegal conduct of the law enforcement officers in not taking petitioner promptly before a committing magistrate, coerced the confession which he made in the District Attorney's office or in any other way deprived him of a fair and impartial trial.

"As to the refusal of the prosecutors to admit counsel during their interrogation of petitioner, counsel stated that he had come to the District Attorney's office at the request of petitioner's son-in-law merely to inquire of petitioner as to his guilt. *At no point did petitioner himself ask for counsel.* In light of these facts, the District Attorney's refusal to interrupt the examination of petitioner, which had been proceeding for almost an hour, so that counsel could make inquiry for petitioner's son-in-law, does not constitute a deprivation of due process, either independently or in conjunction with all other circumstances in this case." (Emphasis added.)

In In re Masching, 41 Cal.2d 530, 534, 261 P.2d 251, 254, defendant requested counsel, and a continuance on the ground that he had been "'confined to bed'". His request was denied. We there said that "Under all the circumstances this procedure amounted to a denial of petitioner's constitutional right to counsel. It follows that his conviction cannot be permitted to stand and that he should be remanded to custody for further proceedings in the municipal court in conformity with his right to counsel. In re McCoy, 32 Cal.2d 73, 76–77, 194 P.2d 531; see In re Egan, 24 Cal.2d 323, 337, 149 P.2d 693; cf. People v. Lanigan, 22 Cal.2d 569, 572–577, 140 P.2d 24, 148 A.L.R. 176." In People v. Lanigan, 22 Cal. 2d 569, 575, 140 P.2d 24, 28, 148 A.L.R. 176, we said, quoting from Glasser v. United States, 315 U.S. 60, 75, 76, 62 S.Ct. 457, 86

L.Ed. 680; " 'To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske [a co-defendant] is at once difficult and unnecessary. *The right to have the assistance of counsel is too fundamental and absolute* to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. [Citing cases.]' " (Emphasis added.) We continued: "Although the Sixth Amendment is applicable only to trials in federal courts (Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595), the same right is protected in this state by article 1, section 13 of our Constitution providing that 'In criminal prosecutions, in any court whatever, the party accused shall have the right * * * to appear and defend, in person and with counsel.' "

In People v. Robinson, 42 Cal.2d 741, 745, 746, 269 P.2d 6, 9, we again quoted from the Glasser case and the Lanigan case in reversing a judgment. " 'Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, *may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment*". Emphasis added; 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680.

In view of the Glasser case and the California cases following it, it appears to me that the statement in the majority opinion heretofore set forth is incorrect. If we continue to follow the Glasser case, we will find it "unnecessary" to determine the exact amount of prejudice arising from a denial to defendant of counsel at every stage of the proceeding in any court whatever. As was said in the Glasser case "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." [315 U.S. 60, 62 S.Ct. 467]

I have heretofore pointed out that the Stroble case is not like the case at bar since there the defendant did not himself ask for counsel. The citation of the Stroble and McCann, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268,[1] cases are, therefore, inapplicable here.

The defendant's confession was undoubtedly an important factor in defendant's conviction of the crime of which he was accused. The confession was made without benefit of counsel which had been requested by defendant. It appears to me that if our constitutional safeguards are to be observed, they should be observed to the letter. This concept is forcibly declared by the Supreme Court of the United States in a recent decision. Ullmann v. United States, 350 U.S. 422, 76 S.Ct. 497, decided March 26, 1956. Mr. Justice Frankfurter speaking for the court stated, 76 S.Ct. at page 501: "Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process.

"No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies.

"As no constitutional guarantee enjoys preference, so none should suffer subordination or deletion. It is appropriate to read the conviction expressed in a memorable address by Senator Albert J. Beveridge to the American Bar Association in 1920, a time when there was also manifested impatience with some of the restrictions of the Constitution in the presumed interest of security. His appeal was to the Constitution—to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor. [He said:] 'If liberty is worth keeping and free representative government worth saving, we must stand for *all* American fundamentals —not some, but all. All are woven into the great fabric of our national well-being. We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient. If one American fundamental is prostrated, others in the end will surely fall. The success or failure of the American theory of society and government, depends upon our fidelity to every one of those interdependent parts of that immortal charter of orderly freedom, the Constitution of the United States.' Beveridge, The Assault upon American Fundamentals, 45 Reports of American Bar Ass'n., 188, 216 [1920]. To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."

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[1] The McCann case was involved with the question of waiver of counsel and trial by jury.

I am of the opinion that defendant's requested instruction relative to the jury's disregard of the confession should have been given. Defendant was entitled to, and should have been accorded, the right to counsel at the time he made the confession. As a result, the confession was obtained in violation of his constitutional rights and should not have been considered by the jury.

I would therefore reverse the judgment.

Rehearing denied; CARTER, J., dissenting.

146 Cal.App.2d 234

Luther M. WARDA, Plaintiff and Respondent,

v.

Max SCHMIDT, Individually and doing business under the firm name and style of Meadow Glen Home Builders, Defendant and Appellant.

No. 16895.

District Court of Appeal, First District, Division 2, California.

Nov. 26, 1956.

Rehearing Denied Dec. 26, 1956.

Hearing Denied Jan. 23, 1957.

Action on book account between plaintiff plastering contractor and defendant builder. The Superior Court, San Mateo County, Murray Draper, J., entered judgment, and defendant appealed. The District Court of Appeal, Kaufman, J., held that in view of testimony that installment payment provisions of 1947 contract were never followed and that all payments made by defendant to plaintiff were on account, according to subsequent oral agreement, evidence warranted finding that plaintiff had proved book account, and that amount which defendant was indebted to plaintiff on book account was certain sum.

Judgment affirmed.

1. Account, Action on 🔑17

A book account is created by the agreement or conduct of the parties thereto.

2. Account, Action on 🔑17
Limitation of Actions 🔑29(2)

The mere recording in book of transactions or incidental keeping of accounts under express contract does not of itself create a book account, and such memoranda cannot be utilized under guise of book account as device to extend statute of limitations beyond time it would run on contractual obligation. West's Ann.Code Civ. Proc. §§ 337, subd. 2, 339, subd. 1.

3. Limitation of Actions 🔑29(2)

Parties to a written or oral contract may, by agreement or conduct, provide that monies due under such contract shall be subject of account between them; in that event, cause of action arising therefrom is on account and not on underlying contract, within statute of limitations. West's Ann. Code Civ.Proc. §§ 337, subd. 2, 339, subd. 1.

4. Account, Action on 🔑22

In action on book account between plaintiff plastering contractor and defendant builder, evidence warranted finding that fact that two oral contracts entered into between parties in 1947 had no payment provisions justified finding that this was because payments thereunder were to be subject to account already established between parties. West's Ann.Code Civ.Proc. §§ 337, subd. 2, 339, subd. 1.

5. Limitation of Actions ⟹29(2)

If there is an account relation between parties, requirements as to character of book or books and manner in which account must have been kept to be acceptable as a book account, under four-year statute of limitations, are not very stringent. West's Ann. Code Civ.Proc. § 337, subd. 2.

6. Account, Action on ⟹17

To be acceptable as book account, book must show against whom and in whose favor charges were made, it must have been kept in ordinary course of business, it must state debts and credits of transactions involved completely enough so that amount due to claimant can be reasonably determined from it.

7. Account, Action on ⟹17

Though normally entries in account book must be made at or near time of transactions to which they relate, and there should be no long delay without satisfactory explanation, irregularity in that respect is not necessarily fatal to action on book account.

8. Limitation of Actions ⟹29(2)

Entry of balance at time of submission of bill and specifications did not necessarily prevent account kept in ledger from being book account subject to four-year statute of limitations, in case involving alleged book account between plaintiff plastering contractor and defendant builder. West's Ann.Code Civ.Proc. § 337, subd. 2.

9. Account, Action on ⟹17

When it is customary for contractors, as evidence indicated in action involving balance due on alleged book account between plaintiff plastering contractor and defendant builder, to ascertain amount due and bill at end of total transaction only, entry of total amount due at that time would be considered timely and in due course of business.

10. Account, Action on ⟹17

That builder, who was sued by plastering contractor for balance due on alleged book account between them, could not judge from total entered whether it was correct, would not preclude documents from being book account, where such was normal, in that to judge correctness of account recourse to bills or invoices is generally needed.

11. Account, Action on ⟹17

Though it was technically somewhat irregular not to enter amount of bill itself but to subtract payments made up to date of it, such slight technicality would not be decisive of question whether there was book account between plaintiff plastering contractor and defendant builder, nor would other technical irregularities, like line left open, have that effect.

12. Account, Action on ⟹25

That amount of judgment for plaintiff, in action between plastering contractor and defendant builder on alleged book account, did not correspond with balance according to account but was some $15,000 less, would not justify attack on judgment; that plaintiff could not prove total amount due according to book account would not prevent all recovery.

13. Account, Action on ⟹22

In action on book account between plaintiff plastering contractor and defendant builder, in case where installment payment provisions of 1947 contract were never followed and all payments made by defendant to plaintiff were on account, according to subsequent oral agreement, evidence warranted finding that plaintiff had proved book account, and that amount which defendant was indebted to plaintiff under book account was certain amount.

Freed & Freed, Eli Freed, Eugene A. Mash, San Francisco, for appellant.

W. A. Lahanier, Frank B. Blum, John F. Gallen, San Francisco, for respondent.

KAUFMAN, Justice.

Defendant appeals from a judgment for plaintiff on a book account.

Plaintiff is a plastering contractor. Defendant is a builder. During the years 1946–1949 defendant opened in the City of

Millbrae a subdivision known as Meadow Glen. In 1946 defendant built 48 houses. Plaintiff did the outside plastering work on these houses under an oral contract. He was paid $500 per house. In 1947 defendant commenced building a group of 171 houses. He furnished to plaintiff a master tract plan to enable plaintiff to bid on the plastering work for the 171 houses. The master plan indicated that the 17 houses were to be located on almost level ground and that the windows therein were to have wood casings. On May 22, 1947 plaintiff and defendant entered into a written contract whereby plaintiff was to do the plastering work on the 171 houses for which he was to be paid $500 per house for plastering the outside and $800 per house for plastering the inside. Defendant had the option to use sheetrock interiors so that inside plastering might not be required for all the houses. The contract was based upon the master plan. Its terms provided for installment payments of the amount due thereunder: sixty percent was to be paid to plaintiff when the first coat of plaster was put on; thirty percent upon completion of the second coat, and the remaining ten percent when the wash was applied and the job completed.

Defendant deviated from the master plan during the construction of the 171 houses. The elevations were raised on some of the houses thus requiring a larger area to be plastered. In addition, steel rather than wood casings were used for the windows. Steel window casings are plastered in a different manner than wooden ones. The technique of plastering steel casings is known to the plastering trade as bullnosing. It requires more plaster than is used for a wood window casing.

Plaintiff complained to defendant about the extra plastering necessitated by the changes in the master plan. The parties entered into an oral agreement whereby defendant agreed to compensate plaintiff for the extra plaster work. No amount was set by the parties. Subsequently, plaintiff billed defendant for the additional plastering at the rate of $2.25 a square yard for exterior plastering and $1.50 a square yard for interior plastering.

Defendant planned to build an additional 110 houses in Meadow Glen. In the latter part of 1947 he entered into an oral contract with plaintiff whereby he agreed to pay plaintiff the flat rate of $2.50 a square yard for the plaster work on these houses.

A notice of completion of the 171 houses was recorded on December 22, 1948. One for the 110 houses was recorded on February 25, 1949. Plaintiff commenced this action on January 2, 1953. The complaint filed on that day was in two counts: an account stated and a book account. Plaintiff sought to recover $38,658.60 which was alleged to be the balance owed to him by defendant as a result of the aforementioned events. The trial court, sitting without a jury, found and concluded that plaintiff did not prove an account stated; that he had established a book account, and that the amount which defendant was indebted to plaintiff under the book account was $23,592.64, for which plaintiff was entitled to a judgment. A judgment was accordingly entered.

Defendant pleaded as an affirmative defense the bar of the two-year statute of Code of Civil Procedure, § 339, subdivision 1 (liability not founded upon an instrument of writing). It is his position that plaintiff received money in excess of that provided for in the written contract of May 22, 1947; that said contract was so discharged or that it was superseded by the two oral contracts entered into in 1947; that the pleading of an action on an account subject to the four-year statute of Code of Civil Procedure, § 337, subdivision 2 was an improper device to circumvent the applicable two-year statute, as there was no account between the parties and the papers produced as constituting the book account did not, as a matter of law, constitute a book account within the purview of section 337, subdivision 2, supra, because no debits were charged when accrued, but a balance only entered as a debit after completion of all the work, because they showed irregularities which prevented the required accuracy and because the balance found due by the court is not shown by the account and cannot be calculated from it.

[1-3] A book account is created by the agreement or conduct of the parties thereto. Mercantile Trust Co. v. Doe, 26 Cal.App. 246, 146 P. 692; Gardner v. Rutherford, 57 Cal.App.2d 874, 885–886, 136 P.2d 48; Parker v. Shell Oil Co., 29 Cal.2d 503, 507, 175 P.2d 838. The mere recording in a book of transactions or the incidental keeping of accounts under an express contract does not of itself create a book account. Stewart v. Claudius, 19 Cal.App.2d 349, 352, 65 P.2d 933; see also Tillson v. Peters, 41 Cal.App.2d 671, 676–677, 107 P.2d 434; Lee v. DeForest, 22 Cal.App.2d 351, 360–361, 71 P.2d 285. Such memoranda cannot be utilized under the guise of a book account as a device to extend the statute of limitations beyond the time it would run on the contractual obligation. See cases collected in Parker v. Shell Oil Co., 55 Cal. App.2d 48 at page 55, 130 P.2d 158. However, the parties to a written or oral contract may, by agreement or conduct, provide that monies due under such contract shall be the subject of an account between them. Mercantile Trust Co. v. Doe, supra, 26 Cal.App. 246, 146 P. 692; Gardner v. Rutherford, supra, 57 Cal.App.2d 874, 886, 136 P.2d 48; Parker v. Shell Oil Co., supra, 29 Cal.2d 503, 507, 130 P.2d 158. In that event a cause of action arising therefrom is on the account and not on the underlying contract. Parker v. Shell Oil Co., supra, 29 Cal.2d 503, 507, 130 P.2d 158. Such is the situation in this case.

[4] George Bryant, who was plaintiff's foreman and bookkeeper at the time of the events here involved, testified that the installment-payment provisions of the May 22, 1947 contract were never followed and that all payments made by defendant to plaintiff were on account. Plaintiff testified likewise. Linea Miller, who was defendant's bookkeeper at the time of the events here involved, was called as a witness by defendant. She testified that the payments made to plaintiff during this period were on account. The two oral contracts entered into between plaintiff and defendant in 1947 had no payment provisions. The trial court could properly infer that this was because payments thereunder were to be subject to the account already established between the parties. A transfer in writing of a credit of defendant with a third party to plaintiff expressly stated that it was received by plaintiff on the account of defendant.

[5-7] If there is an account relation between the parties the requirements as to the character of the book or books and the manner in which the account must have been kept to be acceptable as a book account under section 337, subdivision 2, supra, are not very stringent. "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." Egan v. Bishop, 8 Cal.App.2d 119, 122, 47 P.2d 500, 502. The book must show against whom and in whose favor the charges are made. Wright v. Loaiza, 177 Cal. 605, 607, 171 P. 311. It must have been kept in the ordinary course of business. Epley v. Cunningham, 134 Cal.App.2d 769, 770, 286 P.2d 380. It must state the debits and credits of the transactions involved completely enough so that the amount due to the claimant can be reasonably determined from it. Robin v. Smith, 132 Cal.App.2d 288, 291, 282 P.2d 135. Although normally entries in an account book must be made at or near the time of the transactions to which they relate and there should be no long delay without satisfactory explanation, Landis v. Turner, 14 Cal. 573, 575, an irregularity in that respect is not necessarily fatal to an action on a book account. See Schneider v. Oakman Con. Min. Co., 38 Cal.App. 338, 341, 176 P. 177, in which an entry was accepted as properly included in the account although it was due on Decem-

ber 3, 1912 but entered upon the books as late as August, 1914.

The evidence in this case clearly establishes that plaintiff had in his office a loose-leaf ledger book of a permanent nature known as a Dibold ledger. Three pages from the ledger were received in evidence. The pages are dated 1948, 1949, 1950. Each page is entitled "Meadow Glenn [sic], Millbrae, Calif., Max Schmidt." Bryant, plaintiff's foreman-bookkeeper, who was the custodian of the ledger, testified that the entries on these pages were made by him or under his supervision and the manner in which they were made. The ledger sheets start with a credit item in favor of defendant on January 5, 1948. Eleven credit items follow. The twelfth item posted on January 14, 1949, shows a debit balance. There are eleven further items which consist of ten credits with adjustments to reflect them in the debit balance and one debit entry. The last entry considered by the trial court was dated October 9, 1950.

Bryant, by way of foundation, testified that he made notes of the plastering work actually done in a memorandum or work book. These figures were reduced to itemized sheets showing the work done and computing the monetary value thereof. These sheets were attached to a bill submitted by plaintiff to defendant on January 14, 1949. Bryant testified that the bill was not earlier submitted because plaintiff had been receiving payments on account and it was only when the job was nearing completion that the bill was prepared. Plaintiff testified that this bill along with others rendered were kept in a "regular book." Plaintiff at the trial did not contend that book of bills was one of several books constituting the book account. See Gardner v. Rutherford, supra, 57 Cal.App.2d 874, 136 P.2d 48; Egan v. Bishop, supra, 8 Cal.App.2d 119, 47 P.2d 500. The bill from plaintiff to defendant was admitted in evidence for the limited purpose of explaining entries in the ledger sheets upon which plaintiff relied to establish the book account. It is so treated on this appeal. Defendant's expert witness Davey testified that plaintiff's method of keeping accounts was not unusual for contractors, that they enter the cash received, make up a bill and detailed invoices from measurements taken and then make an actual debit charge for the balance when the job is done. A simple mathematical calculation demonstrates that the debit balance posted on January 14, 1949 is the difference between the bill submitted to defendant and the credits previously posted.

[8–11] Under the above law and facts we cannot say that the entry of the balance at the time of the submission of the bill and specifications necessarily prevented the account kept in the Dibold ledger from being a book account subject to the four-year statute. The debit items in the Dibold ledger were, of course, in terms of money. When the parties started to operate under the May 22, 1947 written contract, no particular amount could have been posted as a debit because defendant had the option of using sheetrock interiors and it was not clear how many interiors plaintiff would be called upon to do. When the written contract was superseded by the first oral one the amount to be paid for, and the area encompassed by, the extra plastering work was not definitely set. The second oral contract had set rates which applied to an area not then certain. There is no binding rule as to the time at which parts of a combined transaction must be reduced to certain amounts and entered in the books, nor as to the number of units which may be grouped together as one transaction. When it is customary for contractors, as the evidence indicated, to ascertain the amount due and bill at the end of the total transaction only, the entry of the total amount due at that time can be considered timely and in due course of business. It is true that appellant could not judge from the total entered whether it was correct, but such is normal; to judge the correctness of an account, recourse to bills or invoices is generally needed. It was technically somewhat irregular not to enter the amount of the bill itself but to subtract the payments made up to the date of it, but such slight technicality cannot be decisive of the question whether there was a book account or not. The same applies to other technical irregularities complained of like a line left open. It must be noted that appellant concedes that all his payments were correctly entered. As to the correctness of the debit entries extensive evidence was taken.

[12, 13] Appellant's grievance that the amount of the judgment does not correspond with the balance according to the account but is some $15,000 less is wholly without merit. Evidently, the fact that the plaintiff cannot prove the total amount due according to the book account does not prevent all recovery, but judgment will be given for the lesser amount proved. Moore v. Teel, 6 Cal.App.2d 696, 698, 45 P.2d 412; 1 C.J.S., Account, Action on, § 22, p. 622. In this case the trial court disallowed one major item and reduced others. Its decision is supported by substantial evidence and must be affirmed.

Judgment affirmed.

DOOLING, Acting P. J., concurs.

146 Cal.App.2d 553

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Lester Farrel JACKSON and Howard Allen, Defendants and Respondents.

Cr. 2695.

District Court of Appeal, Third District, California.

Dec. 3, 1956.

Proceedings on motion to quash burglary information. The Superior Court, Stanislaus County, Frank C. Damrell, J., granted the motion, and the People appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence at preliminary hearing had been sufficient to justify magistrate in holding defendants to answer charge of burglary.

Reversed.

1. Criminal Law 🔑238

Proof produced at preliminary hearing is sufficient if it establishes reasonable and probable cause, and it need not establish guilt; "reasonable and probable cause" meaning such a state of facts presented to magistrate as would lead a man of ordinary caution to believe and conscientiously entertain a strong suspicion that person accused is guilty.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable and Probable Cause".

2. Burglary 🔑42(1)

Evidence of defendant's mere possession of stolen goods is not sufficient, standing alone, to sustain charge of burglary; but such possession is a circumstance strongly indicating guilt of person in possession and must be considered in connection with all of circumstances shown in determining whether proof produced is sufficient.

3. Criminal Law 🔑238

Evidence at preliminary hearing was sufficient to justify magistrate in holding defendants to answer charge of burglary.

4. Criminal Law 🔑238
Indictment and Information 🔑140(1)

It is record before magistrate that is decisive on issue as to whether accused should be held to answer charge, and in arriving at his decision magistrate may weigh evidence, resolve conflicts, and give or withhold credence to witnesses; but in testing, on motion to quash information, sufficiency of showing made before magistrate, Superior Court cannot do those things.

5. Indictment and Information 🔑140(1)

On motion to quash information, conflicts in evidence adduced before magistrate holding defendant to answer charge are to be disregarded, favorable evidence is to be accepted and every legitimate inference that may be drawn therefrom must be drawn in favor of magistrate's decision, and if, when so viewed, there is in record evidence of sufficient substantiality to support decision, reviewing court is without power to set decision aside.

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Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for appellant.

Nathan B. McVay and E. Paul Folfer, Modesto, for respondents.

VAN DYKE, Presiding Justice.

After a preliminary hearing before a magistrate, respondents were held on a complaint charging them with burglary. An information was filed against them and they moved the superior court to set it aside upon the grounds that they had been committed without reasonable or probable cause. The motion was granted and the People appeal.

The facts as shown at the preliminary examination are as follows: Mrs. Monica Ney was the owner of property consisting of an unoccupied dwelling house located in Stanislaus County. On March 3, 1956, she stopped at the premises and discovered that numerous items of furniture were missing; that a back door had been opened and the premises ransacked. It is not claimed that the proof of the corpus delicti was not sufficiently established. It appeared that numerous items which had been removed from the Ney premises were on March 2, 1956, consigned by defendants Jackson and Allen to one McCoy, a used furniture auctioneer in Hayward, who sold the articles except for two marble-top dressers. These were taken back by respondents and sold to a used furniture shop. In negotiating with McCoy, respondent Jackson signed his name "Lee Jakson" and in his dealings with the used furniture dealer he gave a false name, "H. Johnson", taking a check made out to him in that name. In talking to the investigating officer, Jackson first denied ever having sold any furniture in Hayward, but on further questioning, admitted that he had made such a sale and stated to the officer that he had purchased the articles from a man known as H. Green from whom he had taken a bill of sale. The officer and Jackson went to Jackson's home and obtained a bill of sale bearing a signature "H. Green". Also, Jackson stated to Bates that he had not been accompanied to Hayward by Allen and later on admitted that Allen had been with him. Bates talked with Allen, who first said he had never sold any articles of furniture to McCoy and then admitted that he had been with Jackson when the furniture was consigned. McCoy testified that in Allen's presence Jackson had stated that Allen was his partner.

[1-3] It is familiar law that proof produced at a preliminary hearing is sufficient if it establishes reasonable and probable cause. It need not establish guilt. Reasonable and probable cause means such a state of facts presented to the magistrate as would lead a man of ordinary caution to believe and conscientiously entertain a strong suspicion that the person accused is guilty. People v. McRae, 31 Cal.2d 184, 187 P.2d 741. While mere possession of stolen goods is not sufficient evidence standing alone upon which a charge of burglary may be sustained, yet such possession is a circumstance strongly indicating the guilt of the person in possession and must be considered in connection with all the circumstances shown. People v. Harrison, 129 Cal.App.2d 197, 276 P.2d 188. Among the circumstances which, coupled with the possession of stolen property, have been held sufficient to connect the accused with the crime and sustain a commitment are, false statements showing consciousness of guilt, false statements as to how the property came into defendants' possession, and the assumption of a false name. These circumstances were all present here. We hold the evidence sufficient to justify the magistrate in holding the defendants to answer.

[4] Respondents argue that the delivery of a bill of sale signed "H. Green" and the statement of Jackson to the officer that it had been given to him by a man of that name from whom he had purchased the furniture explains away the appearance of guilt raised by the rest of the record. Herein, however, respondents mistake the function of the trial court in passing upon the motion to quash. It is the record before the magistrate that is decisive. In arriving at his decision the magistrate may weigh the evidence, may resolve conflicts, and may give or withhold credence to witnesses. In testing the sufficiency of the showing made before him on motion to quash the superior court cannot do these things. In re Vandiveer, 4 Cal.App. 650, 653, 88 P. 993; In re James, 47 Cal.App. 205, 207, 190 P. 466. In People v. Flanders, 140 Cal.App.2d 765, 768, 296 P.2d 13, 15, it is stated:

> "* * * On a motion to set aside an information, the court may not substitute its judgment as to the weight of the evidence for that of the magistrate conducting the preliminary examination. On such a motion the court will not inquire into the sufficiency of the evidence if there is some evidence in support of the information."

[5] While the investigating officer testified as to what Jackson told him about his purchase of the furniture and about the bill of sale and produced a document as that bill of sale, the magistrate was not required to believe that Jackson told the truth. In view of the admitted possession of the stolen articles and of the testimony of the officer as to the guilty conduct of respondents, the situation is the familiar one where a reviewing court is testing a record upon a challenge that it does not contain sufficient evidence to sustain a decision made by a trier of fact. In applying that test, conflicts are to be disregarded, favorable evidence is to be accepted and every legitimate inference that may be drawn therefrom must be drawn in favor of the decision or order under review. When so viewed, if there is in the record evidence of sufficient substantiality to support the order or decision, the reviewing court is without power to set the decision aside. Applying that rule to the facts disclosed by this record, we hold that the record before the committing magistrate met the test as being sufficient to lead a man of ordinary caution to believe and conscientiously entertain a strong suspicion that the respondents were guilty of the burglary of which they were accused.

The order of the superior court quashing the information is reversed.

SCHOTTKY and PEEK, JJ., concur.

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146 Cal.App.2d 265

BERKELEY CREMATORY, Incorporated, a corporation, Plaintiff and Appellant,

v.

CITY OF EL CERRITO, Defendant and Respondent.

No. 16907.

District Court of Appeal, First District, Division 1, California.

Nov. 27, 1956.

Rehearing Denied Dec. 27, 1956.
Hearing Denied Jan. 23, 1957.

Action for determining status of property under zoning ordinance. The Superior Court of Contra Costa County, Wakefield Taylor, J., rendered a judgment declaring that plaintiff's property had been validly rezoned from commercial to residential, and plaintiff appealed. The District Court of Appeal, Agee, J. pro tem., held that rezoning ordinance, which repealed prior ordinance requiring posting of notice before rezoning, was invalid in absence of compliance with the requirement of posted notice.

Reversed.

1. Municipal Corporations ⚷601(15)

Where zoning ordinance required posted notice of petition or proposal to rezone, subsequent ordinance repealing such ordinance and rezoning property was invalid in absence of compliance with requirement of posted notice. West's Ann.Gov.Code, §§ 65600, 65601, 65650 et seq., 65651.

2. Pleading ⚷36(3)

Where trial court admitted ordinance showing rezoning from commercial to residential, over objection that it was not within issues framed by pleadings, and trial court stated that defendant city would be allowed to amend its answer to conform to proof but city never offered any such amendment, city remained bound by admissions in answer to the effect that property had been in commercial zone.

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Blair F. Burton, El Cerrito, for appellant.

Clifford C. Anglim, City Atty. of the city of Richmond, Tsar N. Calfee, Acting City Atty. of the city of Richmond, Richmond, for respondent.

AGEE, Justice pro tem.

This is an appeal by plaintiff from a judgment declaring that its property was validly rezoned from commercial to residential.

The property involved is a parcel of land in the City of El Cerrito, consisting of 22 lots. This land was zoned commercial by Ordinance No. 125, adopted March 30, 1931. Section 10 of this ordinance provides that: The City Council may rezone any land zoned under the ordinance or all zones or otherwise alter and change the zoning, *but first* the City Council shall give notice of the petition or proposal to rezone by the posting of written notices of the hearing thereon on the property to be rezoned.

Zoning Ordinance No. 13 N.S. was adopted October 19, 1953. It expressly repealed Ordinance No. 125 and zoned appellant's property as R-2 (residential). The city, respondent herein, admits that it did not post notice as provided in section 125.

Respondent's position is that the requirement of posting in Section 10 of Ordinance No. 125 applies only to an amendment of that ordinance; that Ordinance No. 13 N.S. is a new and precised section of a master plan adopted in accordance with the then existing statutes relating thereto, i. e., sections 65250–65254 of the Government Code*; that Ordinance No. 13 N.S. does not attempt to amend or revise Ordinance No. 125; and that sections 65250–65254, supra, do not require posting on the property.

[1] The effect of the adoption of Ordinance No. 13 N.S. was to "alter and change the zoning" of appellant's land. The plain purpose of section 10 of Ordinance No. 125 was to require notice by posting on the property before this could be done. This ordinance was in full force and effect until its repeal on October 19, 1953, by Ordinance No. 13 N.S. The requirement of notice by posting was not in conflict with any state law or, in particular, sections 65250–65254, supra. It simply required a form of notice in addition to the published notice provided for by section 65253, supra. We conclude that respondent was required to comply with Section 10 of Ordinance No. 125 as a part of the legal proceedings leading up to the adoption of Ordinance No. 13 N.S. and that its failure to do so renders Ordinance No. 13 N.S. void as to appellant's land insofar as it attempts to change its zoning.

The repeal of Ordinance No. 125 was an integral part of the adoption of Ordinance No. 13 N.S. We do not pass upon the question as to whether No. 125 could be repealed and then later a new ordinance not providing for notice passed.

Toward the end of the trial, respondent attempted to show that in 1937, the appellant's land had been rezoned from commercial to a classification designated as "R-4." Appellant objected to such proof on the ground that it was not within the issues as framed by the pleadings. The trial court nevertheless admitted the ordinance upon which respondent relied and stated that respondent would be allowed to amend its answer to conform to the proof. Respondent never offered any such amendment. The pleadings are thus in their original condition and the allegation in the complaint that the property in question was zoned as commercial from March 30, 1931, until October 19, 1953, stands admitted. It should be noted that, in addition to the objection made, appellant offered to prove by the official zoning map that the zoning of its property had not been changed by the 1937 ordinance. In Central California Creditors' Ass'n v. Seeley, 91 Cal.App. 327, at page 331, 267 P. 138, at page 140, the court said: "During the course of the trial respondent [plaintiff] made a motion to amend the amended complaint to conform to proof. * * * This motion was granted, but we have been unable to find anywhere in the record that any such amendment was actually made. * * * Respondent's failure to avail itself of the permission to amend may be considered an abandonment of his motion, which may have been induced by Miller's testimony." See also Carpentier v. Brenham, 50 Cal. 549.

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* These sections were repealed by Stats. 1953, ch. 1355; see new sections 65600, 65601, and 65650 et seq., effective Sept. 9, 1953.

[2] In the instant case, it may have been the appellant's offer to prove by the records that the 1937 ordinance did not effect a rezoning of appellant's property that caused respondent not to offer any amendment to its answer. Whatever the reason, the answer was not amended and respondent remains bound by its admissions made therein.

Our conclusion as to the effect of the noncompliance with Section 10 of Ordinance No. 125 makes it unnecessary to discuss the other points involved on this appeal.

The judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

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146 Cal.App.2d 227

Gilbert W. SMITHERS, Plaintiff and Respondent,

v.

Adolph J. EDERER, Defendant and Appellant.

No. 16988.

District Court of Appeal, First District, Division 1, California.

Nov. 26, 1956.

Action to recover amount which plaintiff had allegedly loaned to defendant. From a judgment rendered by the Superior Court, City and County of San Francisco, H. A. van der Zee, J., in favor of plaintiff for amount admitted due by defendant, defendant appealed. The District Court of Appeal, Agee, J. pro tem., held notwithstanding statute providing for dismissal of actions not brought to trial within five years, where defendant, in answer, had admitted that part of sum prayed for was due, without interest, court could properly, after such five year period, enter judgment in favor of plaintiff for such sum, since defendant had consented to such, and since such judgment could be entered without trial or hearing on disputed issues, but court could not allow interest, since interest issue was disputed.

Judgment affirmed as modified.

1. Judgment ⚡181(14)

In action wherein plaintiff sought to recover amount which he allegedly loaned to defendant, defendant by admitting that part of sum was due, made entry of summary judgment against him for such amount proper.

2. Dismissal and Nonsuit ⚡60(1)

The statutory provision for dismissal of action where there has been no trial within five years of filing is not inflexible and is subject to implied exceptions, having as its object expediting administration of justice in trial of fact issues, and does not compel dismissal where no trial would be required. West's Ann.Code Civ.Proc. § 583.

3. Dismissal and Nonsuit 🔑60(1)

Notwithstanding statute providing for dismissal of actions not brought to trial within five years, where defendant, in answer, admitted that part of sum prayed for was due, without interest, court could properly, after such five year period, enter judgment in favor of plaintiff for such sum, since defendant had, in answer, consented to such, and since such judgment could be entered without trial or hearing on disputed issues, but court could not allow interest, since interest issue was disputed. West's Ann.Code Civ.Proc. § 583.

4. Judgment 🔑181(15)

In action wherein plaintiff sought to recover amount which it had allegedly loaned defendant, defendant by denying in answer, that any interest was due, presented triable issue as to interest making it improper for trial court to grant summary judgment on issue.

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Leo J. Walcom, John T. Harmon, San Francisco, for appellant.

J. W. Jackson, Bergen Van Brunt, San Francisco, for respondent.

AGEE, Justice pro tem.

Defendant appeals from a summary judgment granted more than five years after the commencement of the action and over the objection of defendant who contended that dismissal of the action was mandatory under section 583 of the Code of Civil Procedure.

The action was filed on June 15, 1949. It alleged that plaintiff had loaned defendant $5,000 and prayed for judgment in this amount plus interest from November 26, 1947. The defendant alleged in his answer that plaintiff had advanced the $5,000 as an investment in a theatrical production being produced by defendant; that their understanding was that if said production was successful, plaintiff was to receive back the $5,000 without interest, plus a one-half interest in the profits; that if the production was unsuccessful, plaintiff was to get back $2,500 only, without interest; that the production was unsuccessful and, as the result, defendant was indebted to plaintiff in the sum of $2,500, without interest. Defendant prayed "that plaintiff have judgment only for the unpaid indebtedness admitted herein."

On July 27, 1954, defendant filed a motion to dismiss on the ground that the action had not been brought to trial within five years after being filed. Code Civ.Proc. § 583. While this motion was pending plaintiff filed a motion for judgment in the amount of $2,500 which defendant admitted was owing and for an order severing the remainder of the claim and ordering the action to proceed as to such remainder. Code Civ.Proc. § 437c, last paragraph. In his motion plaintiff stated that if the court was of the opinion that a trial could not be had as to the remaining amount claimed by him, he waived "all claim and demand for judgment over the amount of money that the defendant has admitted by his verified affidavit and answer is now due, owing and unpaid to the plaintiff." The court thereupon granted plaintiff a judgment for $2,500 but denied his motion to proceed as to the remainder of such claim. It also denied defendant's motion to dismiss. The minute order entered by the court refers to plaintiff's waiver of any additional claim. It is apparent that the court accepted such waiver upon the condition specified by plaintiff, i. e., that the court was of the opinion that a trial could not be had as to any disputed issue. Such an opinion must necessarily rest upon section 583 of the Code of Civil Procedure, which provides that an action shall be dismissed unless it is brought to trial within five years after being filed. Thus, although the record shows a denial of defendant's motion under section 583, which was addressed to the entire action, the effect of the court's order was to dismiss and terminate the action except as to the amount which defendant had admitted in this answer was due and owing.

[1] There can be no question that plaintiff was entitled to a judgment for $2,500

at any time after defendant filed his answer and within five years after the action was filed. The only question is whether the court had any right to grant such judgment after the five years had expired, in view of the provisions of section 583 of the Code of Civil Procedure.

As to that portion of the action that was not in dispute, the court was faced with the same situation as that in Martin v. Gibson, 48 Cal.App.2d 449, 119 P.2d 1012. There the plaintiff filed an action to foreclose a mortage. The answer admitted all of the allegations of the complaint. When more than five years had elapsed after the filing of the complaint, the defendants moved under section 583 to dismiss the action and the trial court granted the motion. On appeal, the judgment of dismissal was reversed. It was held that the defendants by admitting all the facts alleged in the complaint agreed that there should be no trial. It should be noted that, in the instant case, the plaintiff was not allowed to go to trial as to that portion of the action which was in dispute. Instead, he was given judgment only for that portion of his claim that did not necessitate a trial in the light of defendant's answer and his prayer therein that plaintiff have judgment for the amount admitted to be due. By his answer defendant in effect waived a trial as to such amount and he cannot complain if the judgment is the one which he asked to have rendered.

[2] In Martin v. Gibson, supra, the court said, 48 Cal.App.2d at page 451, 119 P.2d at page 1013, that section 583 of the Code of Civil Procedure should be construed " 'with common sense and the dictates of justice'. 23 Cal.Jur., § 104, p. 722. We do not believe the legislature intended to compel a dismissal where there would be no trial, the object being to expedite the administration of justice in the matter of the trial of any issues of fact."

[3] Plaintiff has called attention to certain judically created exceptions to the application of the mandatory provisions of section 583, such as in Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153 (trial delayed because of undetermined appeal from motion granting change of venue) and Rose v. Knapp, 38 Cal.2d 114, 237 P.2d 981, (trial delayed because the result depended upon the determination in another proceeding). These cases demonstrate that the dismissal provision of section 583 is not inflexible and that it is subject to implied exceptions. Plaintiff has set forth in great detail why the instant action was not brought to trial within five years. The main reasons were that plaintiff is a marine engineer and was almost continuously at sea on ships transporting war materials to Korea and later to Indo-China and, when he was in port in San Francisco, defendant's counsel was always engaged in another trial. However, we do not think the factual situation presented here warrants a holding that proceeding to trial would have been "impossible, impracticable or futile". Chief Justice Gibson in Rose v. Knapp, supra, 38 Cal.2d at page 117, 237 P.2d at page 983. The best that can be said is that it might have been impractical. We prefer to base our decision on the ground that the judgment rendered is the one which the defendant expressly consented to in his answer and that it was one which could be rendered without a trial or hearing on disputed issues. Martin v. Gibson, supra.

[4] The minute order entered by the trial court correctly did not include interest on the $2,500. In fact, plaintiff did not request interest in his motion for judgment. The formal judgment later signed erroneously included interest from July 15, 1949. The defendant's answer pleaded an agreement that the debt was "without interest." This presented a triable issue and the court had denied plaintiff's motion to proceed with the action as to the disputed issues. The judgment should be limited to the amount not necessitating a trial. Martin v. Gibson, supra. Interest on the $2,500 should be allowed only from the time of entry of judgment.

The judgment is modified by striking therefrom the provision for interest prior to the entry of judgment. As so modified, the judgment is affirmed, each of the parties to bear his own respective costs on appeal.

PETERS, P. J., and FRED B. WOOD, J., concur.

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146 Cal.App.2d 513

Gina Cass WILCOX, Plaintiff and Respondent,

v.

Ruth REIS, S. G. Reis and S. G. Reis Co., a copartnership composed of Ruth Reis and S. G. Reis, Defendants and Appellants.

Civ. 21849.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1956.

Rehearing Denied Dec. 28, 1956.

Hearing Denied Jan. 30, 1957.

Action on oral employment contract by real estate agent for 50 per cent of commission received from sale of realty brought against real estate firm. The Superior Court, Los Angeles County, Philbrick McCoy, J., entered judgment for agent and real estate firm appealed. The District Court of Appeal, Moore, P. J., held that there was substantial evidence to sustain court's finding that the parties had never supplanted their original, oral contract providing that agent should receive 50 per cent of commission for the sale of real estate, although a revised plan of commission participation had been presented to the agent.

Judgment affirmed.

1. Master and Servant 🔑80(10)

In action for commissions under oral contract by real estate agent against real estate firm, finding that firm and agent had not supplanted original oral contract providing for 50 per cent commission in event real estate transaction was consummated by a revised plan of commission participation was justified by the evidence.

2. Appeal and Error 🔑931(1)

All conflicts in evidence must, on appeal, be resolved in favor of respondent.

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Richard L. Sieg, Jr., Beverly Hills, for appellants.

Goodstein, Moffitt & Rosen, Los Angeles, by Gerald L. Rosen, Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendants Ruth and S. G. Reis appeal from a judgment awarding plaintiff fifty per cent of the commission received from the sale of the home of Arturo Rubinstein. Appellants contend that the evidence does not suffice to support the findings.

[1] Respondent was an employee in the real estate office of appellants. She testified that before entering such employment she asked Mrs. Reis what her compensation would be as a real estate saleswoman. "She told me that I would receive 50 per cent of commissions. At that time she told me there had to be a buyer and a seller; no deal was consummated unless there were both, and we would split 50–50." Having accepted appellants' offer, respondent participated in nineteen transactions in her capacity as a real estate saleswoman. In some of these transactions she obtained an open listing, in others an exclusive listing, or procured the buyer. In seventeen of the transactions she was paid fifty per cent of the commissions obtained by appellants. The two instances wherein she received less than fifty per cent are not in point.[1] Mrs. Reis testified that on every transaction for which respondent secured the listing and for every transaction on which she had

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[1] One was consummated before she obtained her license to act as a saleswoman; in the other, she obtained neither the buyer nor the seller but merely spent an afternoon as a hostess on the property.

anything to do with the sale, "exclusive of the present case in issue" she received fifty per cent of the commission. This evidence is sufficient to support a finding that the parties agreed to a fifty-fifty division of all commissions obtained by appellants where respondent had secured the listing, or the buyer or made the sale.

Appellants insist that a "Revised Commission Participation Agreement" governed the commission arrangements between the parties. That agreement set up a schedule of commission participation dependent upon the role each real-estate agent played in the ultimate transaction. In other words, a broker would be entitled to thirty per cent for an exclusive listing, a lesser percentage for a nonexclusive listing and a greater percentage if his efforts also procured the buyer. Both respondent and Mrs. Reis testified that a copy of this agreement had been presented to respondent but not signed by her. The latter testified that she immediately told Mrs. Reis that she did not have any intention of being bound by the proposed schedule of commission participation. Furthermore, the subsequent commissions earned by the parties were not shared in accordance with the terms of the proposed agreement. Appellants introduced evidence for the purpose of explaining why respondent was paid fifty per cent of certain commissions instead of the lesser percentages indicated by the proposed agreements. The trial court was not obliged to believe such evidence but adopted the testimony of respondent as the basis of its decision. The finding that the litigants never supplanted their original, oral contract with the "Revised Commission Participation Agreement" is well supported.

[2] As to the disputed transaction, a social acquaintance informed respondent that the Rubinsteins were interested in leasing their home and they might be willing to sell. After respondent and Mrs. Reis had viewed the premises they discussed the prospects of selling the place. Although the testimony is in conflict as to whether respondent suggested the name of the potential buyer, the court found that the home was eventually sold; that appellants were paid a commission of $7,000; that respondent had earned one-half thereof, to wit, $3,500 for her services in effecting the sale. The evidence was substantial in support of the judgment and will not on that account be reversed. Olivero v. Rosano, 42 Cal. App.2d 740, 743, 109 P.2d 976. All conflicts in the evidence must, on appeal, be resolved in favor of respondent. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Drabkin v. Bigelow, 59 Cal.App.2d 68, 74, 138 P.2d 750.

Because the listing of the Rubinstein property was obtained by respondent, in accordance with the contract of the parties, she was entitled to be paid in accordance with her contract.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.

146 Cal.App.2d 231

William MULLER, Petitioner and Appellant,

v.

The MUNICIPAL COURT OF THE SOUTHERN JUDICIAL DISTRICT OF SAN MATEO COUNTY and the Honorable Edward J. Ryan, as Judge of said Municipal Court, Respondents and Respondent.

Civ. 17023.

District Court of Appeal, First District, Division 1, California.

Nov. 26, 1956.

Proceeding on application for writ of mandamus against municipal court directing entry of defaults and a determination upon merits of application for judgment against nonappearing defendants in a forcible entry and detainer action. The Superior Court, County of San Mateo, Edmund Scott, J., denied petition and petitioner appealed. The District Court of Appeal, Fred B. Wood, J., held that where proceeding to set aside defaults was instituted subsequent to municipal court hearing and was pending at time of superior court hearing, that was sufficient ground for superior court in exercise of its legal discretion to deny issuance of a writ.

Affirmed.

1. Mandamus ⟹16(1)

Where plaintiff in forcible entry and detainer action in municipal court was denied application for entry of default and judgment against two nonappearing defendants and he petitioned superior court for writ of mandamus against municipal court directing entry of the defaults and determination upon the merits of his application for judgment against defaulting defendants, and on hearing before superior court it developed that defaults had been entered prior to hearing in municipal court, one of the issues was removed and mandamus would not be granted directing the doing of that which had already been done.

2. Mandamus ⟹5

Where plaintiff in forcible entry and detainer action in municipal court petitioned superior court for writ of mandamus against municipal court directing entry of default against nonappearing defendants and a determination of application for judgment against defaulting defendants, and it appeared that proceeding to set aside defaults had been instituted subsequent to municipal court hearing, that was sufficient ground for superior court in exercise of its legal discretion to deny issuance of writ to hear and determine application for default judgment.

3. Armed Services ⟹34.9(1)

In proceeding for writ of mandamus against municipal court directing entry of defaults against nonappearing defendants in forcible entry and detainer action in such municipal court and a determination upon the merits of plaintiff's application for judgment against such defaulting defendants, where no moratorium affidavit had been filed as required by Soldiers' and Sailors' Civil Relief Act, there was no abuse of discretion in withholding the requested writ in absence of such affidavit. Soldiers' and Sailors' Civil Relief Act of 1940, § 200, 50 U.S.C.A.Appendix § 520.

4. Forcible Entry and Detainer ⟹38(4)

Where forcible entry and detainer action was instituted against several defendants, some of whom answered and some of whom did not appear, rights of plaintiff as against defaulting defendants could be determined when his case against answering defendants was tried, and plaintiff could not be prejudiced by a refusal to enter default or judgment against nonappearing defendants before case with answering defendants was tried. West's Ann.Code Civ.Proc., § 579

William Muller, in pro. per.

Charles Reagh, San Francisco, Keith C. Sorenson, Dist. Atty. of San Mateo County, Lyle R. Edson, Chief Civil Deputy Dist. Atty., Redwood City, for respondent.

FRED B. WOOD, Justice.

Appellant William Muller brought a forcible entry and detainer action in the municipal court and served six defendants, four of whom appeared and answered. The other two defaulted. He then applied to that court for entry of default and for judgment against these two. The court denied the application, whereupon Muller petitioned the superior court for a writ of mandamus against the municipal court, directing entry of the defaults and a determination, upon the merits, of Muller's application for judgment against the defaulting defendants. After a hearing the superior court denied the petition for a peremptory writ and Muller appealed.

[1] Upon the hearing before the superior court it developed that the defaults had been entered prior to the hearing in the municipal court. That removed one of the issues. No purpose would be served

in directing the doing of that which had already been done.

[2] It further appeared that a proceeding to set aside the defaults, instituted subsequent to the municipal court hearing, was pending in the municipal court at the time of the superior court hearing. That, we believe, was sufficient ground for the superior court, in the exercise of its legal discretion, to deny issuance of a writ to hear and determine Muller's application for a default judgment. See Rogers v. Board of Directors, 218 Cal. 221, 223–225, 22 P.2d 509; Ault v. Council of City of San Rafael, 17 Cal.2d 415, 417, 110 P.2d 379; 16 Cal.Jur. 768, Mandamus, § 7.

[3] It further appears that no moratorium affidavit has been filed as required by 50 U.S.C.A.Appendix, § 520. That statute declares that in the case of a default "the plaintiff, before entering judgment shall file in the court [here, the municipal court] an affidavit setting forth facts showing that the defendant is not in military service." Muller claims he need not file such an affidavit until just before entry of judgment; hence, that he has a right to a determination of his application for judgment against the defaulting defendants prior to filing the affidavit. However, that might otherwise be (we need not decide), the lack of such an affidavit seems appropriate for consideration by the superior court when determining whether to direct the municipal court to proceed. We see no abuse of discretion in its withholding of the requested writ in the absence of such an affidavit.

[4] In conclusion, we observe that under no possible view of the case has Muller (contrary to his contention) suffered an adverse determination of his substantive rights. His rights as against the defaulting defendants (whether their defaults be set aside or not) can be determined (even if several judgments against them be permissible) when his case against the answering defendants is tried. See Code Civ. Proc. § 579 as interpreted in Trans-Pacific T. Co. v. Patsy F. & R. Co., 189 Cal. 509, 513, 209 P. 357; Mirabile v. Smith, 119 Cal.App.2d 685, 686, 260 P.2d 179.

The order appealed from is affirmed.

PETERS, P. J., and BRAY, J., concur.

146 Cal.App.2d 384

Leo SPIVA, Plaintiff and Respondent,

v.

PHOENIX INDEMNITY COMPANY, a corporation, Defendant and Appellant.

Civ. 8852.

District Court of Appeal, Third District, California.

Nov. 28, 1956.

Contractor brought action against insurer for declaratory relief. The Superior Court of Merced County, R. R. Sischo, J., entered judgment adverse to insurer, and insurer appealed. The District Court of Appeal, Van Dyke, P. J., held that where contractor's liability policy, which was issued to contractor to enable him to perform salvage operations in Kern County on school property, was a job site policy covering salvage operations on any job site whereon contractor conducted salvage operations, but it contained a provision for automatic insurance for additional operations, the policy covered a parking lot improvement job outside Kern County.

Judgment affirmed.

1. Insurance 🔑434

Where contractor's public liability policy issued by insurer to contractor, so as to enable him to perform salvage operations on school property in Kern County, stated that policy covered salvage operations in Kern County "and elsewhere," and school job was expected to be and was in fact completed in a short time, but policy covered one year period, policy was a "job site policy" covering subsequent salvage operations outside Kern County.

See publication Words and Phrases, for other judicial constructions and definitions of "Job Site Policy" and "and Elsewhere".

2. Insurance ⚷434

Where contractor's liability policy, which was issued to contractor to enable him to perform salvage operations in Kern County on school property, was a job site policy covering salvage operations on any job site whereon contractor conducted salvage operations, but it contained a provision for automatic insurance for additional operations, the policy covered a parking lot improvement job outside Kern County.

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Weinstock, Anderson, Maloney & Chase, San Francisco, for appellant.

L. A. MacNicol, Merced, E. R. Vaughn, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Respondent was a general contractor licensed as such. He usually confined his work to road building, cement work, general building and paving. He described himself as a small, general contractor. He operated in and out of Modesto where he had a business address at his home. There, he kept his operating equipment. For some time prior to September, 1952, due to strikes in the industry, he had done little work and had purposely let his liability insurance lapse. An earthquake had damaged buildings in Bakersfield, and respondent went there with the purpose of bidding for some demolition work. He bid three jobs and succeeded in being the best bidder on a job of wrecking and removing a damaged incinerator and chimney belonging to a school. Liability insurance was required, and on September 12th respondent went to appellant's agents in Bakersfield to purchase it. He was given a certificate of insurance which enabled him to proceed with the job he had successfully bid, and he finished the work in approximately a week. A formal policy, countersigned at Bakersfield, September 19, 1952, was written by appellant, covering the period from September 12, 1952 to September 12, 1953.

Seven or eight months after the initial date of the policy and while respondent was performing contract work in Merced, his operations damaged property belonging to others through spraying hot sealing oil on automobiles parked nearby. A number of claims were made against him. He referred these claims to appellant, and appellant denied liability, claiming that the coverage involved was not within its policy. Respondent brought this action for declaratory relief, and the case was tried upon issues made up as to the extent of coverage afforded. Appellant filed a cross-complaint asking that the policy be reformed to make it applicable only to the school job, but the issues thus raised were not tried, and the cross-complaint was abandoned. Respondent tendered no issues concerning either reformation or estoppel to deny coverage. Both parties assert that they stand on the contract as written, though differing as to its meaning. The court received evidence as to the circumstances surrounding the making of the contract as an aid to its interpretation and then construed the contract as affording coverage for claims arising out of respondent's performance of the work in Merced which we have referred to. From the ensuing judgment so declaring, appellant appeals.

Respondent testified that, while he did not generally operate in Kern County, on this occasion he went down there for the specific purpose of bidding on some demolition jobs; that the school accepted his bid on the incinerator and chimney jobs, but required liability insurance which would protect the school; that he was then operating without liability insurance. He was referred to the Roberts Insurance Agency which wrote insurance through appellant in order that he might secure the necessary coverage. He told the agency that he was a contractor, described the job he had bid, and said that he had to cover the job at once as he then had no liability insurance. The agency called up appellant at its San Francisco offices, and within a few hours received authorization to write the insurance required. A certificate of insurance was given respondent, sufficient in form and substance to enable him to satisfy the school's requirements and he paid a year's minimum premium. The certificate stated appellant had issued to Spiva a public liability policy covering bodily injury and property damage within certain limits and under the heading "Description and location of operations covered" there was typed the following: "Salvage operations—Kern County and elsewhere in California." The term of insurance was given as from 9–12–52 to 9–12–53. It was stated that the certificate was issued at the request of the Kern County Union High School. When the school job was completed respondent returned to Modesto, taking no more jobs in Kern County. The policy, as later written by appellant, was never delivered to respondent, but he testified that his draft was delivered to the school, and it appears that the parties are not in dispute that the copy of the policy introduced in evidence at the trial was a full, true and correct copy of the one actually issued by appellant. Respondent made no inquiry as to, or request for, the policy until claims were made against him. Under the circumstances, the policy stands as an integration of the contract between the parties subject only to such construction as is necessary to clarify any ambiguities that may exist.

[1] The policy is written on a form entitled "Manufacturers' and Contractors' Public Liability Policy". It states the company's agreement to pay on behalf of the insured all sums which the insured should become obligated to pay by reason of liability imposed upon him by law for damages arising out of the defined hazards. The definition of hazards, so far as material here, reads as follows: "Division 1. Premises—Operations. The ownership, maintenance or use of the premises, and all operations during the Policy period which are necessary or incidental thereto." This language, of course, suggests that the premises will be described in the policy, and that the coverage will be limited to such described premises and to accidental damage arising out of the ownership, maintenance, or use thereof, including operations necessary or incidental to such ownership, maintenance, or use. But when we turn to the declarations wherein the form furnishes opportunity for description of the premises, we find the following: "Location of Premises Kern County and Elsewhere in California." We find further that the space intended for a statement of the interest of the insured in the premises is left blank as is also the space intended for a statement of the part of the premises occupied by the insured. The definition of hazards suggests business premises, owned, maintained, or used by the insured as a contractor, but there is no suggestion in the negotiations that Spiva owned any business premises in Kern County, or that he expected to own, maintain, or use business premises therein. There is no description of business premises at all, and the only policy reference to such premises is the statement that they are somewhere in California. Under the heading "Item 4. Purposes of Use 1. Premises—Operations", there is typed the following: "Salvage Operations—including incidental wrecking, shoring or other structural work the handling of machinery in damaged buildings, and salesmen or clerical office employees at site of wrecking." It is suggested that this locates the premises as the site of the school job, but that cannot be, for it conflicts with "Kern County and Elsewhere in California." The suggestion is also in conflict with the fact that the school job was expected to be, and was, completed in a short time, whereas the policy was issued for a year, and the minimum premium for that period was accepted. The last quoted matter concerning "Salvage Operations," etc., together with "Kern County and Elsewhere in California" as the only descrip-

tion of premises authorizes and, in our opinion, compels this policy to be construed as a job site policy. This construction is in harmony with that of the trial court, which declared that the policy did cover the insured's job site operations on the parking lot he was improving in Merced. This construction is also in harmony with a statement in the policy as follows: "'The unqualified word "premises" wherever used in this policy shall mean (a) the premises designated in the declarations including buildings and structures thereon and the ways immediately adjoining and (b) when a territory is designated in the declarations, in addition to or *in lieu of a specific location, places within said territory while used by or on behalf of the named insured,* * * *.'" See, for similar constructions of practically identical policies, Associated Indemnity Corp. v. National Surety Corp., Tex.Civ.App., 287 S.W.2d 714, 716, and Berger Brothers Electric Motors, Inc. v. New Amsterdam Casualty Co., 293 N.Y. 523, 58 N.E.2d 717.

Construing this policy, however, to cover the premises on which respondent was performing a contract is not enough to fasten liability upon appellant. The stated coverage is for accidental damage arising out of the insured's use of the premises, and the policy declarations prescribe the purposes of such use and thereby limit the coverage to the described use, that is: "Salvage Operations—including incidental wrecking, shoring or other structural work the handling of machinery in damaged buildings, and salesmen or clerical office employees at site of wrecking." As we have noted, this same general limitation was stated in the certificate of insurance given to Spiva for delivery to the school authorities. Whatever uncertainties or ambiguities may have afflicted the balance of the policy, these provisions are neither uncertain nor ambiguous. They limit the coverage to salvage operations as therein described. The evidence is clear that in improving the parking lot, Spiva was in no sense engaged in salvage operations and particularly is it demonstrated that spraying hot oil on automobiles belonging to the claimants was not an accident which arose out of salvage operations. We conclude that except by operation of an automatic insurance clause next discussed the policy did not cover Spiva's operations on the Merced lot.

[2] Finally, respondent contends that, in all events and however construed, the policy picked up coverage not otherwise covered by the insuring agreements because of the provisions for automatic insurance for additional operations on described premises. We have already said that so far as premises be concerned this was a job site policy that covered salvage operations on any job site whereon Spiva conducted such operations. The automatic insurance provisions so far as here pertinent reads as follows: "Automatic Insurance for Additional * * *, Operations, * *. If the named Insured * * * undertakes operations not insured by this Policy, such insurance as is afforded under division 1 of the Definition of Hazards applies also to such * * * operations." Division 1 of the Definition of Hazards thus referred to so far as here material reads as follows: "Definition of Hazards Division 1. Premises—Operations. The * * * use of the premises, and all operations during the Policy period which are necessary or incidental thereto." We have already said that Spiva, while working on the Merced parking lot, performing work undertaken by him as a contractor was not engaged in salvage operations. It follows that he was engaged in other operations; operations within the scope of his business as declared by him to the appellant, and upon premises described in the policy. The sole purpose of the inclusion in a policy of an automatic insurance provision is to extend coverage. It can have no other purpose. We conclude, therefore, that coverage for the operations on the Merced parking lot was afforded by the automatic insurance provisions. Appellant argues in this respect that coverage for such work was expressly excluded by exclusion provision (d) which reads as follows: "This Policy does not

apply: * * * (d) under divisions 1 * * of the Definition of Hazards, to liability with respect to * * * operations on or from other premises which are owned, rented or controlled by the Insured." But as we have construed the policy the premises here involved are not "other premises" but are the described premises. The exclusion, therefore, does not operate.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

146 Cal.App.2d 139

Axel E. NEILSEN, d/b/a California Mercantile Company, Plaintiff and Appellant,

v.

Jack SAYLORS, Growers Lumber Company, Carlen Construction Company Associates, Charles Carlen, Dan Nelson, First Doe, Second Doe, Third Doe and Fourth Doe, Defendants and Respondents.

Civ. 17449.

District Court of Appeal, First District, Division 2, California.

Nov. 20, 1956.

Rehearing Denied Dec. 20, 1956.

Hearing Denied Jan. 16, 1957.

Action for balance allegedly due for merchandise sold. Defendants cross-complained in interpleader and deposited sum allegedly due into court. The Superior Court, County of Santa Clara, Byrd L. Salsman, J., upon motion of defendants vacated an order directing litigation of conflicting claims to the amount deposited, and directed repayment of the fund. Plaintiff appealed from the order vacating the order in interpleader, and defendants moved to dismiss the appeal upon the ground that the order of vacation was not an appealable order. The District Court of Appeal, Draper, J. pro tem., held that where vacation of interlocutory order of interpleader merely restored plaintiff to the position he held when he commenced his action against defendant, and relieved him of any bar to full prosecution of his claims against defendants, plaintiff was not a party aggrieved and since such order was not a special order made after final judgment it was not appealable, but could be reviewed only upon appeal from a final judgment in the action.

Appeal dismissed.

1. Appeal and Error 🔑78(2), 870(2)

An order of substitution of defendants, made upon motion for interpleader, upon deposit in court, is not a final judgment and is therefore not appealable, but review of such order must be sought upon appeal from the final judgment in the case. West's Ann. Code Civ.Proc., § 386.

2. Appeal and Error 🔑82(3), 151(2)

Where vacation of interlocutory order of interpleader merely restored plaintiff to the position he held when he commenced his action against defendant, and relieved him of any bar to full prosecution of his claims against defendants, plaintiff was not a party aggrieved, and since such order was not a special order made after final judgment it was not appealable, but could be reviewed only upon appeal from a final judgment in the action. West's Ann.Code Civ.Proc., §§ 386, 938, 963.

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O. A. Goth, Redwood City, for appellant.

Ryan & Ryan, San Francisco, for respondents.

DRAPER, Justice pro tem.

Plaintiff's complaint was on the common counts, seeking from all defendants a balance allegedly due for merchandise sold. Defendants Carlen and Nelson cross-complained in interpleader, alleging that they had purchased lumber from defendants Saylor and Growers Lumber Company and owed therefor an amount in excess of the prayer of the complaint. Named as cross-defendants were the assignee for benefit of creditors of defendant Growers Lumber Company (who was not a party to the action as originally filed), plaintiff and all defendants except cross-complainants. It was alleged that the cross-defendants asserted conflicting claims to the amount admittedly owed by cross-complainants. Upon motion by cross-complainants under Code of Civil Procedure, § 386, and after deposit in court of the amount admitted due, they were directed to litigate among themselves their conflicting claims to the fund.

Three months later, cross-complainants moved to set aside that order under Code of Civil Procedure, § 473. They alleged that in fact they had paid more than was due for the lumber purchased by them but, through excusable neglect, their books had shown a balance remaining due when the cross-complaint was filed. Their motion was granted. The court vacated its earlier order, and directed repayment to cross-complainants of the amount previously deposited in court.

Plaintiff appealed from the order vacating the order in interpleader. Cross-complainants move to dismiss the appeal upon the ground that the order of vacation is not an appealable order.

It seems clear that the latest order is not appealable unless it is a "special order made after final judgment", Code Civ.Proc. § 963. If the original order in interpleader were appealable as a final judgment, it would follow that the order vacating it is within the quoted language, and is itself appealable. Casner v. Superior Court, 23 Cal.App.2d 730, 74 P.2d 298; Colby v. Pierce, 15 Cal.App.2d 723, 59 P.2d 1046.

[1] But an order of substitution of defendants, made under Code of Civil Procedure, § 386 upon deposit in court has been held not a final judgment, and therefore not appealable. Camp v. Oakland Mortgage & Finance Co., 205 Cal. 380, 270 P. 685. In Cassidy v. Norton, 25 Cal.App. 433, 435, 143 P. 1057, it is said that review of such an order must be sought upon appeal from the final judgment in the case.

Appellants argue that the proceedings discussed in those cases involved the first clause of Code of Civil Procedure, § 386, which permits substitution of a conflicting claimant for the original defendant, upon deposit in court; whereas the present proceeding is by way of cross-complaint in interpleader, as permitted by the second clause of the section. But this distinction, referred to in Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 275 P. 794, appears to have no bearing on the appealability of the interlocutory order for deposit of funds and discharge of the stakeholder.

[2] We see no reason to give detailed consideration to the asserted distinction here, as it is apparent that appellant is not a "party aggrieved", Code Civ.Proc. § 938, by the order. Vacation of the interlocutory order restores appellant to the position he held when the action commenced, and relieves him of any bar to full prosecution of his claims against respondents Carlen and Nelson. Appellant argues only that by reason of the interlocutory order he has filed pleadings making certain "admissions" which he would otherwise not have made. He does not contend that these admissions are untrue or inaccurate. We cannot see that truth impedes the search for justice, or that the pleading of it is a ground for appeal by the pleader.

Appellant's claims can be fully reviewed upon appeal, if any, from such final judgment as may be entered here. The motion to dismiss this appeal is granted, without prejudice to such review upon appeal from final judgment herein.

DOOLING, Acting P. J., and KAUFMAN, J., concur.

146 Cal.App.2d 110

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raul Martinez RAMOS, Defendant and Appellant.

Cr. 5680.

District Court of Appeal, Second District, Division 2, California.

Nov. 19, 1956.

Defendant was convicted of selling heroin. The Superior Court of Los Angeles County, Louis H. Burke, J., entered judgment and an order denying motion of defendants for a new trial, and the defendant appealed. The District Court of Appeal, Fox, J., held that question whether there was entrapment of defendant by informer was for the Superior Court sitting without a jury.

Judgment and order affirmed.

1. Criminal Law ⚷37

Where the doing of an act is a crime, regardless of the consent of anyone, and the criminal intent originates in the mind of defendant, and offense is completed, fact that an opportunity was furnished, or that defendant was aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense.

2. Criminal Law ⚷37

If an officer uses no more persuasion than is necessary to an ordinary sale of a narcotic, and defendant is ready and willing to make the sale to the officer, there is no "entrapment."

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

3. Criminal Law ⚷739(1)

In prosecution for sale of heroin, question whether there was entrapment of defendant by informant was for the trial court sitting without a jury. West's Ann. Health & Safety Code, § 11500.

Philip S. Schutz, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., G. A. Strader, Deputy Atty. Gen., for respondent.

FOX, Justice.

Defendant was convicted of violating section 11500 of the Health and Safety Code, in that on July 16, 1955, he sold a narcotic known as heroin. He appeals from the judgment and the order denying his motion for a new trial.

Defendant does not deny making the sale. His sole point on appeal is that the evidence establishes as a matter of law the defense of entrapment.

On the afternoon of July 16, 1955, Deputy Sheriff Guiterrez, who was assigned to the narcotic detail, was introduced by another deputy sheriff to an informant known only as "Poncho." Guiterrez and Poncho went to the corner of Brooklyn and Mednick, in East Los Angeles, where the latter telephoned defendant, who was an acquaintance, that he wanted to see him. In about ten minutes defendant drove up. Annie DeAnda was with him. Guiterrez and Poncho entered the car. A few minutes later, as defendant drove southerly on Mednick, Poncho asked him, "Have you got the stuff?" Defendant replied, "Yes." Poncho then said to Guiterrez, "Give me the money." The officer handed him "$24.00 for the stuff." Defendant then said something to Mrs. DeAnda that Guiterrez was unable to understand, whereupon she said to the officer, "We will drop you off at the next corner. We will take him [Poncho] with us, give him the stuff and then we will drive him back." Guiterrez objected to this, saying, "It is my money. I won't let him out of my sight." Mrs. DeAnda replied, "After all, you can't blame us. We don't know who you are and we can't take any chances."

Defendant continued driving to the corner of Mednick and First Streets, a distance of some two or three blocks from where the officer and Poncho had entered the car. He there made a right turn when Poncho said to him, "If you are going to act like that then let us off right here. We don't want anything from you." Defendant then stopped the car, Guiterrez alighted and Poncho followed him. Thereupon Poncho said to defendant, "Well, are you going to give me the stuff?" At that point defendant handed Poncho a blue balloon containing ten capsules of heroin and received $24 from him.

According to the officer, this is all the conversation between him and Poncho on the one hand and defendant and Mrs. DeAnda on the other. Defendant, however, testified that Poncho stated several times that he was sick—"real sick;" that he wanted the stuff for his own use; that, in effect, Poncho begged him to sell the heroin to him. Defendant further testified that Poncho had, on a number of prior occasions, attempted to buy narcotics from him but without success; that he had told Poncho he was a user but not a "pusher," i. e., a peddler. He further testified that when Poncho called him on the telephone and said he wanted to see him, he (Poncho) said it was "important." There was not, however, anything said in that telephone conversation about narcotics, according to defendant.

[1, 2] This court recently had occasion to review the law of entrapment in People v. Cummings, 141 Cal.App.2d 193, 296 P.2d 610 (rehearing denied). It was there pointed out 141 Cal.App.2d at page 201, 296 P.2d at page 615, that "In People v. Braddock, 41 Cal.2d 794, 802, 264 P.2d 521, 525, the court had this to say on the subject of entrapment: 'The many decisions in this state which define the defense of entrapment were reviewed in People v. Lindsey, 91 Cal.App.2d 914, 205 P.2d 1114, and the law stated as follows: "Where the doing of an act is a crime, regardless of the consent of anyone, the courts are agreed that if the criminal intent originates in the mind of the accused and the offense is completed, the fact that an opportunity was furnished, or that the accused is aided in the commission of the crime in order to secure the evidence necessary to prosecute him therefor, constitutes no defense. [Citations.] If the officer uses no more persuasion than is necessary to an ordinary sale, and the accused is ready and willing to make the sale, there is no entrapment." 91 Cal.App.2d at page 917, 205 P.2d 1115. More recently it was held: "It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated. Where an accused has a pre-existing criminal intent, the fact that when solicited by a decoy he committed a crime raises no inference of unlawful entrapment." [Citations.]' "

[3] Defendant's theory of entrapment is based on his own testimony that Poncho importuned him to make the sale because he said he was sick for lack of narcotics. He seeks to bolster his position by his further testimony that he had refused to sell Poncho narcotics on a number of previous occasions. The effect of the officer's testimony is that Poncho did not represent or pretend that he was ill or that he begged defendant to make the sale. In fact, the clear inference is that the heroin was not being purchased for Poncho's personal use but rather for his companion, Guiterrez. It was for the trial court to resolve this conflict and determine on a factual basis whether Poncho, the informant, was guilty of unreasonable persuasion or pressure in effecting the sale, or whether he used "no more persuasion than is necessary to an ordinary sale" and whether the defendant was "ready and willing to make the sale". People v. Lindsey, 91 Cal.App.2d 914, 917, 205 P.2d 1114, 1115. Involved in making this determination was defendant's credibility, and the weight that should be given to his testimony. In view of defendant's obvious interest in the outcome of this case, the trial judge was not required to give credence to defendant's story and, from the implied findings, it is apparent that he did not. Since, according to defendant, Poncho did not mention narcotics in the telephone conversation but did state it was important to see him, and in view of the

reluctance of defendant and his woman companion to make the sale in the presence of a stranger, it is a reasonable inference that defendant expected and intended to make a sale and took the contraband along for that purpose. From this the trial court could properly conclude that Guiterrez and Poncho merely provided "the occasion for one engaged in illegal activities to ply his trade." People v. Bowlby, 135 Cal.App.2d 519, 530, 287 P.2d 547. This does not amount to entrapment. People v. Braddock, supra; People v. Bowlby, supra. From the foregoing it is clear that the evidence did not establish the defense of entrapment as a matter of law.

Judgment and order affirmed.

MOORE, P. J., and ASHBURN, J., concur.

146 Cal.App.2d 252

Jerrell BABB, Plaintiff, Cross-Defendant and Respondent,

v.

Thomas EISTRAT, Defendant, Cross-Complainant and Appellant.

Civ. 22080.

District Court of Appeal, Second District, Division 1, California.

Nov. 26, 1956.

Rehearing Denied Dec. 26, 1956.

Action for a money judgment. Defendant filed a cross-complaint for damages. From a judgment of a Superior Court for plaintiff on the cross-complaint, defendant appealed. On plaintiff respondent's motion to dismiss the appeal on ground of appellant's failure to make timely arrangements with Superior Court clerk to pay for transcript, the District Court of Appeal, White, P. J., held that appellant's statements, in opposition to motion, that since plaintiff allowed judgment against him on complaint to become final, defendant thought he could not be further injured by plaintiff's acts if appeal were not perfected, but became apprehensive on subsequently reading a recent decision of District Court of Appeal that judgment appealed from would be res judicata in his pending action against a party not concerned with instant action, showed that delay was not occasioned by excusable neglect and hence did not show good cause required by Rule on Appeal for appellate court to relieve appellant from such default.

Motion granted, and appeal dismissed.

1. Appeal and Error 🔑787

The burden rests on appellant to use reasonable diligence to perfect and prosecute appeal.

2. Constitutional Law 🔑321

Courts favor determination of litigation on merits and all parties thereto should have day in court at all stages of proceedings.

3. Appeal and Error 🔑371

Application of Rule on Appeal that notice of appeal shall not be effective, unless appellant makes arrangements with lower court clerk to pay cost of preparing transcript within ten days after notification of clerk's estimate of such cost, is mandatory, in absence of showing of good cause for noncompliance with rule. West's Ann. Rules on Appeal, rules 5(c), 53(b).

4. Appeal and Error 🔑371

Statements by defendant-appellant, in opposition to plaintiff-respondent's motion to dismiss appeal from judgment for plaintiff on defendant's cross-complaint, that plaintiff having allowed a judgment against him on his complaint to become final, appellant thought he could not be further injured by plaintiff's acts, if appeal were not perfected, but that, on subsequently reading a recent decision of District Court of Appeal, appellant became apprehensive that judgment appealed from would be res judicata in pending action by him against a party not concerned with instant action, showed that appellant's failure to make timely arrangements with lower court clerk to pay for transcript was not occasioned by excusable neglect and hence did not show good cause required by Rule on Appeal for Appellate Court to relieve appellant from such default. West's Ann.Rules on Appeal, rules 5(c), 10(a), 53(b).

◆

Thomas Eistrat, Alhambra, in pro. per.

Jerrell Babb, Los Angeles, in pro. per.

WHITE, Presiding Justice.

Respondent moves to dismiss the appeal herein on the ground that appellant failed to make timely arrangements with the clerk of the lower court for payment for the clerk's transcript within the time provided by the Rules on Appeal.

Respondent's motion to dismiss is supported by a certificate of the clerk of the superior court which shows that on August 2, 1954, plaintiff (respondent herein) filed a complaint; that the relief prayed for was a judgment against the defendant (appellant herein) for the sum of $2,500; that on March 21, 1955, appellant herein filed his fourth amended cross-complaint praying for damages in the amount of $4,100 as costs and expenses alleged in his first and second causes of action, together with the sum of "more than $1.00" as damages for the libels alleged in his third cause of action.

On December 31, 1955, judgment was entered ordering that plaintiff (respondent herein) take nothing by reason of any matters alleged in his complaint and that defendant (appellant herein) have judgment against plaintiff thereon; that cross-complainant (appellant) take nothing by reason of any matters alleged in his fourth amended cross-complaint, and that cross-defendant (respondent) have judgment against cross-complainant thereon. It was further ordered that each party to this action bear his own costs.

Notice of entry of judgment was filed January 3, 1956, and was served by mail, January 13, 1956, on plaintiff, Jerrell Babb, appearing in propria persona.

Notice of intention to move for new trial on cross-complaint was filed February 15, 1956; there is no entry on the register of actions of any ruling on said motion.

Notice of appeal from said judgment, on behalf of defendant (appellant herein), was filed February 28, 1956.

Notice to clerk to prepare transcript, and notice to order reporter's transcript was filed March 9, 1956. Pursuant to Rule 4(a) of Rules on Appeal, a copy of the aforesaid notice was mailed March 19, 1956, to court reporters Ruth Lipton and John S. Murdock.

In accordance with the provisions of Rule 5 of the Rules on Appeal adopted by the Judicial Council, a notice by the clerk of the superior court designating the estimated cost for the preparation of the clerk's transcript was mailed March 28, 1956, to defendant (appellant) appearing in propria persona. As of October 8, 1956, the date of the clerk's certificate, no arrangement had been made with the clerk for the payment thereof.

Pursuant to Rule 4(a) of Rules on Appeal, the clerk, on March 26, 1956, received a copy of a letter written to appellant herein, by Ruth Lipton, court reporter, designating the estimated cost ($100) for preparation of the reporters' transcript on appeal. Up to the date when the clerk's certificate was issued no arrangement had been made with her for the payment thereof, and no waiver of deposit had been filed by said reporter Ruth Lipton. A waiver of deposit for the preparation of court Reporter's (John S. Murdock) transcript on appeal was filed March 23, 1956. As to the preparation of the clerk's transcript, appellant had until April 7, 1956, to make his arrangements for payment of the clerk's costs. To date nothing has been done by appellant in that regard.

Rule 5(c) of the Rules on Appeal provides as follows: "(Clerk's charges) The notice given by the appellant under the foregoing provisions of this rule *shall not* *be effective for any purpose unless,* within 10 days after notification from the clerk of his estimate of the cost of preparing the transcript, with the exception of exhibits and affidavits which the respondent has directed to be copied, the appellant shall make arrangements with the clerk for the payment thereof." (Emphasis added.)

Rule 10(a) of Rules on Appeal provides in part as follows: "* * * If the appellant shall fail to perform an act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

Appellant resists the motion and as grounds therefor asserts that "After respondent allowed the judgment against him on the complaint for attorneys (sic) fees to become final, it appeared to appellant that although he had a meritorious appeal and had been unfairly treated by respondent, that he (appellant) could not be further injured by respondents (sic) acts were the appeal not perfected.

"Last week appellant (sic) received by mail a copy of respondent's 'Notice of Motion to Dismiss Appeal Under Rule 5(c) and Rule 10(a) of Rules on Appeal'. Such motion appeared innocuous.

"Upon just now receiving the advance sheet 301 P.2d No. 2, it appears from the case of Barker v. Carver [Cal.App.], 301 P.2d 307 (Civ. 21491) 2 D.C.A. 1, most recently decided by this Honorable Court, that the exception of derivative liability (Witkin, California Procedure, Vol. 3, pp. 1959–1961) as somewhat extended by the Bernhard v. Bank of America case, 19 Cal. 2d 807, 122 P.2d 892, to the requirement of mutuality and privity by the party asserting a plea of res judicata, has been further stated and extended. It therefore now appears, that the Brush Industrial Lumber Company in action 640312, Civil 21905, may be unjustly enriched to the detriment of appellant herein, with no benefit or detriment to respondent herein, by Brush asserting that the judgment on the cross-complaint herein appealed from is res judicata as to Brush, if such judgment on the cross-complaint herein is not rendered moot by stipulation offered herein, or said findings and judgment on the cross-complaint are not corrected on the merits by perfection of this appeal."

There is attached to appellant's points and authorities in opposition to respondent's motion for dismissal of appeal, a stipulation signed by him and which he states respondent refused to sign. The proffered stipulation provides for a dismissal of respondent's cross-complaint filed in the superior court, "without determination of the merits and with prejudice to an action again between the parties hereto non pro tunc (sic) as of time of filing originally, and that this appeal on the cross-complaint and judgment thereon be dismissed as moot, subject to the Honorable Justices of above entitled court approving this stipulation."

[1, 2] It is a fundamental rule of appellate procedure that the burden rests on an appellant to use reasonable diligence to perfect and prosecute his appeal. True, it is an oft repeated rule that the courts favor a determination of litigation upon the merits, and that all parties should have their day in court at all stages of the proceedings. This policy undoubtedly influenced the Judicial Council in promulgating Rule 53(b) of Rules on Appeal, wherein provision is made authorizing the appellate tribunal to relieve a party from default occasioned by failure to comply with the Rules on Appeal, but the rule just cited makes such relief dependent on "good cause".

[3, 4] In the absence of some showing amounting to "good cause" under Rule 53 (b) of Rules on Appeal, the application of Rule 5(c) above quoted is mandatory, Whelpton v. Taylor, 81 Cal.App.2d 949, 951, 185 P.2d 391. From a reading of the reasons advanced by appellant in opposition

to the motion to dismiss, it is at once manifest that the delay herein was not occasioned by excusable neglect but rather because, as appellant states, since respondent allowed that portion of the judgment denying him relief on his complaint to become final, "it appeared to appellant that although he had a meritorious appeal and had been unfairly treated by respondent, that he (appellant) could not be further injured by respondent's acts were the appeal not perfected"; that when appellant received a copy of the notice to dismiss the appeal, "such motion appeared innocuous," but that upon reading a recent decision of the District Court of Appeal, he (appellant) became apprehensive lest "* * * the judgment on the cross-complaint herein appealed from is res judicata" as to another action appellant now has pending against a party not concerned with the instant action.

We are satisfied that under the facts and circumstances here present, to deny respondent's motion to dismiss would result in manifest injustice to him.

The appeal is dismissed.

DORAN and FOURT, JJ., concur.

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146 Cal.App.2d 216

Claire Porter McMILLEN, Plaintiff and Appellant,

v.

SOUTHERN PACIFIC COMPANY, Defendant and Respondent.

Civ. 16886.

District Court of Appeal, First District, Division 1, California.

Nov. 26, 1956.

Rehearing Denied Dec. 26, 1956.

Hearing Denied Jan. 23, 1957.

Action by passenger for injuries allegedly sustained when, while disembarking from defendant's train, it allegedly jolted causing her to fall and strike her back against train step. The Superior Court, City and County of San Francisco, William T. Sweigert, J., entered judgment for railroad and passenger appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence presented a question for the jury as to whether train was jolted while passenger was descending steps of the train.

Judgment affirmed.

1. Evidence 🔑588, 594

The jury is the sole judge of the credibility of witnesses and is free to disbelieve them even though they are uncontradicted, if there is any rational ground for doing so.

2. Evidence 🔑590
Witnesses 🔑315

In passing on a credibility of a witness, the jury is entitled to consider his interest in the result of the case and the manner in which he testifies.

3. Witnesses 🔑331½

Even though medical testimony as to the extent and nature of a passenger's injuries did not directly concern issue of railroad's liability for such injuries, it could properly have been considered by the jury in determining passenger's credibility.

4. Carriers 🔑320(26)

In action by passenger for injuries allegedly sustained when, while disembarking from defendant's train, it allegedly jolted causing her to fall and strike her back against train step, evidence presented a question for the jury as to whether train was jolted while passenger was descending steps of the train.

5. Carriers 🔑316(3)

In action by passenger for injuries allegedly sustained when, while disembarking from defendant's train, it allegedly jolted causing her to fall and strike her back against train step, burden was upon passenger to establish facts necessary to bring into play the doctrine of res ipsa loquitur, and whether or not the alleged jolt occurred was one of those facts.

6. Evidence ⚷589

In action by passenger for injuries allegedly sustained when, while disembarking from defendant's train, it allegedly jolted causing her to fall and strike her back against train step, jury was not required as a matter of law to accept passenger's story even though it was not directly controverted.

7. Carriers ⚷347(9)

In action by passenger for injuries allegedly sustained when, while disembarking from defendant's train it allegedly jolted causing her to fall and strike her back against train step, evidence was sufficient to raise a question for the jury as to contributory negligence of passenger in failing to hold on to railing on side of steps at the time she was disembarking from train.

8. Carriers ⚷321(1)

Where railroad sued by passenger for injuries was not negligent as a matter of law in the operation of one of its passenger trains, giving of an instruction on unavoidable accident was not error.

9. Carriers ⚷280(1)

A railroad is not an insurer or guarantor of a passenger's safety.

◆

Wexler & Wexler, Millbrae, for appellant.

Ropers & Majeski, Redwood City, for respondent.

AGEE, Justice pro tem.

Plaintiff appeals following an adverse jury verdict in a personal injury action, contending that the evidence is insufficient to sustain the verdict and that the trial court erroneously instructed the jury.

On November 22, 1950, at 6 p. m., appellant boarded respondent's train at San Francisco as a paying passenger. She injured her back while getting off the train at Millbrae. Appellant was the only witness as to what happened. Her version is as follows: "Q. Now, was there anyone else on that coach ready to disembark at the time you were standing on the top platform? A. There was a man on the bottom step, waiting for the train to stop, and I was on the platform—of the coach—on the platform. Q. Now, did the train come to a stop? A. It came to a complete stop. Q. Tell us what happened from that point on. A. Well, then the man on the bottom step got off and I started to go down the steps, and I had some bundles in my left arm and I was holding on with my right hand and, as I stepped, started to step from the step below the platform to the next step, the train jolted and it just jolted me off my feet and I lost my handgrip and I just went right out of the train; I landed with my feet on the pavement and my back against the step." Appellant estimated that the train had been stopped for "five or six seconds" before the jolt occurred.

[1, 2] Appellant states her first contention as follows: "The uncontradicted evidence of the appellant is to the effect that while she was a paying passenger on the respondent's train and while she was in the act of descending the steps of the respondent's train after the train had stopped, that the train suddenly and severely jolted and jerked, throwing the appellant down the steps of the train and thereby severely injuring the appellant. *There is no evidence in the record to impeach or contradict this testimony.*" (Emphasis ours.) Appellant's contention, in effect, is that the jury was required to accept her story as a *matter of law.* We do not agree. As stated in Blank v. Coffin, 20 Cal.2d 457, 464, 126 P.2d 868, 870: "The jury, however, is the sole judge of the credibility of the witnesses [citing authorities] and is free to disbelieve them even though they are uncontradicted if there is any rational ground for doing so. * * * There are many reasons why a jury may refuse to believe a witness. * * * In passing on the credibility of a witness, the jury is entitled to consider his interest in the result of the case." As the court points out, even the manner in which the witness testifies may be considered.

[3, 4] There are many things which may have caused the jury to disbelieve appellant. She did not report the accident to respondent until over six weeks later and then it was through her attorney, whom she first consulted on January 8 or 9. The jury could have inferred that her reason for so doing was that she had not, up until that time, considered that respondent was to blame for her fall. Respondent was a daily commuter and the train was a commuters' train. If the accident had been investigated soon after it is alleged to have occurred, it is quite likely that fellow commuters would have been able to say whether the train had or had not jolted or jerked at the time and place in question. The jury had a right to consider also the many conflicts between respondent's testimony and that of her medical witnesses as to the extent and nature of her injuries. There was a considerable variance. Even though this testimony does not directly concern the issue of liability, it may be considered by the jury in determining respondent's credibility. In Nelson v. Black, 43 Cal.2d 612, at page 613, 275 P.2d 473, the Supreme Court said: "From the conflicts in his own testimony and with other evidence in regard to the nature of the medical treatment he received, the extent and duration of his asserted disability, and his physical condition prior to the accident, the jury reasonably could have concluded that he testified falsely concerning those matters. Having so determined, *it could have disregarded his entire testimony*". (Emphasis added.) It may be pointed out, also, that appellant's account of the train's movement is difficult to believe unless it can be concluded that, for some unexplained reason, the engineer, after bringing the train to a complete stop, decided to start forward or backward and again stop, this time abruptly. There was no testimony that the original stop at Millbrae had been abrupt or unusual. The "jolt" occurred "five or six seconds" after the train had come to a complete stop, according to appellant. However, the engineer testified, without objection, to his usual method of operating the train and described how, after he has brought it to a stop, he sets the engine brake which holds the train in a stopped position. He then looks back for a proceed signal which a brakeman gives him after all the passengers have detrained. He keeps his hand on the brake until the signal is given. If this method was followed at the time in question, the "jolt" described by appellant could not have happened.

Respondent called the five members of the train crew and they all testified that they could not recall any jolting or jerking. This was negative testimony from which the jury could have inferred that, if there had been this unusual movement of the train, they would have been able to recall it. Scott v. City & County of San Francisco, 91 Cal.App.2d 887, 888–889, 206 P.2d 45; White v. Los Angeles Ry. Corp., 73 Cal.App.2d 720, 167 P.2d 530; Ostertag v. Bethlehem Shipbuilding Corp., 65 Cal.App.2d 795, 800, 151 P.2d 647.

[5, 6] The burden was upon appellant to establish the facts necessary to bring into play the doctrine of res ipsa loquitur. Steele v. Pacific Electric Ry. Co., 168 Cal. 375, 378–379, 143 P. 718. Whether or not the alleged "jolt" or "jerk" occurred was one of these facts. The jury was not required *as a matter of law* to accept appellant's story. It reasonably could have found that appellant had failed to sustain the burden of proof required of her and that, therefore, the doctrine of res ipsa loquitur did not come into play. There would then have been no inference of negligence to rebut.

[7] Assuming, however, that the jury found that the alleged severe "jolt" or "jerk" occurred, then the doctrine of res ipsa loquitur is applicable and an inference arises that it was caused by the respondent's negligence. In addition to the defense that it had used the utmost care and diligence for appellant's safe carriage, respondent also had available the defense of appellant's contributory negligence if there was sufficient evidence to support it. Appellant does not dispute this as an ab-

stract proposition but contends that there is not sufficient evidence in the instant case upon which a finding of contributory negligence could have been made. Therefore, appellant argues, the trial court erred when it instructed on contributory negligence. We do not agree.

Appellant testified that, as she was starting to descend the steps, she was holding some bundles in her left arm but was holding with her right hand onto the hand railing. It was dark at the time. It would appear that, under the circumstances, the jury could have found that the exercise of ordinary care required that appellant use the hand rail. However, her physician testified, reading from his notes, that she made the following statement to him shortly after the accident: "while stepping down, the train jerked, causing her to fall across the steps, hitting the mid-section of the upper back across the steps. *She broke part of her fall by grabbing hold of a railing on the side of the steps.*" (Emphasis added.) From this, the jury could have inferred that she did not have a hold on the hand rail at the time of the alleged jolt but only attempted to gain one *after* she had started to fall. From such inference, the jury could reasonably have concluded that she did not exercise ordinary care for her own safety and that this was one of the proximate causes of her fall. Accordingly, it was proper to instruct the jury on the issue of contributory negligence. Moreover, appellant herself offered an instruction (marked by the court as "Given in substance") which told the jury that if they found the necessary elements of res ipsa loquitur to be present, *"and* that the *plaintiff* was *free from contributory negligence,"* (emphasis added) the verdict should be in favor of appellant. Two other instructions offered by appellant, both marked by the court as "Refused, subject otherwise covered," told the jury that if the elements of res ipsa loquitur are present the burden is then thrown upon the carrier to establish that such injury was not caused by its neglect but by "the contributory negligence of the passenger." If it was error to instruct on contributory negligence, the error was invited by appellant. See 4 Cal.Jur.2d 423; Fuentes v. Panella, 120 Cal.App.2d 175, 182, 260 P.2d 853; Rivera v. Goodenough, 71 Cal.App.2d 223, 231, 162 P.2d 498.

[8] Appellant asserts that it was also prejudicial error to instruct on unavoidable accident because there was no evidence from which such a finding could be made. This question was settled by the Supreme Court in Parker v. Womack, 37 Cal.2d 116, at page 122, 230 P.2d 823, at page 826, where it held that a determination that an accident was unavoidable is proper where the evidence merely shows that a plaintiff has failed in his proof. In Driver v. Norman, 106 Cal.App.2d 725, 727, 236 P.2d 6, 8; Parker v. Womack, supra, is cited as authority for the rule that "the giving of an instruction on unavoidable accident is proper unless the defendant is negligent as a matter of law." See also, Scott v. Burke, 39 Cal.2d 388, 401, 247 P.2d 313; Smith v. City & County of San Francisco, 117 Cal.App.2d 749, 751, 256 P.2d 999; Hooper v. Bronson, 123 Cal.App.2d 243, 251, 266 P.2d 590; Zollars v. Barber, 140 Cal.App.2d 502, 295 P.2d 561. We have determined that the respondent was not negligent as a matter of law and that, therefore, the giving of the instruction on unavoidable accident was not error. But we would like to point out that it would not have been error to have refused such instruction. Attention is invited to Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, where at page 636, 245 P.2d 583, at page 589, a number of cases are listed in which it was held not to be error to refuse such an instruction where all elements of a defendant's liability under the evidence presented are covered by other instructions. See also Mr. Justice Carter's dissenting opinion in Parker v. Womack, supra.

Appellants argue that Parker v. Womack, supra, does not apply to a passenger-common carrier accident. There is nothing in its language, however, that indicates any such limitation. This Court made no such distinction in Taylor v. Luxor Cab Co., 112 Cal.App.2d 46, 56, 246 P.2d 45, which involved a passenger-taxicab situation. Appellant cites Pezzoni v. City & County of San Francisco, 101 Cal.App.2d 123, 225 P.2d 14, and Finley v. City & County of San Francisco, 115 Cal.App.2d 116, 251 P.2d 687. Neither of these cases held that the giving of an instruction on unavoidable accident was improper. In the Pezzoni case the jury was told that "'* * * before an accident can be said to be unavoidable it must appear * * * that the occurrence was one which ordinary care * * would not have guarded against * * *.'" The Court pointed out that from this "the jury could only reasonably understand that defendant was only bound to use ordinary care to escape liability for its action." 101 Cal.App.2d at page 125, 225 P.2d at page 15. The same mistake was made in the Finley case, but the court made this pertinent observation, 115 Cal.App.2d at page 122, 251 P.2d at page 691: "Instructions on such a *theory* [unavoidable accident] are not objectionable provided they contain an accurate statement of the applicable law." In the instant case, the only instruction given on unavoidable accident defined it as follows: "* * * an accident or occurrence that occurs without having been proximately caused by negligence as I have explained that term to you." The jury had been instructed that "negligence," so far as respondent was concerned, meant the failure to use the utmost care and diligence, and that "negligence," as to appellant, meant the failure to exercise ordinary care for her own safety. Hence, the confusion that existed in the Pezzoni and Finley cases did not obtain here. It is implicit in the Finley case that an instruction in a common carrier case on unavoidable accident, if correctly stated, is proper. In this case, the instruction correctly stated the law. Appellant also cites Hyman v. Market Street Railway Co., 41 Cal.App.2d 647, 107 P.2d 485 and Scandalis v. Jenny, 132 Cal.App. 307, 22 P.2d 545. In both of these cases, as pointed out in Parker v. Womack, supra, the defendant was negligent *as a matter of law*. That is not the situation here. In the remaining case cited by appellant, Barr v. Hall, 12 Cal.App.2d 489, 55 P.2d 1246, the trial judge refused to instruct on unavoidable accident. Had the trial judge done so in the instant case, it would not have been error either.

After the trial judge had concluded his instructions, appellant's counsel asked for an instruction on life expectancy, whereupon respondent's counsel asked for the instruction on unavoidable accident. Both were then given. Appellant urges that the instruction on unavoidable accident thereby received extra emphasis. We do not agree. The trial judge had simply overlooked these two proposed instructions and was reminded of them by respective counsel in a manner that resulted in no emphasis on either.

[9] Appellant's concluding assignment of error is that the instructions given were "heavily weighted in favor of the carrier." We have read the entire record, with particular attention to the instructions given, and we are satisfied that this is not so. It would serve no useful purpose to set forth the entire charge herein. Appellant also calls attention to a number of instructions which, she says, indicate to the jury that respondent was not liable. For example, appellant complains of the instruction that respondent is not an insurer or guarantor of appellant's safety. This is, of course, a correct and relevant statement of the law.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; CARTER, J., dissenting.

146 Cal.App.2d 393

Charles RAY, d/b/a Built-Rite Fence Company, Petitioner,
v.
INDUSTRIAL ACCIDENT COMMISSION of the State of California and William Charles Wolgamott, Respondents.

District Court of Appeal, Third District, California.

Nov. 28, 1956.

Proceeding by employer seeking review of a workmen's compensation award of the Industrial Accident Commission granting employee additional compensation by reason of alleged serious and wilful misconduct of employer. The District Court of Appeal, Peek, J., held that evidence supported finding that employee's injury was caused by the serious and wilful misconduct of employer in failing to provide a guard for a circular saw maintained upon a manual feed table.

Award affirmed.

1. Workmen's Compensation 🔑941

Legislative intent in adopting statutes allowing increased workmen's compensation awards where an employer is found to have violated some safety measure is to induce safety measures and methods in industrial employment, and awards under such statutes are in the nature of a penalty. West's Ann.Labor Code, § 4553.

2. Workmen's Compensation 🔑941

Any compensation which may accrue by reason of serious and willful misconduct of an employer in violation of a safety measure is separate and distinct from ordinary compensation benefits provided by the Labor Law, and therefore a compromise and release agreement entered into between an employer's insurance carrier and employee covering ordinary compensation benefits did not defeat employee's claim for additional benefits predicated upon serious and willful misconduct of employer. West's Ann.Labor Code, §§ 3700, 4553; West's Ann.Civ.Code, arts. 1541, 1542.

3. Workmen's Compensation 🔑1281

Where an employee, by an amended application for additional workmen's compensation by reason of alleged serious and willful misconduct of his employer, did not attempt to state a new cause against his employer but merely set forth in detail the facts upon which his claim was based in accordance with a rule of the Industrial Accident Commission, such amended application was merely in amplification of his original application, and would be deemed to have been filed as of the date of the original application for purposes of determining applicability of the statute of limitations. West's Ann. Labor Code, §§ 4553, 5407; West's Ann. Code Civ.Proc., § 350.

4. Workmen's Compensation 🔑1092

Although the Industrial Accident Commission may adopt reasonable rules of practice and procedure, it cannot restrict the time prescribed by the legislature for the filing of claims.

5. Workmen's Compensation 🔑1265

Employee's petition for additional compensation by reason of alleged serious and willful misconduct of his employer in maintaining a circular saw upon a manual feed table without a guard as provided in the general safety orders of the Department of Industrial Relations, sufficiently pleaded facts forming the basis for a claim against employer based on his willful misconduct. West's Ann.Labor Code, § 4553.

6. Workmen's Compensation 🔑1674

In proceeding by employee for additional compensation by reason of alleged serious and willful misconduct of employer in maintaining a circular saw upon a manual feed table without a guard as provided in the general safety orders of the Department of Industrial Relations, evidence sustained finding that the employee's injury was caused by the serious and willful misconduct of employer. West's Ann.Labor Code, § 4553.

◆

Manwell & Manwell, James G. Changaris, Marysville, for petitioner.

Donald E. Huckins, Marysville, for respondent Wolgamott.

Everett A. Corten, Daniel C. Murphy, San Francisco, for Industrial Accident Commission.

PEEK, Justice.

Petitioner seeks review of an award of the Industrial Accident Commission granting respondent-employee Wolgamott additional compensation by reason of the alleged serious and willful misconduct of the petitioner-employer under the provisions of Labor Code, section 4553.

The facts show that on February 16, 1954, Wolgamott, while operating an unguarded table saw, sustained an injury admittedly arising out of and in the course of his employment. On January 31, 1955, after negotiation with the respondent insurance carrier, Wolgamott entered into a "Compromise and Release" of claim for the sum of $4,320 which was the exact amount of the advisory disability rating of 36 percent previously given by the Permanent Disability Rating Bureau. The agreement which was on a form supplied by the Commission provided in part as follows:

> "Upon approval of this Compromise agreement by the Industrial Accident Commission and payment in accordance with the provisions hereof, said applicant releases and forever discharges said employer and insurance carrier from all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury * * *."

The agreement was not signed by the petitioner but only by Wolgamott and Fireman's Fund, petitioner's insurance carrier, and was not attested to by two disinterested witnesses or a notary public as required by Labor Code, section 5003, however no question in that regard was raised before the Commission.

On February 10, 1955, prior to the approval of the compromise agreement by the Commission, Wolgamott filed an application for increased compensation under the provisions of section 4553 of the Labor Code. On February 17, 1955, pursuant to a referee's recommendation, the compromise agreement was approved by the Commission and filed. On March 1, 1955, Wolgamott filed an amended application for hearing wherein he specifically charged the violation of safety orders of the Department of Industrial Relations requiring the maintenance of a hood over a circular saw. The answer of the employer (1) denied the allegations of misconduct, (2) affirmatively alleged the application was barred by the provisions of section 5407 of the Labor Code and (3) pleaded the compromise and release in bar. The Commission found against the employer over his first affirmative defense based on section 5407, but made no finding on his second affirmative defense and concluded that the injury was caused by the serious and willful misconduct of the employer and awarded additional compensation. A petition for reconsideration was granted, but after further consideration the decision was affirmed.

It is now contended by the petitioner (1) that the claim was barred by the written "Compromise and Release", (2) that the claim is barred by the statute of limitations, and (3) that the charge of misconduct was neither properly pleaded nor supported by the evidence.

Petitioner's argument in support of his first contention is predicated primarily upon the release provisions contained in Civil Code, sections 1541 and 1542, and upon the alleged failure of the Commission to find specifically on the issue so raised. Neither petitioner nor the I.A.C. has referred this court to any California decision. However, we find that one California case, Peterson v. Industrial Acc. Comm., 81 Cal. App.2d 352, 183 P.2d 927, 930, has noted to a degree the difference between the procedures relative to the two types of benefits, and that courts in other jurisdictions, namely Massachusetts and Nebraska, have had the question squarely presented. In the Peterson case the court noted that while one may claim both ordinary compensation and compensation arising out of willful misconduct in the same proceeding, nevertheless the language of section 5407 indicates an intention that "* * * some definite step, other and different from the filing of a general application, must be taken to raise an issue of willful misconduct * *." This distinction is further amplified by the fact that under the terms of section 3700, compensation for ordinary benefits is compulsory while under the provisions of section 11661 of the Insurance Code, insurance covering willful misconduct liability cannot be legally written.

[1] Although the cases from other jurisdictions arose under statutes different from those in this state, the rationale of the decisions appears to be substantially the same and equally applicable here; that the insurance carrier can only be interested in that portion of the coverage in which it is directly liable, and this could not include compensation for serious or willful misconduct for which it could not insure. See Mercer-Fraser Co. v. Industrial Acc. Comm., 40 Cal.2d 102, 108, 251 P.2d 955. Hence the insurance carrier could not bargain for the release of the employer from such additional compensation, and any attempt to include him therein would be void. The legislative intent in adopting statutes allowing increased awards where the employer is found to have violated some safety measure is to induce safety measures and methods in industrial employment, and as our courts have held, is in the nature of a penalty. Mercer-Fraser Co. v. Industrial Acc. Comm., supra. Thus in the case of R. J. Wilson Co. v. Industrial Commission, 219 Wis. 463, 263 N.W. 204, 208, where, as in the present case, a compromise agreement was entered into solely between the insurance carrier and the employee, the court held: "It would be contrary to public policy to construe the compromise agreement in the instant case as relieving the employer from statutory liability for payment of increased compensation."

[2] We therefore conclude that any compensation which may accrue by reason of the serious and willful misconduct of an employer under section 4553 is clearly separate and distinct from the ordinary compensation benefits provided for under section 3700, and that the "Compromise and Release" agreement between the insurance carrier and the employee covering the ordinary compensation benefits could not defeat the employee's claim for additional benefits predicated upon the serious and willful misconduct of the employer.

From what has been said concerning petitioner's first contention, it follows that any finding on this issue must necessarily have been adverse to petitioner, and therefore the failure of the Commission to specifically find thereon is immaterial. 24 Cal.Jur., sec. 188, p. 944.

[3, 4] It is further contended by the petitioner that the application for increased benefits failed to allege with particularity the facts upon which the claim was founded as provided by Rule 10,700 of the Administrative Code; that the amended pleading setting forth such detail was not filed until March 1, 1955, or more than one year after the occurrence of the injury; and that therefore the application and claim for increased compensation was barred by the statute of limitations, in other words that the amended application did not relate back to the original application. An action is commenced when the complaint is filed, sec. 350, Code Civ.Proc., and this is true even though the complaint is irregular. While it is true that under said Rule 10,700, all pleadings alleging an injury by reason of serious and willful misconduct must set out in sufficient detail the specific basis upon which the charge is founded so that the adverse party and the Commission may be fully advised as to the true basis of the claim, it is also true as noted therein that failure to comply with the section is merely grounds for a "continuance." Necessarily therefore such failure is not jurisdictional. The applicant, by the amended application, did not attempt to state a new cause against the employer but

merely set forth in detail the facts required by Rule 10,700 and therefore, being merely in amplification of the original application, it is deemed to have been filed as of the date of the original application. Wennerholm v. Stanford University School of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358. Although the Commission may adopt reasonable rules of practice and procedure, it cannot restrict the time prescribed by the Legislature for the filing of claims. Carter v. Seaboard Finance Co., 33 Cal.2d 564, 585, 203 P.2d 758.

Since we have concluded that the claim was not barred by the statute and that the compromise agreement between the employee and the carrier did not bar the present proceeding, it remains to be determined whether or not the serious and willful misconduct of the employer was properly pleaded, and whether or not the record discloses sufficient evidence to support the conclusion of willful misconduct.

[5] The amended application alleges that the employer maintained a circular saw upon a manual feed table without a guard as provided in the general safety orders of the Department of Industrial Relations; that the employer had been warned of the danger but that the employer, knowing the danger, refused to remedy the dangerous condition. Certainly such allegations were sufficient to advise the employer and the Commission as to the basis of the claim. Rule 10,700, Adm.Code.

[6] The evidence in support of the application shows that prior to the accident the employer had been notified of the dangerous condition of the saw and that it ought to have a guard; that the employer specifically admitted that the saw, in its then condition, was dangerous; that he had knowledge of the safety statute; that the employer's foreman, 30 days prior to the accident, had discussed with him the matter of placing a guard on the saw; that the employer had stated he would do so as soon as possible; and that the foreman had started to make such a guard but had been told by the employer to let it go for the time being. There was further testimony that others had been injured by the saw but less severely than the applicant herein. Under such facts and circumstances we cannot say that the Commission's finding that the injury was caused by the serious and willful misconduct of the employer was not sustained by the evidence. Pacific Employers Ins. Co. v. Industrial Acc. Comm., 209 Cal. 412, 288 P. 66.

The award is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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146 Cal.App.2d 223

Robert T. McCARTHY and Margaret G. McCarthy, his wife, Plaintiffs, Cross-Defendants, and Respondents,

v.

William Dennis BARTON and Jean Gretchen Barton, his wife, Defendants, Cross-Complainants, and Appellants.

Civ. 16942.

District Court of Appeal, First District, Division 1, California.

Nov. 26, 1956.

Rehearing Denied Dec. 26, 1956.

Hearing Denied Jan. 23, 1957.

Action for breach of warranty of value in sale of realty, wherein defendants cross-complained for fraud inducing the sale. The Superior Court of Contra Costa County, Homer W. Patterson, J., rendered judgment for plaintiffs and cross-complainants appealed. The District Court of Appeal, Agee, J. pro tem., held that evidence supported adverse finding on the cross-complaint.

Affirmed.

1. Fraud ⚷58(4)

Evidence supported finding that contract for sale of land was not induced by vendors' false representation as to net cost thereof to vendors, as basis for adverse judgment on cross-complaint for fraud.

2. Appeal and Error ⚷926(1)

Where record on appeal did not disclose trial court's ruling on objections to evidence, reviewing court would not assume that objections had been sustained because trial court found in favor of objecting parties on issue to which such evidence was directed.

Robert J. Drewes, Dinkelspiel & Dinkelspiel, San Francisco, for appellants.

John G. Evans, San Francisco, for respondents.

AGEE, Justice pro tem.

This is an appeal by defendants and cross-complainants, husband and wife, from that portion of a judgment which denied a recovery upon their cross-complaint against plaintiffs and respondents, also husband and wife.

Appellants operated a business under the name of Consolidated Plastics. Respondents owned a parcel of land improved by a building. The parties agreed to exchange an 80% interest in the business for the real estate.

A written contract of sale was prepared by appellants' attorney. It contained the following express warranty: "The net worth of the business as of the date of sale according to good general accounting practices will not be less than the net worth of said business as shown on the attached Balance Sheet of February 28, 1953, of Consolidated Plastics." (Said balance sheet showed a net worth of $70,372.13; 80% of $70,372 is $56,297.60). The contract contained no representation as to the cost or value of the real property being conveyed by respondents.

The respective transfers took place on or about May 5, 1953. In the action thereafter commenced by respondents against appellants, the trial court found that there had been a breach of said warranty and rendered judgment in favor of respondents for $9,718.05, that being the difference, as found by the court, between the true net worth of the interest in the business received by respondents and the warranted net worth thereof, to wit, $56,297.60. This judgment has been paid and appellants have abandoned their appeal therefrom.

Appellants' cross-complaint is based upon the allegations that respondents falsely represented the net cost to them of the land and building as $59,297.60 and that they were induced to enter into the contract in reliance thereon. Judgment for the difference between the alleged cost and the actual cost was prayed.

[1] The trial court found that no such representation had been made and that appellants were not so induced. Appellants contend that there is not sufficient evidence to support such a finding. We do not agree. The record shows that the parties were primarily concerned with *valuation* and that cost came into the transaction only incidentally. The finding that appellants had not been induced to enter into the contract by any representation as to cost is likewise supported by the record. We need refer only to a portion thereof. Appellant Barton himself testified as follows:

> "Q. What method was determined by you and Mr. McCarthy for fixing the valuation of the real property which was transferred by the McCarthys to you for the agreement that you have before, and your subsequent bill of sale of eighty per cent in the Consolidated Plastics? A. I took part in no discussions with Mr. McCarthy as to arriving at that. He simply told me what it was worth, and that was that.
>
> "Q. What did Mr. McCarthy say to you about the property? A. You are asking for ten days' discussions.
>
> "Q. Well, in substance, what did he say to you with respect to the property that was being transferred? A. That was—That it was an automobile agency, a business that he had built and—well, which he had built after his ex-

perience in the Mid-west as a Chevrolet dealer, and prior to that as a vice-president of the Chevrolet Company, and representing long years of experience in the business as a successful going business.

"Q. Did he tell you how much a month that he was receiving from the building? A. Yes, $1,000.00.

"Q. And did you verify that before you consummated this agreement of May 1, 1953? A. We received the lease, yes; that would be confirmation.

"Q. And did he tell you how much he paid for the property? A. *No,* he only—*never, at any time.* We didn't buy it. I guess that is the reason he didn't refer to it that way.

"Q. Did he ever tell you how much he paid for the land? A. He referred to it in the total figures only.

"Q. Well, will you answer the question this way: did he ever say how much he paid for the land? A. *Not to my knowledge.*

"Q. Did he tell you how much he had spent in building the building? A. He only referred to it in the total *values* of land and building.

"Q. But, he didn't tell you how much the building cost him to construct? A. Right at this moment I don't recollect it, no." (Emphasis added.)

Appellants' attorney, who prepared the agreement, testified in part as follows:

"Q. (by Mr. Evans) Will you look at the contract, Mr. Holstrom, and I will ask you this: Will you state why there is no representation in that contract with respect to the valuation or cost of the land that was transferred by the McCarthys to the Bartons? A. Because the valuation of the land was not definitely fixed at the time this contract was entered into. * * *

"The Court: Do I understand that you were drawing a contract here that Mr. Barton was to exchange his interest here in Consolidated Plastics for some land of which there had been no determination of its value at all?

"The Witness: No, Your Honor. There had been an approximate determination of the value. These parties were exchanging equal assets for equal assets because they were interested in the tax aspects of the matter and not having to report any capital gains tax, and all during the conversations and negotiations with these two parties, they were attempting to arrive at the values to be exchanged here, and there was no definite fixed value on either one of these assets until after this contract was entered into, as I recall."

It will be noted that the parties were interested in *value.* And why should appellants be concerned with respondents' cost in considering a future tax liability? Assuming that the transaction was a "like for like" non-taxable exchange under section 112(b) (1) of the Internal Revenue Code of 1939, 26 U.S.C.A. § 112(b) (1), the appellants' cost basis for tax purposes would be "the same as in the case of the property exchanged * * *." Ibid. § 113 (a) (6). If the property acquired in the exchange consisted in part of property permitted to be received without the recognition of gain or loss, and in part of other property, "there shall be assigned to such other property an amount equivalent to its *fair market value* at the date of the exchange." Ibid. § 113(a) (6), emphasis added. Similar rules prevail under the 1954 Internal Revenue Code. 26 U.S.C.A. § 1031. It is clear, then, that in a tax-free exchange, appellants would keep their old cost basis (of 80% of plastics business) and respondents' cost of the real property would have no significance to appellants.

[2] The trial court took under submission the respondents' objections to certain evidence introduced by appellants as to the cost of the real property. The record fails to disclose what, if any, ruling was made thereon and appellants argue that the objections are deemed to have been sus-

tained because the trial court found in favor of respondents on the issue to which such evidence was directed. This is not a proper assumption, see DeTray v. Higgins, 31 Cal.App.2d 482, 487–488, 88 P.2d 241, but we need not pass upon the point in view of the conclusion that there was no fraudulent representation as to cost and that appellants were not induced to enter into the contract by reason of any representation as to cost.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; SCHAUER, J., dissenting.

146 Cal.App.2d 354

William RATTRAY, Thomas Forsythe, James Crawford, Plaintiffs,

v.

Glen Edward ALBERT, Pacific Greyhound Lines, a corporation, et al., Defendants.

Thomas FORSYTHE, Appellant,

v.

Glen Edward ALBERT and Pacific Greyhound Lines, a corporation, Respondents.

Gerald ROCCO and George Milo, Plaintiffs,

v.

Glen Edward ALBERT, Pacific Greyhound Lines, a corporation, et al., Defendants.

George MILO, Appellant,

v.

Glen Edward ALBERT and Pacific Greyhound Lines, a corporation, Respondents.

Civ. Nos. 21634, 21635.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1956.

Consolidated cases involving injuries sustained by bus passengers as result of collision with truck. From orders of the Superior Court of Los Angeles County, Arthur Crum, J., two plaintiffs appealed. The District Court of Appeal, Ashburn, J., held that, on record presented, it had not been an abuse of discretion to grant a new trial, on issue of damages, as to (1) a 37 year old cabinet maker to whom jury had awarded $20,000 for neck and back injuries, for which he had incurred special damages in amount of $6,560.10, and (2) a 46 year old interior and exterior set director in motion picture industry, to whom jury had awarded $25,000 for nose, neck and back injuries, causing him to incur special damages in amount of $2,357.50.

Affirmed.

1. New Trial 🔑68

Trial judge has positive duty to keep verdict in line with facts when matter is presented to him on motion for new trial.

2. New Trial 🔑9

On record presented, in consolidated cases involving injuries sustained by bus passengers as result of collision with truck, it was not an abuse of discretion to grant a new trial, on issue of damages, as to (1) a 37 year old cabinet maker, to whom jury had awarded $20,000 for neck and back injuries, for which he had incurred special damages in amount of $6,560.10, and (2) a 46 year old interior and exterior set director in motion picture industry to whom jury had awarded $25,000 for nose, neck and back injuries, causing him to incur special damages in amount of $2,357.50.

3. Courts 🔑104

It is not province of reviewing court to present detailed argument on sufficiency of evidence to support findings where it appears that question is one purely of determining which side shall be believed.

◆

Robert A. Zarick, Gordon D. Schaber, Sacramento, for appellant, Thomas Forsythe.

Anthony J. Scalora, Gordon D. Schaber, Sacramento, for appellant, George Milo.

Bauder, Gilbert, Thompson & Kelly, Los Angeles, for respondents.

ASHBURN, Justice.

The appellants in these consolidated cases are George Milo and Thomas Forsythe. They were injured on June 14, 1953, while riding as passengers in a bus operated by defendant Albert on behalf of defendant Pacific Greyhound Lines. The bus was driven into the rear end of a truck and trailer and passengers were thrown out of their seats. A jury awarded plaintiff Milo $25,000, and plaintiff Forsythe $20,000. The proof of negligence was convincingly clear. The trial judge granted defendants' motion for a new trial in each case, limiting the same to the issue of damages; the order specified insufficiency of the evidence to justify the verdict as the ground of the ruling.

No claim is made that this was not a proper occasion for a limited new trial if any new trial is to be had. Clifford v. Ruocco, 39 Cal.2d 327, 329, 246 P.2d 651. Appellants' contention is that the evidence is in such shape that it was an abuse of discretion to grant a new trial.

The rules governing review of an order granting a new trial for insufficiency of the evidence are stated in Ballard v. Pacific Greyhound Lines, 28 Cal.2d 357, 358, 170 P.2d 465, 467: "* * * The trial court in considering a motion for new trial is not bound by a conflict in the evidence, and has not abused its discretion when there is any evidence which would support a judgment in favor of the moving party. [Citations.] The only conflict may be the opposing inferences deducible from uncontradicted probative facts. In such case the trial court may draw inferences opposed to those accepted by the jury and may thus resolve the conflicting inferences in favor of the moving party for 'It is only where it can be said as a matter of law that there is no substantial evidence to support a contrary judgment that an appellate court will reverse the order of the trial court.' [Citations.]"

Concerning an order granting the motion upon the ground of excessive damages (which is essentially an insufficiency of the evidence, Sinz v. Owens, 33 Cal.2d 749, 760–761, 205 P.2d 3, 8 A.L.R.2d 757), it is said in Strosk v. Howard Terminal Co., 129 Cal.App.2d 797, 802, 277 P.2d 828, 831: "'Whatever may be the rule which should govern the trial judge, it is certain that when his action in granting a new trial on the ground of excessive damages, or requiring a reduction of the amount as the condition of denying one, comes to be reviewed on appeal, his order will not be reversed unless it plainly appears that he abused his discretion; and the cases teach that, when there is material conflict of evidence regarding the extent of damage, the imputation of such abuse is repelled, the same as if the ground of the order were insufficiency of the evidence to justify the verdict.' Doolin v. Omnibus Cable Co., 125 Cal. 141, 144–145, 57 P. 774, 775 * *."

[1] The trial judge has a positive duty to keep the verdict in line with the facts when the matter is presented to him on motion for new trial. The Supreme Court in Bond v. United Railroads, 159 Cal. 270, 286, 113 P. 366, 373, 48 L.R.A.,N.S., 687, had this to say on the subject: "We have cause to fear that the trial courts sometimes act on the theory that they can shift the responsibility in this matter to the appellate court, and that an excessive verdict can be corrected on appeal. This is a mistake. Our power over excessive damages exists only when the facts are such that the excess appears as a matter of law, or is such as to suggest at first blush, passion, prejudice, or corruption on the part of the jury. [Citations.] Practically, the trial court must bear the whole responsibility in every case." See also, People v. Robarge, 41 Cal.2d 628, 633, 262 P.2d 14.

With respect to plaintiff Forsythe it is claimed by appellants' counsel that he, a 37 year old cabinet maker, was asleep at the time of the accident and suddenly found himself in the aisle lying partly on an old man, partly on his side. He went to his regular physician, Dr. Carlton, on the next day, at which time his neck motion was limited, his back was stiff and he was suffering intense pain. The doctor testified that plaintiff had had a laminectomy of the neck two years before and that on this occasion he was suffering from post-traumatic spinal shock and subluxation of the fourth and fifth vertebrae. After five or six weeks of physiotherapy the patient was referred to Dr. Chapman who put him in traction and a traction brace from October, 1953 to April, 1954. In May of that year plaintiff began to get worse and finally in December went to Dr. Hunter Brown who diagnosed a cervical subluxation on the left side between C–4 and C–5, also a left scalenus anticus syndrome as the cause of his complaint to his left upper extremity. He performed a Crutchfield tong operation and prescribed the wearing of a collar. Plaintiff's special damages amounted to $6,560.10.

Defendants' witness, Dr. Crossen, radiologist, testified that x-rays taken prior to this accident, in 1949, and those taken subsequent thereto disclosed not much difference except an increase in spur formation, "a rather normal physiological reaction to occur in that period of time when we have a neck with some loss of stability." He found no evidence of any compression fracture.

Dr. Dorrell Dickerson, specialist in neurology and neuro-surgery, testified on behalf of defendants. He had examined plaintiff in 1950 after a previous injury in which plaintiff claimed to have been struck on the head by a two-by-four plank. He examined him again in December, 1953, and found him suffering from the same complaints of terrific headaches, pain in the neck, especially on bending and moving. Plaintiff told him of the first accident and his neck bore the scar of a laminectomy operation. Upon the examination in 1953 he manifested the same symptoms in the same places. In this connection Dr. Carlton testified that the first time he saw Forsythe after the accident he said: " 'I feel like I used to. I hurt again.' And he said, 'I haven't felt like this for two years,' and he was scared." Dr. Dickerson further said: "There is no indication of spinal cord or nerve root injury or abnormality. He does not require treatment at this time. From the history it is possible that he could have jerked his neck at the time of the bus accident, but if this did take place he shows no change over the condition I found in 1950."

Dr. Wallace Dodge, a specialist in general and traumatic surgery, examined plaintiff Forsythe on July 7, 1953. X-rays then taken disclosed the previous laminectomy and certain arthritic changes in the neck which were not of recent origin. The witness observed no aggravation of the previous injury and no subluxation or displacement.

The problem with respect to plaintiff Forsythe obviously was one of segregating the effects of the former accident and operation from the bus accident of June, 1953, and separately appraising the latter as the proximate cause of existing disability or as exacerbating a previously existing disability. That there was ample room for difference of opinion between reasonable men seems clear.

Concerning the plaintiff Milo, a 46 year old interior and exterior set director in the motion picture industry, it appears that when the crash came he was thrown into the seat in front of him and rendered unconscious. His nose was injured, he had a cut under the eye, his leg was bruised, his back wrenched, and the eyes failed to focus properly. He soon developed an ache in the small of his back when on his feet; also some urinary difficulties. Little was done for him before November. That was about five months after the accident. Awakened with "terrible" pains across his shoulders and down his arms and fingers, he then consulted Dr. George Gering, whose diagnosis was stated as follows: "I felt that Mr. Milo had had primarily a whiplashing type of injury to the neck which had resulted in injury to one or more of the intervertebral discs and had resulted in a compression of the—I believe it was the fourth cervical vertebrae—and had had a traumatic radiculitis resulting from the injuries to the neck. In other words, the nerve roots emerging from the canals between the vertebrae had been bruised or injured as a result of the injury sustained." He also termed it a compression fracture of C–5 and a partial dislocation or subluxation. Diathermy, injections and traction were used from November to May, 1954; also a collar type device. In January, 1955, Dr. Gering changed the treatement to a new type of injection and traction. Plaintiff's symptoms were pain and numbness and weakness in the arm and hand; dull pain in the small of the back, which continued to the time of trial. Plaintiff's proof of special damages amounted to $2,857.50. He continuously performed his daily work from the time of the accident to the time of the trial.

Dr. Dodge examined Mr. Milo in January, 1954. He found some thickening in the cartilage area of the nose, no tenderness in the neck and no spasm. Also a fifty per cent reduction in rotation of the head from left to right, a condition which might be voluntary or involuntary and the doctor could not determine which; however, there was no spasm to account for it. X-rays were taken and they disclosed the lordotic curve to be normal and showed no compression fracture whatever. Dr. Dodge testified that there were no objective symptoms of disability in the neck; that plaintiff may have had a severe strain of the neck in the bus accident but that any evidence of same had disappeared. He said he was sure there was no fracture of the neck, that any injury which plaintiff may have suffered was one to the soft tissues and that the wearing of the collar would do him no good whatever.

Dr. Crossen took and examined x-rays of plaintiff on November 3, 1953; he found a slight downward and forward slanting of the upper tables of the fourth and third cervical vertebrae, a lump or kyphosis on the fifth cervical interspace, which could be due to voluntary or involuntary muscle contraction or spasm. The x-rays showed no compression fracture but some spurs which appeared to have formed over a considerable length of time, arthritic spurs. The lordotic curve was practically normal and there was no evidence of soft tissue reaction in the ligaments which would have been expected if there had been a fracture in June, 1953, the month of the accident.

Plainly, the Milo picture presents a question of fact as to the nature and extent of the injuries suffered in the accident, one upon which reasonable minds might well differ.

[2, 3] We have not undertaken a detailed or comprehensive review of the evidence in support of the conclusion we have reached, namely, that the trial judge did not abuse his discretion in granting a new trial in each case. "It is not within our jurisdiction to decide that the trial judge arrived at an erroneous conclusion as to the credibility of the witnesses and the weight of the evidence. Much less may we go further and hold that his conclusions upon the factual aspects of the case were so palpably erroneous as to render the order an abuse of discretion. Our question is whether a verdict for an amount considerably less than that awarded would have had reasonable and substantial support in the evidence. [Citations.] A smaller verdict would not have been inadequate as a matter of law." (Ona v. Reachi, 105 Cal.App.2d 758, 762, 233 P.2d 949, 951.) That is true here; a smaller verdict would be justified by the evidence. "The case is merely one in which there is a conflict in the evaluation of evidence. Because we might have found the evidence tilting one way rather than the other is no ground for reversal. The argument made here is one which should have been, and no doubt was, made to the trial court. It is not the province of a reviewing court to present a detailed argument on the sufficiency of the evidence to support the findings where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled. (Gillespie v. Gillespie, 121 Cal.App.2d 95, 97, 262 P.2d 607.)" Sonkin v. Hershon, 130 Cal.App.2d 491, 492, 279 P.2d 156, 157.

The order granting a new trial is affirmed in each case.

MOORE, P. J., and FOX, J., concur.

146 Cal.App.2d 390

MADERA SCHOOL DISTRICT OF MADERA COUNTY, Plaintiff and Appellant,

v.

M. MAGGIORINI, also known as Marcella Maggiorini, Vincent Maggiorini and Walter Maggiorini, Defendants and Respondents.

Walter MAGGIORINI, Cross-Complainant and Respondent,

v.

MADERA SCHOOL DISTRICT OF MADERA COUNTY, Cross-Defendant and Appellant.

Civ. 8887.

District Court of Appeal, Third District, California.

Nov. 28, 1956.

Quiet title action. The Superior Court, Madera County, Stanley Murray, J., rendered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Schottky, J., held that where lots were numbered on recorded map but map did not show true measurements of each lot and deeds of grantees only indicated the lots by number, there was uncertainty as to boundary line, and same could be established by acquiescence.

Affirmed.

1. Boundaries ⚿48(1)

Where lots were numbered on recorded map but map did not show true measurements of each lot and deeds of grantees only indicated the lots by number, there was uncertainty as to boundary line and same could be established by acquiescence.

2. Boundaries ⚿37(5)

Evidence sustained finding that fence had been agreed upon and acquiesced in as boundary line.

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Coffee & Wolfe, Lester J. Gendron, Dist. Atty., Madera, for appellant.

Matt Goldstein, Fresno, for respondents.

SCHOTTKY, Justice.

The Madera School District commenced an action to quiet its title to Lots 19 and 20 of Lankershim Colony. Mrs. Marcella Maggiorini acquired Lot 21 of the Lankershim tract in 1921. Her deed described the property by lot number, not by metes and bounds. She held title until 1953 when at the time of distribution of her estate Lot 21 was devised to respondent Walter Maggiorini. The school district in 1948, by purchase from a Mr. and Mrs. Gann, acquired Lots 19 and 20 which are adjacent to and lie west of Lot 21. They had acquired the property in 1946 from a Mrs. Baratta who had acquired title to the property in 1936. Mrs. Baratta had rented the property from 1924 to 1936.

After the property was acquired by the school district, it had the property surveyed. The surveyor testified that the survey established that a barbed wire fence which was erected as a barrier between the lots was within the east boundary of Lots 19 and 20. After discovering that an encroachment existed the school district brought suit to quiet title. Respondents defended the action on the ground that the fence which had been in existence for over 20 years indicated a boundary which had been established by agreement, and also claimed the property under the doctrine of adverse possession.

The trial court found that the fence indicated a boundary line which had been established between the property owned by the school district and respondent, and that the property was owned by the respondent. The court also found for respondent on the issue of adverse possession.

Judgment was entered that plaintiff take nothing by reason of its complaint and that defendant Walter Maggiorini have judgment upon his cross-complaint that the line of the fence be fixed as the boundary line between Lots 21 and 20.

Plaintiff, school district, has appealed from said judgment and attacks the finding of the court that there was an agreement and acquiescence as to the boundary which the fence indicated. The school district does not question the doctrine that a boundary may be established by acquiescence and agreement, but it claims that where the true line can be ascertained by reference to a recorded map there can be no doubt as to the true line and, therefore, the doctrine that a boundary may be determined by acquiescence may not be invoked. There is authority for the proposition that a boundary line is not unknown when descriptions in a deed are certain and the evidence is readily available from which the true boundary can be ascertained. Williams v. Barnett, 135 Cal.App.2d 607, 287 P.2d 789; Garrett v. Cook, 89 Cal.App.2d 98, 200 P.2d 21.

[1] However in the instant case there was evidence in the record which indicated the true line was not described in the recorded map of Lankershim Colony. The map did not show the true measurement of each lot. The lots were numbered on the recorded map. There were no monuments to show the dividing line for each lot except the fence. The surveyor in making his survey gave equal size to each lot. The recorded map did not indicate the size of each. No monuments, except the fence, indicated the boundary lines of each lot. The deeds of the grantees only indicated the lots by number. These facts are sufficient to sustain a finding that there was uncertainty as to the boundary line.

Some California cases contain language indicating that:

> "* * * The fact that an accurate survey is possible is not conclusive of the question whether a doubt existed as to the location of a common boundary. Thus the doubt may arise from a believed uncertainty which may be proved by direct evidence or inferred from the circumstances surrounding the parties at the time when the agreement is deemed to have been made * * *; and if in good faith the parties resolve their doubt by the practical location of the common boundary it will be considered the boundary called for by the deed." Mello v. Weaver, 36 Cal.2d 456, 460, 224 P.2d 691, 693.

In Martin v. Lopes, 28 Cal.2d 618, 170 P.2d 881, the statement is made that in order to invoke the doctrine of agreed boundaries all that need be shown is lack of knowledge by both parties of where the line should be drawn.

[2] As to the finding that the fence was agreed upon and acquiesced in as the boundary line there was evidence that the fence was in existence for over 40 years. The property was cultivated up to the fence by both adjoining landowners. We think this is sufficient evidence to support the finding.

In Hannah v. Pogue, 23 Cal.2d 849, 147 P.2d 572, the trial court held that the boundary between the land of plaintiff and defendant was an old fence. In affirming the judgment the Supreme Court said, 23 Cal.2d at pages 856 and 857, 147 P.2d at page 576:

> "* * * It is the rule, however, that the court may infer that there was such an agreement ensuing from uncertainty or a dispute, from the long-standing acceptance of a fence as a boundary between the lands of two owners. [Citing cases.]
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> "Mrs. Hannah testified that the fence was in existence when her husband acquired the property, that it remained standing down to the time of the trial, and that she believed it marked the boundary until she learned that defendant Pogue had employed a surveyor to determine the boundary. This testimony establishes her acceptance of the fence as the boundary, in all likelihood reflecting the belief of her husband and former owners on the other side of the fence. She also testified that she knew of no agreement that the fence should constitute the boundary. This testimony does not necessarily rebut the inference that there was such an agreement, however, for the inference may

be made that an agreement was inherent in the long-standing acceptance of the fence as the boundary."

No other points raised require discussion. The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

146 Cal.App.2d 276

N. Lindsay SOUTH, Plaintiff and Appellant,

v.

H. A. WISHARD, also known as Harry A. Wishard, Stella Wishard, his wife, Maudine Brown, et al., Defendants.

H. A. Wishard, also known as Harry A. Wishard, and Stella Wishard, his wife, Respondents.

Civ. 21668.

District Court of Appeal, Second District, Division 3, California.

Nov. 27, 1956.

Rehearing Denied Dec. 27, 1956.

Hearing Denied Jan. 23, 1957.

Action to quiet title to interest in oil and gas royalties owned or claimed by certain defendants and to obtain constructive trust therein in favor of plaintiff. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment of dismissal following sustaining of demurrer of two defendants to the second amended complaint without leave to amend, and plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that question whether plaintiff had knowledge of facts sufficient to cause a person of ordinary prudence and judgment to make inquiry as to truth of one defendant's statements in regard to acquisition of such interest was, on the facts pleaded, one of fact and not one to be decided adversely to plaintiff upon demurrer.

Judgment reversed.

1. Evidence ⇨48

Court would take judicial notice of records of the U. S. General Land Office.

2. Pleading ⇨6

In action to quiet title to certain property consisting of overriding oil and gas royalties and sums derived therefrom, complaint would be read as if it incorporated all the pertinent facts which were shown by U. S. General Land Office records.

3. Action ⇨38(2)

Quieting Title ⇨35(2)

Where first cause of action was to quiet title to plaintiff's alleged oil and gas royalty interest, but general allegation of such interest was controlled by allegation of second cause of action that legal title thereto was in name of one defendant and that such defendant took title as trustee of a constructive trust by reason of fraud and breach of agreement, the alleged first and second causes of actions would have to be regarded as a single cause of action, and plaintiff's claim of equitable ownership would not sustain an action to quiet title against holders of the legal title.

4. Appeal and Error ⇨80(6)

Where plaintiff sought to quiet title to oil and gas royalty interest as against two defendants and third defendant and an accounting and recovery of the royalties received by the two defendants, with no money judgment against third defendant, judgment, which the two defendants saw fit to have entered, and which was final as to causes of action for recovery of money from the two defendants, was appealable, since remaining cause of action was entirely different and involved none of the issues which had been decided. West's Ann.Code Civ.Proc., § 579.

5. United States ⇨135

Where plaintiff did not seek to quiet title to an interest in land but to enforce a claimed constructive trust in royalties received and to be received under a Government lease, such judgment would not cloud the title or in any manner affect the ownership of the land by the Government, and therefore, the Federal Government was not an indispensable, necessary, or proper party to the action.

6. Appeal and Error ⚷919

Upon appeal from judgment of dismissal as to certain defendants following sustaining of their demurrer to second amended complaint without leave to amend, allegation in complaint would be deemed to be true, and it would be assumed that such allegation would have support in the evidence plaintiff would be able to produce.

7. Trusts ⚷103(1)

"Confidential and fiduciary relations" are, in law, synonymous and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another, and usually where the relationship exists in fact, if not in law, there is some blood relationship, but this is not a requisite. West's Ann.Civ.Code, §§ 2223, 2224.

See publication Words and Phrases, for other judicial constructions and definitions of "Confidential and Fiduciary Relations".

8. Trusts ⚷371(2)

Allegations that defendant promised plaintiff that, as an accommodation, defendant would organize a corporation for benefit of third party and receive compensation therefor for use and in name of plaintiff, but that defendant rendered the services and received the compensation that was contemplated, were sufficient to allege existence of a constructive trust.

9. Principal and Agent ⚷69(2), 78(3)

Allegation that defendant undertook to render a service to plaintiff by organizing a corporation for plaintiff's client and to obtain for use and benefit of plaintiff the agreed compensation, was sufficient to allege that defendant became plaintiff's agent for such purposes, and, on such alleged facts, defendant would have duty to turn over to plaintiff, as defendant's principal, the oil and gas royalty interest, alleged to constitute the compensation, when defendant received it, even though his alleged service to plaintiff was gratuitous. West's Ann.Civ.Code, § 2224.

10. Trusts ⚷101

Agent, who has duty to take title to property for or in name of his principal, and who takes it for himself, holds under a constructive trust. West's Ann.Civ.Code, § 2224.

11. Trusts ⚷92½

Action to obtain constructive trust in certain oil and gas royalty interest on ground that defendant had taken title to such interest as plaintiff's agent and had been unjustly enriched through receipt of royalties was not based upon an agreement to hold property in trust for plaintiff or to transfer it, and, therefore, the cause of action did not come within the statute of frauds. West's Ann.Civ.Code, §§ 852, 1624, subd. 4.

12. Trusts ⚷63½, 92½

No writing is required to establish a trust which is created by operation of law. West's Ann.Civ.Code, §§ 852, 1624, subd. 4.

13. Limitation of Actions ⚷104(1)

Fact, if true, that there had been fraudulent concealment of facts at time of and after assignment to defendant of oil and gas royalty interest claimed by plaintiff, and such fraudulent concealment, if any, caused plaintiff to forego an investigation, statute of limitations would not commence to run until plaintiff discovered the alleged fraud, even though prior thereto the assignment had been filed in the U. S. Land Office records and sometime later recorded in the county recorder's office.

14. Records ⚷19

Land office records, like other public records, constitute constructive notice of facts recorded therein.

15. Records ⚷19

One who deals in property cannot deny knowledge of the contents of public records which affect the title at time he engages in his transactions, and he is also chargeable with knowledge of matters which come of record later if he has a continuing duty to ascertain all facts that might affect validity of his title or right.

16. Limitation of Actions ⇨100(13)

One who comes to court charging fraud after statutory time for institution of his action has expired but who claims that the statute has been tolled because of his ignorance of the fraud is chargeable with knowledge of all facts which could have been ascertained by a careful and prudent investigation, and mere lack of knowledge resulting from failure to make an investigation will not serve as an excuse for the delay.

17. Limitation of Actions ⇨100(11)

Duty to investigate is not absolute, and one to whom representations of fact are made and who believes them has a right to rely thereon, and, if such representations are such as will reasonably prevent him from making an investigation prior to running of statute of limitations, his failure to investigate is excusable, and, if the excuse is valid, he cannot be charged with knowledge of facts which would have been discovered only in course of an investigation.

18. Records ⇨19

If, by reason of defendant's alleged representations, plaintiff was dissuaded from making any inquiry, he was no more to be charged with knowledge of contents of land office records than with knowledge of facts he might have ascertained from third parties who dealt with defendant in regard to transaction with which defendant sought to charge plaintiff with notice.

19. Notice ⇨15

Question whether it can be held, as matter of law, that person had knowledge of facts sufficient to cause a person of ordinary prudence and judgment to make inquiry on matter as to which such person claimed lack of notice is usually one of fact and is not to be answered in the affirmative unless the facts are such that such person had a manifest duty to investigate as the only reasonable course to be taken consistent with exercise of ordinary prudence and judgment.

20. Trusts ⇨371(6½)

In action to establish constructive trust in favor of plaintiff in interest in oil and gas royalties on ground that defendant had taken title thereto as plaintiff's agent and had been unjustly enriched through receipt of royalties, question whether plaintiff had knowledge of facts sufficient to cause a person of ordinary prudence and judgment to make inquiry as to truth of one defendant's statements in regard to acquisition of such interest was, on the facts pleaded, one of fact and not one to be decided adversely to plaintiff upon demurrer.

21. Equity ⇨80

If plaintiff's delay has been induced by defendant's fraud, laches is no more available as a valid defense than is the defense of the statute of limitations.

22. Equity ⇨72(1)

Doctrine of laches does not rest upon mere lapse of time, but usual question is whether the lapse has resulted in some detriment to person who seeks protection under the doctrine or whether such person will suffer detriment if the right asserted is enforced against him, and, if such person has done nothing or omitted nothing to alter his position with respect to the claim or right asserted, the defense of laches cannot be successfully maintained.

23. Trusts ⇨365(5)

In action to obtain a constructive trust in favor of plaintiff in interest in oil and gas royalties on ground that one defendant had taken title to such interest as plaintiff's agent and had been unjustly enriched through receipt of royalties, defense of laches would not provide sound reason for order sustaining defendants' demurrer in absence of allegations in complaint from which any detriment to defendants could be inferred.

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Lawrence W. Young, James C. Janjigian, Fresno, for appellant.

J. E. Simpson, Los Angeles, for respondents.

SHINN, Presiding Justice.

[1, 2] Plaintiff South appeals from a judgment of dismissal as to defendants Harry A. Wishard and Stella Wishard, his wife, following the sustaining of their demurrer to plaintiff's second amended complaint without leave to amend. The property in litigation consists of overriding oil and gas royalties from wells in Fresno County and sums derived therefrom. Plaintiff alleges that he is the owner of 1/16th of 100% of production from the land, which royalty interest stands in the name of Harry A. Wishard, who holds the same for the use and benefit of plaintiff as trustee of a constructive trust. The complaint also names as a defendant Maudine Brown, who filed an answer alleging she claims an interest in the property adverse to the plaintiff. The record to be considered consists of the complaint, the demurrer of defendants Wishard and certain records of the U. S. General Land Office, copies of which were lodged with the trial court on the hearing of the demurrers. These are records of which the court takes judicial notice. They show that fee title to the land is in the United States and that the rights to royalties flow from a government oil and gas lease. The complaint is to be read as if it incorporated all the pertinent facts which were shown by the land office records. Livermore v. Beal, 18 Cal.App. 2d 535, 64 P.2d 987. It is shown by those records that the government issued a prospecting permit to Lena S. Gatchel and later a lease of the land to her assignee, Petroleum Securities Corporation, reserving a 7½% overriding royalty in the primary (discovery) acreage and a 2% royalty in the secondary acreage. Gatchel assigned one-half of her royalty to Sumpf and he assigned to Wishard "an undivided one-sixteenth interest in all of my royalty interest as set out in the assignment above described." (This would not be 1/16th of 100% of production as alleged by plaintiff, but 1/16th of 3¾%, or a .2343 plus percentage of the whole.)

The complaint contains four causes of action. The first is against the Wishards and Brown to quiet title to the royalty interest. The second is against the Wishards alone. It realleges ownership by plaintiff of the royalty interest but also allege that legal title thereto was taken in the name of Harry A. Wishard in violation of an agreement to take the same in the name and for the use and benefit of plaintiff. The theory of this cause of action is that Wishard took title as trustee of a constructive trust by reason of his fraud and breach of agreement. This cause of action alleges the existence of a confidential relationship between plaintiff and Wishard, the making of allegedly false representations by Wishard, his concealment of the fact that he had acquired the royalty interest and other facts which plaintiff relies upon as excusing his long delay in bringing the action. Other facts are alleged respecting plaintiff's discovery of the fact that Wishard had taken title to the royalties in violation of the claimed agreement. The third and fourth causes of action incorporate the allegations of the second and add an allegation that Wishard took title as plaintiff's agent and an allegation that the Wishards have been unjustly enriched through the receipt of large sums as royalties.

The contentions of the defendants are (1) the holder of an equitable title cannot successfully sue to quiet title against the holder of the legal title; (2) the appeal should be dismissed upon the ground that the judgment in favor of the Wishards will not be appealable until judgment is rendered for or against Brown; (3) title to the leased land is in the United States and the government is an indispensable party; (4) the second, third and fourth causes of action do not allege sufficient facts to establish a constructive trust and (5) all causes of action are barred by the statute of limitations and laches.

[3] The demurrer to the first cause of action was properly sustained. It was no broader than the second and the two must be regarded as a single cause of action. Ephraim v. Metropolitan Trust Co., 28 Cal. 2d 824, 172 P.2d 501; South v. Wishard, 123 Cal.App.2d 642, 267 P.2d 827. While

it is alleged that plaintiff is the owner of the royalty interest, that general allegation is controlled by the allegations of the second cause of action. Plaintiff is seeking to establish an equitable title. His claim of equitable ownership will not sustain an action to quiet title against the holders of the legal title. It was so held in South v. Wishard, supra, 123 Cal.App.2d 642, 267 P.2d 827 (a former appeal in the same case). The first cause of action is insufficient as against the Wishards or Brown.

The material allegations of the second cause of action are: Plaintiff and Wishard were attorneys and friends of many years standing. They had their offices in the same suite and enjoyed an intimate business and social relationship. At all times mentioned in the complaint plaintiff believed implicitly in the integrity and truthfulness of Wishard and reposed in him great trust and confidence. Plaintiff had a client named Caine who informed him that he had acquired 2⁄16ths of 100% royalty interest from one Sumpf in consideration of his agreement to organize at his own expense and for Sumpf's benefit a California corporation. Caine proposed that plaintiff organize the corporation and as compensation agreed to assign to him 1⁄16th of 100% of production from operations on the land under lease. Plaintiff communicated these facts to Wishard, telling him that he, plaintiff, might not be present when Caine and Sumpf came to the office but wished the matter to be taken care of for him and Wishard agreed that if they came while plaintiff was absent he, Wishard, would render the services and take an assignment of royalties in the name of and for plaintiff. Wishard, in plaintiff's absence, and without his knowledge, rendered the services and took an assignment of royalties from Sumpf in his own name. All this occurred in May 1933. In the summer of 1933 plaintiff inquired of Wishard what had been done in the Caine-Sumpf matter and Wishard told him that the parties had abandoned the plan of forming a corporation and that nothing had been done. Plaintiff believed that statement and having complete faith in the integrity and truthfulness of Wishard made no further inquiry until much later. In 1938 oil was discovered on the property. In 1939 Maudine Brown appeared on the scene claiming a royalty interest under an alleged assignment from Wishard in 1933. Her claim was disputed by Wishard. He told her the Caine-Sumpf plan had been abandoned, that any assignment from Sumpf was worthless and advised her not to record it. At the request of Wishard plaintiff made the same representations to Brown. In 1951 plaintiff had a conversation with his nephew which caused him to make inquiry as the result of which he learned that Wishard had been receiving royalties in large amounts since January 1938. The present action was commenced June 15, 1951.

[4] Defendants contend that although the judgment of dismissal is final as to them it will not be appealable until the issues have been finally determined as between plaintiff and Brown. We think the defendants have answered their own argument. They mention the general rule that there can be but one judgment in a case and then add "the only exception to this rule is that separate judgments may be entered as to several defendants where the issues are separate and several as to them." Plaintiff seeks to quiet title to the royalty interest as against the Wishards and Brown. He seeks an accounting and recovery of the royalties received by Wishard and no money judgment against Brown. Section 579 of the Code of Civil Procedure reads: "In an action against several defendants, the Court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper." It was decided in Rocca v. Steinmetz, 189 Cal. 426, 208 P. 964, that this section authorizes judgment to be entered in favor of some of the defendants while the action proceeds as to others, where a separate and several judgment may be rendered. The judgment is final as to the causes of action for the recovery of money

from the Wishards. They saw fit to have that judgment entered. An entirely different cause of action remains involving none of the issues that have been decided. The judgment is appealable. Stafford v. Yerge, 139 Cal.App.2d 851, 294 P.2d 721; Aetna Cas. etc. Co. v. Pacific Gas & Elec. Co., 41 Cal.2d 785, 264 P.2d 5, 41 A.L.R.2d 1037; Beresford v. Pacific Gas & Elec. Co., 113 Cal.App.2d 622, 248 P.2d 773; Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39; Young v. Superior Court, 16 Cal.2d 211, 105 P.2d 363.

Another point urged by defendants is that the action involves title to real property owned by the United States and that the government was an indispensable party. Livermore v. Beal, supra, 18 Cal.App.2d 535, 64 P.2d 987, is claimed to be directly in point. That was a case in which it was attempted to quiet the plaintiff's title to an interest in government land without naming the government as a defendant. Here plaintiff does not seek to quiet title to an interest in land but to enforce a claimed constructive trust in the royalties received and to be received under a government lease. Such a judgment would not cloud the title or in any manner affect the ownership of the land by the government. The action is essentially one based upon the theory of contract or breach of duty, as the result of which Harry Wishard took an assignment of royalties as trustee for plaintiff.

[5] As previously mentioned, the present action was the subject of a former appeal. South v. Wishard, supra, 123 Cal.App.2d 642, 267 P.2d 827. One question was whether the action was triable in Fresno County as an action involving title to real property or should be transferred to Los Angeles County where the Wishards resided. Another question was whether it should be retained in Fresno County because Brown was a resident of that county. It was decided that the present action for royalties already received and to be accumulated is primarily a transitory equitable action to enforce a trust and not one for the recovery of or to quiet title to real property. See Dougherty v. California Kettleman, etc., 9 Cal.2d 58, 69 P.2d 155. Upon the second point it was decided that Brown was named as a defendant for the sole purpose of retaining the action in Fresno County. As incidental to this decision it was also held that the complaint failed to state a cause of action against Brown to quiet title to the claimed royalty interest. The judgment affirmed an order of the trial court transferring the action to Los Angeles County. The decision that the action does not involve the title to or possession of real property is the law of the case and is not subject to re-examination. Wells v. Lloyd, 21 Cal.2d 452, 132 P.2d 471. The U. S. Government is not an indispensable or necessary or proper party to the action.

The next point to be considered is that the facts alleged in the complaint are insufficient to establish the existence of a constructive trust. Defendants argue that on those facts there was no confidential or fiduciary relationship between plaintiff and Wishard and that the allegation that one existed is a mere conclusion. It is unnecessary to analyze the cases cited by defendants on this point, all of which were on facts differing in material respects from the facts alleged in the present case. It is true, of course, that all intimate friends and business associates are not fiduciaries. The allegations of the complaint respecting the relationship between plaintiff and Wishard were of facts and not mere conclusions.

[6] The case pleaded by plaintiff closely resembles in principle Dabney v. Philleo, 38 Cal.2d 60, 237 P.2d 648, with respect to the creation of a constructive trust resulting from false representations and breach of confidence. See, also, Neet v. Holmes, 25 Cal.2d 447, 465, 154 P.2d 854. It is alleged that for years plaintiff and Wishard had been associated together occupying the same suite of offices, "advising with each other, over and concerning mutual professional and business transactions"; they enjoyed an intimate and affectionate regard for each other and

there existed between them a strong bond of friendship and trust, as the result of which plaintiff had unlimited confidence in the promises and representations of Wishard. Happily, such relationships are common among lawyers. They exist because each of the associates believes implicitly in the honor, the high principles, truthfulness and integrity of the others. Where the relationship has stood the test of time and long experience it justifies the highest degree of confidence and trust. One who expects and is expected to rely upon the statements of such an associate in matters of mutual concern has a right to believe that they will be the truth with no element of concealment, equivocation or evasion. The standards of character and conduct that are maintained are far higher than those created by close business relationships or intimate personal friendships. Plaintiff has pleaded his implicit trust in Wishard and his unquestioning belief in the truth of the latter's statements. We do not see that he needed to plead more. Anything in addition by way of elaboration would have been evidentiary. The allegation must be deemed to be true. We must assume that it would have support in the evidence plaintiff would be able to produce. Johnson v. Clark, 7 Cal.2d 529, 535, 61 P.2d 767.

[7] Defendants would have us hold that despite the facts alleged a trial court could not properly determine that the relationship between plaintiff and Wishard was of a confidential and fiduciary character. This would be saying that it is impossible for a confidential relationship to arise out of an association of lawyers such as the one described unless there existed some blood relationship or a measure of helplessness which rendered one associate subservient to the will of another. Any statement to that effect would be contrary to our own well founded belief and shocking to the profession. "Confidential and fiduciary relations are, in law, synonymous, and may be said to exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another." In re Estate of Cover, 188 Cal. 133, 143, 204 P. 583, 588. Although it is usually found where the relationship exists in fact, if not in law, that there is some blood relationship, this is not a requisite under the code or the case law. Civ.Code, §§ 2223, 2224;[1] Adams v. Talbott, 61 Cal.App.2d 315, 320, 142 P.2d 775; Robbins v. Law, 48 Cal.App. 555, 561, 192 P. 118; Bank of America v. Sanchez, 3 Cal.App.2d 238, 243, 38 P.2d 787; Cox v. Schnerr, 172 Cal. 371, 378, 156 P. 509; Dalakis v. Paras, 86 Cal. App.2d 243, 194 P.2d 736; Scovill v. Guy, 205 Cal. 386, 270 P. 934; 25 Cal.Jur. 163–164.

[8] The complaint alleges facts sufficient to justify a finding that a constructive trust existed. If Wishard, under the circumstances alleged, promised South that as an accommodation he would organize a corporation for the benefit of Sumpf and receive compensation therefor for the use and in the name of South, and if he rendered the services and received the compensation that was contemplated, he would have no right to keep the property.

[9, 10] There is an additional reason for holding that on the facts alleged Wishard would be accountable as a constructive trustee. He undertook to render a service to South, namely to organize a corporation for South's client, and to obtain for the use and benefit of South an amount of compensation that was agreed upon. He became the agent of South for those purposes and when the royalty interest was received he had a duty to turn it over to his principal. The fact that his service to South was gratuitous is immaterial in view of the allegations as to the agreement. An agent who has a duty to take title to prop-

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[1] § 2223. "One who wrongfully detains a thing is an involuntary trustee thereof, for the benefit of the owner."

§ 2224. "One who gains a thing by * * * the violation of a trust, or other wrongful act, is unless he has some other and better right thereto, an involuntary trustee of the thing gained, for the benefit of the person who would otherwise have had it."

erty for or in the name of his principal and who takes it for himself, holds it under a constructive trust. Civ.Code, § 2224; Neet v. Holmes, 25 Cal.2d 447, 154 P.2d 854; Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732; Walter H. Leimert Co. v. Woodson, 125 Cal.App.2d 186, 270 P.2d 95.

[11, 12] Defendants' contention that the cause of action pleaded is within the statute of frauds, Civ.Code, § 1624, subd. 4, is untenable. The action is not based upon an agreement to hold property in trust for plaintiff nor upon an agreement to transfer it. As an action to establish a constructive trust it is not within the statute of frauds. No writing is required to establish a trust that is created by operation of law. Civ.Code, § 852; Stromerson v. Averill, supra, 22 Cal.2d 808, 815, 141 P.2d 732.

[13] The crucial question is whether the action is barred by the statute of limitations. Defendants pleaded this defense and they rely upon the following facts. The records of the U. S. Land Office disclose that Sumpf's assignment to Wishard was filed July 6, 1935 and that it was approved by the Secretary of the Interior April 20, 1937. It was in evidence that the assignment was not recorded in the office of the county recorder of Fresno County until January 6, 1938. Defendants contend that plaintiff was charged with knowledge of these facts and that he cannot deny that as early as July 6, 1935, he knew that Sumpf had made an assignment to Wishard. Plaintiff contends, and correctly, that if there was fraudulent concealment of the facts at the time of the transaction and thereafter which caused him to forego an investigation the statute did not commence to run until he discovered the fraud. Neet v. Holmes, supra, 25 Cal.2d 447, 154 P.2d 854.

Arnold v. Universal Oil Land Royalty Co., 45 Cal.App.2d 522, 114 P.2d 408, is relied upon and discussed at length by defendants as a case claimed to be on all fours with the present case as respects the statute of limitations and as authority for the proposition that plaintiff was at all times chargeable with knowledge of the contents of the land office records. Mrs. Arnold was chargeable with knowledge not only of the contents of the land office records but with knowledge of many other facts which would have been discovered upon slight inquiry. Although she knew for some six years her rights were being ignored and had a duty to make an investigation, she made none and offered no sufficient excuse for not making one. Naturally she could not deny knowledge of facts which were readily available to her.

[14, 15] Land office records, like other public records, constitute constructive notice of the facts recorded therein. One who deals in property cannot deny knowledge of the contents of public records which affect the title at the time he engages in his transactions. He is also chargeable with knowledge of matters which come of record later if he has a continuing duty to ascertain all facts that might affect the validity of his title or right. It cannot be questioned that the land office records furnished an accessible means for the discovery of transactions relative to the Sumpf royalty. Assignments of royalty interests under government leases must be filed in the land office. Title 43, Code of Federal Regulations, § 192.141.

[16–18] It is true, of course, that one who comes to court charging fraud after the statutory time for institution of his action has expired but who claims that the statute has been tolled because of his ignorance of the fraud is chargeable with knowledge of all facts which could have been ascertained by a careful and prudent investigation. Mere lack of knowledge resulting from a failure to make an investigation will not serve as an excuse for the delay. It can be said in the present case that plaintiff could have learned of the Sumpf-Wishard assignment if he had made inquiry either of Sumpf or Caine. These, like the land office records, were available sources of information. It is not questioned that inquiry would have developed the fact that the Sumpf-Caine-Wishard transaction had been carried through in 1933. But the duty to investigate is not an absolute one. One to whom representations of fact are made and who believes them has a right to rely upon them. If they are such as to reasonably prevent him from making an investigation his failure to investigate is excusable. If the excuse is valid he cannot be charged with knowledge of facts that would have been discovered only in the course of an investigation. If by reason of Wishard's representations plaintiff was dissuaded from making any inquiry he is no more to be charged with knowledge of the contents of the land office records than with knowledge of the facts he might have ascertained from Sumpf or Caine. Dabney v. Philleo, supra, 38 Cal.2d 60, 237 P.2d 648.

Plaintiff alleges that he was deceived in the summer of 1933 by Wishard's statement that the Caine-Sumpf plan had been abandoned, that he was further deceived by Wishard's statement to the same effect in 1939 and his statement that any interest received from Sumpf was worthless. It is alleged that he believed the statements of Wishard, had implicit faith in his integrity and made no further inquiries as to the facts.

[19] The question is whether we can hold, as a matter of law, that plaintiff had knowledge of facts sufficient to cause a person of ordinary prudence and judgment to make inquiry as to the truth of Wishard's statements. This is usually a question of fact. Neet v. Holmes, supra, 25 Cal.2d 447, 466, 154 P.2d 854; Schaefer v. Berinstein, 140 Cal.App.2d 278, 294, 295 P.2d 113; Dabney v. Philleo, supra, 38 Cal.2d 60, 66, 237 P.2d 648. It is not a question to be answered in the affirmative unless the facts are such as to make manifest a duty to investigate as the only reasonable course to be taken consistent with the exercise of ordinary prudence and judgment.

[20] We have reached the conclusion that upon the facts pleaded the question was one of fact and not one to be decided adversely to plaintiff upon demurrer. The one important fact that militates against the contention of plaintiff is that in 1939 Maudine Brown asserted that in 1933 Wishard had assigned to her an interest in royalties. This was a circumstance which, standing alone, would have excited suspicion that Wishard had received an assignment of royalty from either Sumpf or Caine. However, Brown did not exhibit an assignment and Wishard did not admit having executed one. He resisted her claim. He requested Brown not to record any instrument. This implied that she might hold one, although Wishard at the same time denied having acquired any royalty interest from Sumpf or Caine. But even if he had assigned to Brown some royalty interest it would not necessarily follow that it was out of an interest which he had received from either Sumpf or Caine in consideration of services in the organization of a corporation. And although plaintiff alleges that Wishard did make an assignment in 1933 he does not allege that he knew or that he believed in 1933 that an assignment had been made. Plaintiff believed Wishard's statement that a corporation had not been formed and his assertion that the plan had been abandoned by Sumpf and Caine. Against whatever suspicion the circumstances may have aroused in plaintiff's mind he weighed his confidence in Wishard, his belief in the latter's integrity and truthfulness, and as a result he came to the conclusion that Wishard was telling the truth. And it must be remembered that plaintiff's professed belief that an investigation would not be justified is strengthened by the fact that he made none. We cannot say, to the exclusion of every other reasonable conclusion, that it was unreasonable for plaintiff to accept Wishard's statements as the truth and that in relying upon them he failed to exercise a fair degree of caution

and judgment. It will be for the court to determine after all the evidence is in whether plaintiff's delay in taking action was reasonable and excusable. That is not a question to be decided as a matter of law.

[21] Defendants rely upon the doctrine of laches. They say that plaintiff has slept upon his rights and should not be permitted to assert a stale claim. But if, as alleged, the delay was induced by the fraud of Wishard, laches is no more available as a valid defense than is the defense of the statute of limitations. If the statute has been tolled plaintiff has not been guilty of laches. If the facts found upon a trial sustain the defense of the bar of the statute the question of laches will become moot.

[22] The doctrine of laches does not rest upon the mere lapse of time. There are other tests of its applicability. The usual question is whether the lapse of time has resulted in some detriment to the one who seeks protection under the doctrine, or will suffer detriment if the right asserted is enforced against him. If he has done nothing or omitted nothing to alter his position with respect to the claim or right asserted, the defense of laches cannot be successfully maintained. 18 Cal. Jur.2d p. 214; Austin v. Hallmark Oil Co., 21 Cal.2d 718, 735, 134 P.2d 777.

[23] No facts are alleged in the complaint from which any detriment to the Wishards could be inferred. They were not developing land for the discovery of oil. They have been required to do nothing and have done nothing with respect to the operation of the government lease. There has been no change in their position and they have incurred no obligation. They have done nothing but collect money. The asserted defense of laches did not provide a sound reason for the order sustaining the demurrer of defendants.

The demurrer to the first cause of action was properly sustained. It was error to sustain it as to the second cause of action and as to the third and fourth, which incorporated the allegations of the second.

Although it is alleged that both the Wishards have been receiving the royalty payments and claim to be entitled thereto there is no allegation that Mrs. Wishard was guilty of fraud or that she has or claims any interest in the royalties other than as the wife of Harry. However, defendants have challenged the sufficiency of the complaint on the single theory that it fails to state a cause of action against Harry and no point is made of the fact that Stella is neither charged with fraud nor with knowledge of it.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

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146 Cal.App.2d 370

L. C. FAUS, Plaintiff and Respondent,

v.

PACIFIC ELECTRIC RAILWAY COMPANY, a corporation, Defendant and Appellant.

Civ. 21743.

District Court of Appeal, Second District, Division 3, California.

Nov. 28, 1956.

Rehearing Denied Dec. 27, 1956.

Hearing Denied Jan. 23, 1957.

Suit was brought to quiet title and for possession of realty. The Superior Court of Los Angeles County, Lloyd S. Nix, J., entered judgment adverse to the defendant, and the defendant appealed. The District Court of Appeal, Vallée, J., held that where deeds of realty to electric railway company for rights of way for tracks provided for re-entry by grantors, heirs, or assigns on failure of railway company to use realty for rights of way, and railway company removed tracks for rights of way and ceased operating railroad lines over the realty, the realty reverted under the deeds, though abandonment of railroad lines was caused by change of economic conditions and substitution of motor coach service over parallel routes.

Affirmed.

See also 134 Cal.App.2d 352, 285 P.2d 1017.

1. Appeal and Error ⚷991

Where conflicting inferences could be drawn from evidence introduced for purpose of construing deed, issue was one of fact, and finding of trial court was binding on appeal.

2. Railroads ⚷82(2)

Where deeds of realty to electric railway company for rights of way for tracks provided for re-entry by grantors, heirs, or assigns on failure of railway company to use realty for rights of way, question whether there had been an abandonment by railway company of the rights of way, so that there was a reversion under the deeds, was a question of fact and not of law.

3. Railroads ⚷82(3)

Where deeds of realty to electric railway company for rights of way for tracks provided for re-entry by grantors, heirs, or assigns on failure of railway company to use realty for rights of way, and railway company removed tracks from rights of way and ceased operating railroad lines over the realty, the realty reverted under the deeds, though abandonment of railroad lines was caused by change of economic conditions and substitution of motor coach service over parallel routes.

4. Deeds ⚷156

A right of re-entry or of repossession for breach of conditions subsequent can be transferred. West's Ann.Civ.Code, § 1046.

5. Contracts ⚷138(7)

Defense of illegality of contracts, though open to parties to the contract and those claiming under them, cannot as a general rule be invoked by a third person.

6. Deeds ⚷77

In suit to quiet title and for possession of realty, on ground that there had been a reversion of realty which deceased testator had conveyed to defendant, defendant had no right to raise the defense that deed of realty to plaintiffs by trustee of testamentary trust was invalid.

7. Adverse Possession ⚷58

Possession alone, no matter how exclusive and complete, is not sufficient to create a prescriptive title, and, in order to do that, possession must be adverse to the party against whom such title is asserted.

8. Adverse Possession ⚷114(1)

In suit to quiet title and for possession of realty, wherein defendant claimed title to realty by adverse possession, evidence sustained finding that possession by defendant was not sufficient to create a prescriptive title.

9. Appeal and Error ⚷762

A question smuggled into a closing brief merits scant consideration by reviewing court.

10. Railroads ⚷69

Deeds of realty to electric railway company for rights of way for tracks and providing for re-entry by grantors, heirs, or assigns on failure of railway company to continue to use the realty for rights of way conveyed the fee on a condition subsequent and did not merely convey easements.

◆

E. D. Yeomans and Roger M. Sullivan, Los Angeles, for appellant.

Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., and Francis H. O'Neill, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendant from an adverse judgment in a suit to quiet title and for possession of realty which had been used by defendant as a portion of its right of way in the County of Los Angeles.

In 1897 Pedro Batz, the then owner, by grant deed conveyed a large parcel of land to Charles Emery. The deed included the property which is the subject of this suit.[1]

On August 28, 1901 Charles and Irene Emery by grant deed conveyed four parcels of the "land" containing about 7.55 acres to Los Angeles and Pasadena Electric Railway Company, a corporation, "for the uses and purposes and under the limitations hereinafter provided," described as follows:

> "1. A strip of land 60 feet in width [metes and bounds description]."
>
> "2. A strip of land 60 feet in width [metes and bounds description]."
>
> "3. A triangular piece of land [metes and bounds description]."
>
> "4. A triangular piece of land [metes and bounds description]."

The deed contained the following pertinent provisions:

> "And it is further understood, stipulated and agreed that this conveyance is made and delivered by the said grantors and received and accepted by the said grantees, upon, under and subject to the following conditions subsequent to be kept and performed by the party of the second part, its successors and assigns, that is to say: That the said main and branch lines of said electric railway shall be constructed, upon the lands hereby granted * * *; That after such construction said railway line shall be continuously operated * * *; That no part of said lands hereby conveyed shall be used * * * for any other than for the legitimate railroad purposes hereinabove set forth and provided; And upon the breach of any one of the aforesaid conditions subsequent the said parties of the first part, their heirs or assigns without paying any compensation for any buildings or other improvements or betterments that may then be upon said premises, and without making any compensation or incurring any liability for damages or losses of any kind growing out of such reentry, may reenter in and upon, and take possession of the said strips and parcels of land hereby granted, and the whole thereof, and each and every portion thereof, and have and enjoy the same forever as and of their former estate, and in all respects as if these presents had never been made or delivered, anything herein contained to the contrary thereof notwithstanding; And the party of the second part, its successors and assigns shall upon such breach immediately surrender possession of the said premises, and of each and every part thereof, and shall forfeit all rights thereto acquired hereunder."[2]

The four parcels were acquired by defendant from Los Angeles and Pacific Electric Railway Company prior to 1911.

On May 17, 1904 the Emerys by grant deed conveyed two parcels of land containing 2.21 acres to defendant "for the use and purposes only and subject to the limitations hereinafter provided those certain pieces or parcels of land situate in said County of Los Angeles" described as follows:

> "First: A strip of land of irregular width [metes and bounds description]. Together with the right to construct and maintain upon land adjoining the above described strip of land * * * side slopes."
>
> "Second: A strip of land of irregular width [metes and bounds description]. Together with the right to construct and maintain upon land

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[1] All documents relevant to this action were duly recorded.

[2] The deed also contained provision by which the Emerys reserved the right to establish streets "across the said parcels of land"; the right to lay pipe lines "across said strips and parcels of land." The grantee agreed to beautify "said tracts and parcels of land"; and to use "the said triangular shaped piece of land in Section 8 hereby conveyed" for tracks and a railway station.

> adjoining the above described strip of land * * * side slopes."

The deed states that the parties agreed the conveyance was made "subject to the following conditions, subsequent to be kept and performed by the said party of the second part, its successors and assigns, that is to say: That said described land is to be used in conjunction with the said lands conveyed by said deed to the Los Angeles and Pacific Electric Railway Company as a right of way for the railroad tracks * * * and for no other purpose whatsoever, * * * That the railway tracks which now are or may hereafter be placed upon the land hereby conveyed * * * shall be used only for the purposes of through travel. * * *" This deed contained a provision similar to that in the 1901 deed with respect to the right of re-entry.[3]

Mrs. Emery died in 1907. No claim is made that she had any right in the subject property. Mr. Emery died in 1915. His estate was probated in the superior court of San Benito County. On September 5, 1916 that court by its final decree of distribution appointed Lucien Oudin testamentary trustee of and distributed the entire estate to him in trust with directions to sell all real property situated in California.

On December 21, 1921 Oudin, as trustee, by grant deed conveyed to F. M. Prescott substantially all the land originally acquired by Emery from Batz and including within its boundaries the subject property, together with a large parcel not acquired from Batz, with this exception:

> "Excepting however, from the parcel above described [substantially all of the land originally acquired by Emery from Batz in 1897] the following, to-wit: * * *
>
> "Fourth. Those certain pieces or parcels of the southeast quarter of section eight (8) and of the northeast quarter of the northwest quarter of section seventeen (17) township 1 south range 12 west S.B.B. and M. conveyed to Pacific Electric Railway Company, a corporation, or its predecessor, for a right of way and for depot purposes, said parcels being particularly described in deeds dated May 17, 1904, recorded in Book 2100 at page 248 of Deeds and dated August 28, 1901, recorded in Book 1490 of Deeds at page 173 records of Los Angeles County."

On January 9, 1922 Prescott by grant deed conveyed the property described in his deed from Oudin to Title Insurance & Trust Company. This deed contained the same exception as in the deed from Oudin to Prescott.

On September 20, 1922 Title Insurance & Trust Company released and quitclaimed to defendant all its right, title and interest in the property described in the Emery deeds of 1901 and 1904.

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[3] The re-entry provision reads: And in the event of a failure on the part of the said party of the second part, its successors and assigns to comply with any of the covenants and agreements herein set forth, the said parties of the first part their heirs and assigns, without paying any compensation whatever for any improvements or betterments which may have been placed upon said premises and without making any compensation or concurring [sic] any liability for damages or loss of any kind growing out of such re-entry may reenter in and upon and take possession of the said strips and parcels of land hereby granted and the whole thereof, and each and every portion thereof and have and enjoy the same forever as and of their former estate, and in all respects as if these presents had never been made or delivered, anything herein contained to the contrary thereof notwithstanding.

"And the said party of the second part, its successors and assigns shall upon such breach immediately surrender possession of the said premises and of each and every part thereof and shall forfeit all rights thereto acquired hereunder."

The 1904 deed also contained provisions by which it was agreed that the land was to be used in conjunction with the "lands conveyed" by the 1901 deed; that railway tracks on "the land hereby conveyed" or "the said described land conveyed" by the 1901 deed should be used only for specified purposes. There herein conveyed" or "the land conveyed by" the 1901 deed.

In September 1951 defendant, with the permission of the Public Utilities Commission, ceased operating railroad lines on the property conveyed by the deeds of 1901 and 1904, and removed all its rails.

Oudin died and Waller Taylor II was appointed trustee of the Emery testamentary trust in his place. On December 29, 1953 Taylor executed a quitclaim deed of the subject property to plaintiff. Plaintiff brought this suit to quiet title and for possession of the property, claiming under the re-entry clauses in the deeds of 1901 and 1904. The judgment decreed plaintiff is the owner in fee simple and entitled to possession of the property from and after the abandonment of the property by defendant in 1951, excepting certain portions acquired in 1947 by Alhambra for street-widening purposes by eminent domain proceedings and subject to certain public easements which had been executed and recorded by defendant as conditional grantee of the property prior to its abandonment of the property on September 30, 1951. Defendant appeals.

Defendant's first contention is that the deed from Taylor to plaintiff did not convey the reversionary rights. It is argued that whether the fee or an easement was conveyed by the deeds of 1901 and 1904, the reversionary rights were conveyed with the surrounding property by the deed from Oudin to Prescott and they were subsequently released to defendant by Prescott's successor, Title Insurance & Trust Company. Defendants urged below that the Oudin-Prescott deed is indefinite and uncertain in that it cannot be ascertained therefrom whether the reversionary rights were conveyed thereby. They further contended it was the intention of Oudin to convey such rights. In support of their contention they relied on a provision in Mr. Emery's will directing the testamentary trustee "to sell all of my real property situated in the State of California," and a report made by Oudin to the superior court of San Benito County that he had sold "all said real property in California" except a parcel in Santa Barbara County. The court found that defendant is not the owner or entitled to the possession of the land conveyed by the 1901 and 1904 deeds, thereby impliedly finding that the Oudin-Prescott deed did not convey the reversionary rights.

Defendant says we are not bound by the trial court's construction of the Oudin-Prescott deed. The same contention with respect to a trial court's construction of a written contract was made in Overton v. Vita-Food Corp., 94 Cal.App.2d 367, at page 370, 210 P.2d 757, at page 759, in which we said:

> "Appellant first says that we are not bound by the trial court's construction of the contract and are called upon to determine its meaning as a matter of law. Counsel cite Moore v. Wood, 26 Cal.2d 621, 630, 160 P.2d 772, In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, and Texas Co. v. Todd, 19 Cal.App.2d 174, 185, 64 P.2d 1180. This rule applies only where the trial court's decision was based solely on the terms of the written instrument. Union Nat. Bank of Pasadena v. Hunter, 93 Cal.App.2d [669, 673] 209 P.2d 621. This was the situation in the cases cited by counsel. The rule is otherwise where parol evidence is introduced in aid of interpretation of the contract and where the evidence is such that conflicting inferences may be drawn therefrom. In such case the rule is that a reviewing court will accept or adhere to the interpretation of a contract adopted by the trial court and not substitute another of its own. In re Estate of Rule, 25 Cal.2d 1, 11, 152 P.2d 1003, 155 A.L.R. 1319. In the case at bar evidence was introduced in aid of interpretation of the contract and conflicting inferences may be drawn therefrom."

[1] Defendant concedes "that conflicting inferences could be drawn from the

will and report, which we rely on as confirming our construction of the Oudin-Prescott deed." Since conflicting inferences may be drawn from the evidence introduced for the purpose of construing the Oudin-Prescott deed, the issue was one of fact and the finding of the trial court is binding on review.

The deed from Oudin to Prescott expressly excepted from the property thereby conveyed the property conveyed to Los Angeles and Pasadena Electric Railway Company in 1901 and to defendant in 1904. The trial court found as a fact that title to the reversionary rights created by the Emery deeds was not conveyed by the Oudin-Prescott deed. The deed from Prescott to Title Insurance & Trust Company expressly excepted the reversionary rights. They remained in the trustee of the Emery testamentary trust—Oudin, later Taylor. Hannah v. Southern Pac. R. Co., 48 Cal. App. 517, 192 P. 304. Taylor, pursuant to an order of the superior court of San Benito County, conveyed the reversionary rights to, and they are vested in, plaintiff.

[2, 3] The next point urged is that the court erred in declaring a forfeiture in view of claimed undisputed evidence as to "changed conditions" and waiver. The contention is that by reason of a change of economic conditions and substitution of motor coach service over parallel routes, defendant was excused from further compliance with the terms of the conditions subsequent and that these facts constitute a waiver on the part of plaintiff and his predecessors in interest. The argument seems to be that abandonment of the use of the land as a right of way should be excused because a different mode of transportation had been made necessary through a change of economic conditions. The court found that defendant in 1951 ceased operating railroad lines on the land conveyed by the Emery deeds and removed all its rails, and that the "abandonment of * * * the use of said right of way for railroad purposes and the cessation of use of said property, and failure to perform the express conditions in the said grant of right of way to use the same for railroad purposes * * * constitute a breach of said conditions subsequent."[4] Defendant does not challenge these findings. Whether there has been an abandonment is a question of fact, not of law. People v. Ocean Shore Railroad, 32 Cal.2d 406, 417, 196 P.2d 570, 6 A.L.R.2d 1179; Tamalpais Land & Water Co. v. Northwestern Pac. R. Co., 73 Cal.App.2d 917, 931–932, 167 P.2d 825. The condition subsequent specified in the Emery deeds occurred; the electric railway constructed on the lands granted ceased to be maintained and operated, and the rails were removed. The land has reverted. Potomac Edison Co. v. Routzahn, 192 Md. 499, 65 A.2d 580, 584; Missouri Pac. R. Co. v. Williamson, 195 Ark. 487, 112 S.W.2d 957, 958.

[4] A ruling of the court excluding evidence of the dealings of plaintiff with the trustee and the beneficiaries of the Emery testamentary trust for the purpose of prosecuting the present litigation is assigned as error. The argument is that the evidence would have shown plaintiff's title is invalid. The point is without merit. It appears from the order of the superior court of San Benito County, quoted in the margin,[5] that plaintiff's activities and

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[4] The court finds that it is true that in or about September, 1951, defendant, Pacific Electric Railway Company, discontinued rail passenger service and established motor coach passenger service over parallel and adjacent routes; the court finds that it is not true that the purpose of the original grantor in the use of the language of the deed to the Los Angeles and Pasadena Electric Railway Company was to insure passenger service in connection with the development and subdivision of the adjacent land then owned by said grantors. * *"

[5] The order in part reads: "The petition of L. C. Faus, Administrator with Will Annexed of the Estate of Charles Goodwin Emery, Deceased, for an Order Appointing Trustee of Testamentary Trust, coming on regularly to be heard this 1st day of December, 1953, the

agreements with the trustee and the beneficiaries were fully disclosed to that court before it made the order, and that with that information before it the court authorized the conveyance from the trustee Taylor to plaintiff. A right of re-entry or of repossession for breach of conditions subsequent can be transferred. Civ.Code, § 1046. Taylor is not claiming any illegality in the deed to plaintiff; nor are the beneficiaries.

[5, 6] The defense of illegality, although open to the parties and those claiming under them, cannot as a general rule be invoked by third persons. California Cured Fruit Ass'n v. Stelling, 141 Cal. 713, 720, 75 P. 320; Wayman Inv. Co. v. Wessinger, 13 Cal.App. 108, 110, 108 P. 1022; 17 C.J.S., Contracts, § 283, p. 671. The defense is raised by defendant, a stranger, solely to prevent the enforcement of valid conditions subsequent in deeds executed to defendant and its predecessor in interest, the terms of which have been admittedly broken by defendant. The court did not err in excluding the evidence.

[7, 8] Finally, it is asserted the reversionary rights vested in the trustee of the Emery testamentary trust were destroyed by defendant's adverse possession under color of the deed from Title Insurance & Trust Company. This contention is predicated on the fallacious assumption that by "color of title" under the quitclaim deed from Title Insurance & Trust Company to defendant, made in 1922 and recorded in 1923, the latter obtained "prescriptive title" by continuous "adverse possession" since 1923. It is elementary law that possession alone, no matter how exclusive and complete, is not sufficient to create a prescriptive title. In order to do that the pos-

Court, after examining the petition and hearing the evidence and having been advised that due notice of the hearing of such petition has been given as required by law, and an affidavit having been filed by the said L. C. Faus that certain property, being after-discovered property, having been appraised in the said estate, upon its reopening, at the value of $3.00, and a Certificate of No Tax from the California Inheritance Tax Commissioner having been filed in the said estate, as reopened, covering the said property, hereinafter described; and it appearing to the Court's satisfaction that each and all of the beneficiaries under the said trust have executed quit claim deeds of their right, title and interest in and to the said property to L. C. Faus and have entered into an agreement with the said L. C. Faus that he will prosecute on their behalf necessary litigation to reduce the said property, or the proceeds thereof, to possession and will pay all expenses thereof, including attorney's fees, in consideration of which he will receive as his compensation and for expenses one-half of the property after reduction of the same to possession; and the Court being satisfied that the law requires, and that in order to carry out said trust it is necessary, that a trustee be appointed,

"It is therefore ordered by the Court that Waller Taylor II be appointed Trustee under the trust set forth in the Will of said deceased, to fill the vacancy in said trusteeship caused by the death of Lucian Oudin, the person named as said Trustee in said Will, upon giving bond in the sum of $100;

"And it is further ordered by the Court that the said Trustee take the necessary steps, including commencement of suits, if necessary, to reduce the said estate to possession, and for said purpose the said Trustee is authorized to enter into an agreement with L. C. Faus for the prosecution of said lawsuit, whereby and whereunder the costs of said suit, including attorney's fees, shall be borne by said L. C. Faus with no charge to the said estate or the trustee thereof, in consideration for which one-half of the net proceeds of the estate shall be distributed to the Trustee for distribution in accordance with the provisions of said trust as set forth in the Will of the above named deceased;

"And it is further ordered that the said Trustee be authorized to enter into an agreement with the said L. C. Faus, and for such purpose to execute any and all deeds, documents or papers necessary thereto, on the following described property."

"And it is further ordered, adjudged and decreed that the said L. C. Faus be discharged as Administrator with Will Annexed of the said estate and that his sureties be relieved from liability subsequent hereto. Further found and ordered that the Trustee has furnished the bond hereinabove required of him."

session must be "adverse" to the party against whom such title is asserted. Dobbins v. Economic Gas Co., 182 Cal. 616, 630, 189 P. 1073; Grimmesey v. Kirtlan, 93 Cal.App. 658, 665, 270 P. 243; Madden v. Hall, 21 Cal.App. 541, 132 P. 291. At all times after recordation of the quitclaim from Title Insurance & Trust Company to defendant, the latter continuously used the property for the purposes stated in the Emery deeds until September 1951. There was no evidence that the trustee of the Emery testamentary trust had any knowledge of any claim on the part of defendant to an unrestricted fee in the land. Nor was there any evidence that defendant took any affirmative step to disclose an intent to act in derogation of the terms of the Emery deeds. The finding adverse to this claim is sustained by the evidence.

[9] In their opening brief counsel for defendant in effect conceded that the Emery deeds conveyed the fee on the condition subsequent that the grantees would continue operation of trains on the land conveyed, and that such operation ceased in September 1951. Their contention was that the reversionary rights were conveyed by the Oudin-Prescott deed. In their reply brief they shift their position. They there contend the Emery deeds conveyed easements and not the fee on a condition subsequent. A question smuggled into a closing brief merits scant consideration. The point needs no discussion after Highland Realty Co. v. City of San Rafael, 46 Cal.2d 669, 298 P.2d 15. The court there said, 46 Cal.2d at page 677, 298 P.2d at page 19:

> "It is of course true, as defendants point out, that 'A fee simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended.' (Civ.Code, § 1105; Elliott v. McCombs (1941), supra, 17 Cal.2d 23, 28, 109 P.2d 329.) In the Elliott case a land company deeded to Rice a parcel of land, 'except the south 30 feet thereof reserved for road purposes,' and in concluding that the reservation was of only an easement rather than of the land itself the courts declared, quoting in part from Parks v. Gates (1921), 186 Cal. 151, 155, 199 P. 40, that 'there is a vast difference between a grant for purposes of "right of way" for a road and a grant of land "to be used for a road." The latter grant may be entirely consistent with the conveyance of a fee-simple title, as a road may be maintained as readily on land held in fee as under an easement, but the grant of land as a right of way recognizes nothing but an easement. This rule was applied in Cooper v. Selig, 48 Cal. App. 228, 191 P. 983, where the court construed a deed conveying land to the city of Los Angeles for the purposes of a public road as passing the fee-simple title. Under the same principle of construction, the language in the deed of the land company to Rice conveyed a fee-simple title to him with the reservation of an easement on the part of the grantor. [Citations.]'"

Applying this rule the court noted that the basic deed of 1875 from Hayes before it for construction was "of a right of way 'upon, over, and along a strip of land,'" and therefore concluded that the Hayes deed conveyed only an easement, and not the underlying land. The court then considered a deed from Hayes' successor, Magnesen, which conveyed "A tract of land ten (10) feet in width adjoining and lying south of that portion of the right of way" which Hayes had conveyed. The court said the language of the Magnesen deed "indicates a distinction between the nature and extent of the property interest or right he was conveying and that conveyed by the 1875 deed." In other words the Hayes deed conveyed an easement, the Magnesen deed conveyed the land. Also see Hannah v. Southern Pac. R. Co., 48 Cal.App. 517, 521, 192 P. 304.

Under the rule, the Emery deeds conveyed the fee. The grants were not of land as a right of way. They were not of a right of way "upon, over, and along a strip of land." They were grants of the entire land for the purpose of use as a way for an electric railroad. Two parcels conveyed by the 1901 deed were described as "A strip of land 60 feet in width" with metes and bounds descriptions. The two other parcels conveyed were described as "A triangular piece of land" in a designated quarter section with metes and bounds descriptions. The grantors reserved to themselves, their heirs and assigns, the right to establish and maintain across the "parcels of land" streets "at such points as shall be designated upon any map or maps of subdivision of the lands belonging to the parties of the first part [the grantors] lying adjacent to the said strips and parcels of land hereby conveyed." The grantors also reserved to themselves, their heirs and assigns, the right "to lay, construct and maintain private pipe lines for the conveyance of water across said strips and parcels of land and underneath the tracks." The grantee "as a part of the consideration for this conveyance" agreed that it, its successors and assigns, would construct and equip an electric railway from Los Angeles to Pasadena upon a line passing through the lands conveyed and continuously operate the same, and a branch line to Alhambra. The deed is replete with references to "the land conveyed."

[10] The 1904 deed recites that Pacific Electric "is now the owner of said described property [described in 1901 deed]" and is desirous "of acquiring additional ground"; as an inducement to the Emerys "to grant to" Pacific Electric "said additional ground," it has entered into certain covenants and agreement "hereinafter set forth." In the 1904 deed the Emerys granted "First: A strip of land of irregular width [metes and bounds description] Together with the right to construct and maintain upon land adjoining the above described strip of land * * * side slopes." "Second: A strip of land of irregular width [metes and bounds description] Together with the right to construct * * * side slopes" on adjoining land. This deed is also replete with references to the "land hereby conveyed" and to the "land * * * conveyed" by the 1901 deed. The only mention of a "right of way" is with reference to the use to which the grantee agreed to put the property. The point made for the first time in defendant's closing brief cannot be sustained.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Eric J. MORTIMER, Plaintiff and Appellant,
v.
Olive MARTIN et al., Defendants,

Olive B. Martin and William A. Reed, II, and Franklin McCauley, d/b/a Reed and McCauley, Defendants and Respondents.*

Civ. 16956.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1956.

Rehearing Granted Dec. 28, 1956.

Action for personal injuries to a wholesale grocery salesman slipping and falling on a concrete walkway descending from threshold of rear door to food market premises, of which defendant partners were lessees, to market floor. From a judgment of the Superior Court, County of Santa Clara, Byrl R. Salsman, J., on a jury's verdict for such defendants, plaintiff appealed. The District Court of Appeal, Agee, J. pro tem., held that a city ordinance, claimed by plaintiff to require installation of handrail along such walkway, was inadmissible in evidence and that plaintiff's proposed instructions on effect of violation of such ordinance were properly refused, where absence of handrail was not within issues raised by pleadings.

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* Opinion vacated 308 P.2d 840.

Judgment affirmed.

1. Negligence ⚷119(2)
Trial ⚷251(8)

In action for injuries to wholesale grocery salesman slipping and falling on walkway descending from threshold of rear door to food market premises, of which defendant partners were lessees, to market floor, a city ordinance, claimed by plaintiff to require installation of handrail along walkway, was inadmissible in evidence and plaintiff's proposed instructions on effect of violation of such ordinance were properly refused, where absence of handrail was not within issues raised by pleadings.

2. Negligence ⚷119(2)
Trial ⚷251(2)

Where defendants' negligence is pleaded specially by plaintiff, proof must be confined to acts pleaded, and evidence and instructions relating to acts not specifically mentioned in complaint are variant and not within issues.

3. Trial ⚷250, 260(1)

Proposed instructions adequately covered in instructions given jury or not applicable or material to case were properly refused.

4. Appeal and Error ⚷1068(5)

In personal injury suit, court's failure to give jury standard instruction on expert testimony, was not prejudicial to plaintiff, where testimony of plaintiff's attending physician, who was only expert witness, did not bear on or relate to issue of defendant's liability.

◆

Goldstein, Barceloux & Goldstein, Chico, Merton A. Jacobs, Harvey W. Hoffman, San Francisco, for appellant.

Alexander, Bacon & Mundhenk, San Francisco, for respondent Olive B. Martin.

Pelton, Gunther, Durney & Gudmundson, San Francisco, William B. Boone, San Francisco, of counsel, for respondents Reed, McCauley & Richard.

AGEE, Justice pro tem.

Plaintiff appeals from a judgment entered upon an adverse jury verdict in an action for damages for personal injuries.

The respondents (Reed, McCauley and Richard) are partners doing business as Reed and McCauley Food Mart and are the lessees of the premises in question. The owner of the premises, defendant Olive B. Martin, was granted a nonsuit and no appeal was taken from the judgment entered in her favor. Nonsuits were also granted to the sublessees operating various departments and no appeal was taken from the resulting judgments in their favor.

Appellant is a wholesale grocery salesman. On December 3, 1951, about 11:30 A.M., he parked his car at the rear of the store adjacent to the market and started to enter the market by way of the rear doorway. He had been using this entry way at least once every three weeks for over ten years. A concrete strip runs across the threshold and forms the bottom part of the doorsill. It is two and one-half inches wide and its surface is one inch above the level of the alley which adjoins the rear of the premises. At its inside edge it drops down two and three-quarters inches to the top of a concrete walkway which is five feet long and which descends to the level of the market floor. The total incline from the top to the bottom of the walkway is approximately ten inches and the maximum deviation from the horizontal is less than two and one-half inches to one foot.

Appellant testified that he took two or three steps down this walkway after entering the rear doorway, at which point he slipped and fell. In his complaint for damages for the injuries thereby sustained, appellant alleged in his charging paragraph: "That defendants were negligent in the following particulars: (a) In keeping an incline entrance to a store in a steep and slippery condition where it was known to defendants that said entrance was commonly used by business invitees and business visitors. (b) In failing to keep said incline clear of mud and water and other slippery substances and permitting water and mud to remain thereon in such a condition as to cause it to be dangerous to persons walking over and upon it. (c) In failing to give plaintiff and other persons any signal or warning of the slippery and dangerous condition of the incline at the time. (d) In failing, after defendants knew the dangerous condition of the incline, to remove the mud or water or to take such other action as was necessary to remove the dangerous condition in which the incline was." The next paragraph of the complaint alleges: "That said negligence of defendants, as aforesaid, was the proximate cause of the plaintiff slipping and falling upon the incline as aforesaid, whereby he was injured in the respects hereinabove alleges (sic)."

[1, 2] The evidence as to whether there was any mud or water on the walkway was conflicting. There was also evidence which would support a finding of contributory negligence by appellant. Appellant does not question the sufficiency of the evidence to support the verdict as the record was presented to the jury. His contention is that the court erred in refusing to admit in evidence an ordinance of the City of Palo Alto which required the installation of a hand rail alongside the walkway.

The trial court apparently excluded the ordinance on the ground that the handrail requirement only applied to a stairway and this was not a stairway. We deem it unnecessary to discuss the point because it was not an issue raised by the pleadings. "Where negligence is pleaded specially, proof must be confined to the acts pleaded; evidence and instructions relating to acts not specifically mentioned in the complaint are variant and not within the issues." 19 Cal.Jur. p. 691. We have set forth in their entirety the specific acts of negligence claimed by appellant. Nowhere is there any issue raised as to the lack of a handrail.

In Seamans v. Standard Hotel Corp., 78 Cal.App.2d 818, 178 P.2d 514, a hotel guest sued the hotel for injuries sustained when she fell while descending a stairway. Her complaint alleged that there was a dangerous drop-off from the level of the patio to the level of the basement corridor, which she was attempting to reach. On the trial, her counsel moved to amend the complaint to add that the hotel negligently failed to illuminate the drop-off. This motion was denied. Judgment in favor of the hotel was reversed on the ground that a second charge in the complaint, i. e., failure to warn guests of the drop-off, was sufficiently broad to cover failure to illuminate, since illumination would be one way of warning. However, the plain implication of the decision is that if the complaint had been confined to the first charge, evidence of any other defect would have been outside of the issues. This charge was stated by the court to be pleaded as follows, 78 Cal.App.2d at page 820, 178 P.2d at page 515: "* * * that while plaintiff was descending the steps, leading from the patio into the hotel building, she passed over the perpendicular drop-off which is adjacent to said doorway, and as a proximate result of defendants' negligence slipped and fell headlong and was severely injured; that the defendants negligently 'permitted the said entrance and or doorway and or perpendicular drop-off to be and remain in said dangerous, defective, and hazardous condition; * * *.'" The second charge was stated to be as follows: "'that said defendants at said time and place as aforesaid carelessly and negligently *failed to warn* and advise guests and patrons and business invitees of said hotel among whom was the plaintiff, of the existence and presence of said perpendicular drop-off * * *.'" (Emphasis added.) The court states the basis of its ruling, 78 Cal.App.2d at page 824, 178 P.2d at page 517, as follows: "It is true, as defendant asserts, that if specific acts of negligence are alleged, rather than negligence generally, evidence of acts of negligence other than those specifically alleged would be immaterial and not within the issues. Plaintiff made a specific allegation concerning the alleged structural defect in the stairway and doorway, namely, the drop-off, but she made a general allegation as to negligence in failing to warn the guests of the existence of the alleged structural defect, that is, she did not specify in what particular manner defendant failed to warn them. Evidence regarding a structural defect other than the one alleged would have been immaterial and not within the issues, but evidence to the effect that defendant failed to warn the guests of the existence of the alleged defect, by reason of a lack of illumination in a dark hallway, was material and within the issues. A warning that a six-inch step-down exists in a dark hallway just inside an inward swinging door which is at the bottom step of an entrance stairway to a public building might be given in various ways. Illuminating the perpendicular drop-off would have been one way to warn the guests. Plaintiff was not required to designate specifically in her complaint the various ways in which such a warning could properly be given, and then allege particularly as to each kind of warning so designated that defendant failed to give it. Plaintiff's cause of action included a combination of the alleged negligence of defendant in permitting a specifically described hazardous defect in the building to exist and of his alleged negligence in failing to warn the guests of its existence. The evidence regarding a lack of illumination was material and within the issues presented by the complaint, and should have been considered by the court."

We conclude that the absence of a handrail was not within the issues raised by the pleadings and that the ordinance concerning the same was therefore inadmissible in evidence. It follows that the two instructions proposed by appellant on the effect of a violation of the ordinance were properly refused.

[3, 4] Appellant also complains of the failure to give some 15 proposed "usual and ordinary preliminary instructions." We have examined the entire charge to the jury and conclude that there is no merit in any of these complaints. The subject matter in each of these proposed instructions was either adequately covered in the instructions given or properly refused as not being applicable or material to the present case. One exception should be noted. Appellant offered, but the court did not give, the standard instruction on expert testimony. BAJI No. 33. However, the only expert who testified was the physician who treated appellant's injuries and his testimony did not bear upon or relate to the issue of liability. Therefore, appellant was not prejudiced by the failure to give the expert witness instruction.

The judgment is affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

146 Cal.App.2d 441

Robert G. GARNER, Plaintiff and Appellant,

v.

KMTR RADIO CORPORATION, Defendant and Respondent.

Civ. 21705.

District Court of Appeal, Second District, Division 3, California.

Nov. 30, 1956.

Action by discharged employee against his employer on contention that discharge violated collective bargaining agreement with union. From an adverse judgment of the Superior Court of Los Angeles County, J. F. Moroney, J., plaintiff appealed. The District Court of Appeal, Shinn, P. J., held that where, under bargaining agreement, union alone had authority to demand arbitration of whether employee's discharge was justified, and when employee was discharged for failing to report to work when he was jailed on traffic charge, union business manager and executive board determined that discharge was justified and matter was brought to union membership which failed to determine that discharge was unjustified, union made final determination that discharge was not unlawful, and employee was not entitled to arbitration on application of assistant business manager of union, nearly four years thereafter, on theory that he had not been discharged because he had not been given two weeks written notice or two weeks wages as required by contract.

Judgment affirmed.

1. Labor Relations ⚷434

Where, under bargaining agreement, union alone had authority to demand arbitration of whether discharge was justified, and when employee was discharged for failing to report to work when he was jailed, union business manager and executive board determined that discharge was justified and matter was brought to union membership which failed to determine that discharge was unjustified, union made final determination that discharge was not unlawful, and employee was not entitled to arbitration on application of assistant business manager of union, on theory that he had not been discharged because he had not been given two weeks' written notice or two weeks wages as required by contract.

2. Appeal and Error ⚷712

Points urged on appeal, relating to admission of evidence but outside record, could not be considered.

◆

Robert G. Garner, in pro. per.

John P. Hearne, San Francisco, Joseph J. Burris, Los Angeles, for respondent.

SHINN, Presiding Justice.

Upon this appeal from a judgment in favor of defendant, the record consists of findings, conclusions and judgment, the notice of appeal, notice to the clerk to prepare clerk's transcript on appeal and to produce exhibits, including an agreement entered into September 1, 1949, between Local Union No. 45 of the International Brotherhood of Electrical Workers and the defendant. Plaintiff, appearing in propria persona, was notified by the clerk of this court that "The judgment roll and other documents which might be necessary to properly present the appeal are not in the clerk's transcript." No application has been made for augmentation of the record. The Union was a party plaintiff in the beginning but went out on demurrer, after failing to amend.

The complaint being unavailable we are informed in the briefs that the action is for the recovery of damages claimed as a result of plaintiff's discharge on March 16, 1950, from his employment by respondent as a radio technician.

The court found that the agreement made the Union the exclusive bargaining agent and representative of all technicians employed by the defendant; after a probationary period of 90 days a technician could be discharged only for just cause and by written notice; upon request of the Union the employer must state in writing the reason for the discharge; among the grounds constituting just cause was the failure of a technician to report for duty as assigned; two weeks' notice of discharge was required prior to termination of employment and in lieu of notice the employer must pay the technician two weeks' wages; if the Union believed a discharge to be unjustified the matter would be considered a grievance and submitted to arbitration and if the discharge was found to be unfair the employe would be reinstated and the arbitration board would make an appropriate award with respect to pay for time lost; March 16, 1950, defendant discharged plaintiff for the reason that he failed to report for duty; his failure was because he was then in jail for traffic violation where he remained for 35 days; he had previously served a 10 day sentence for traffic violation; during the period of his employment by defendant plaintiff had received 26 citations with 19 convictions; on March 16, 1950, he was notified that if he failed to appear for work that evening he would be discharged; he failed to report and was discharged. Defendant did not give two weeks' notice in writing nor pay plaintiff two weeks' wages; during such two weeks' period plaintiff was detained in jail. It was further found that the business manager of the Union, Roy Tindall, whose duties included enforcement of union employment contracts and supervision and handling of grievances, immediately after plaintiff's discharge, investigated all the circumstances thereof and determined the discharge to be justified; thereafter the matter of plaintiff's discharge was brought before the executive board of the Union, which determined that the discharge was justified; thereafter the matter was brought before the entire union membership and it was not determined that the discharge was unjustified. No request was made by the Union for a written statement of the reasons for the discharge; no request was made for payment of additional salary and no demand was made that any notice in writing be given plaintiff; for almost four years after the discharge no demand was made for submission of the question of plaintiff's discharge to arbitration. On January 12, 1954, one Stillman, assistant business agent of the Union, wrote a letter to defendant requesting a conference to discuss plaintiff's discharge, or in the alternative that the matter be arbitrated; the matter was discussed with Stillman and the request for arbitration was refused; there has been no arbitration and no court proceeding to compel defendant to submit to arbitration.

The court concluded that under the contract arbitration was the exclusive procedure for the adjustment of employe grievances, including questions relating to discharge and moneys due; that the Union and plaintiff failed to seek or demand arbitration within a reasonable time after plaintiff's discharge and that the Union and defendant have previously acquiesced in and agreed to the discharge and that the same was for just cause. The court further concluded that under the facts found the arbitration procedure was presently unavailable to the Union or to plaintiff.

[1,2] It appears to be the contention of plaintiff that he was not discharged at all because he was not given two weeks' written notice or two weeks' wages. He concedes that these were matters to be settled by arbitration and he does not deny that arbitration was the exclusive procedure for the redress of grievances. His contention appears to be that the original action of the Union amounted to nothing, that the request made by the assistant business agent of the Union almost four years after the discharge properly invoked the arbitration procedure, and when it was rejected by defendant, resort to legal proceedings became available to him. This contention is untenable. The Union was plaintiff's authorized representative and the decision of the Union was not only within its powers to act on behalf of plaintiff but was properly regarded by the trial court as a final determination by the Union that plaintiff's discharge was for just cause and was not wrongful. We agree with this conclusion. It is not suggested in plaintiff's briefs that the Union did not make a complete and fair investigation or that its decision was unjust in any respect. The Union alone had authority to demand an arbitration on plaintiff's behalf and to exercise independent judgment in deciding whether plaintiff had a grievance which justified arbitration. It may well be it was decided that in view of the fact that plaintiff was in jail and would be there for some time, the manner of his discharge without two weeks' notice was not in violation of his contract rights. The assistant business manager of the Union could not, after the lapse of almost four years, rescind, annul

or overrule the determination of the business manager and the executive board of the Union to the effect that plaintiff was entitled to no redress. There are other points urged by plaintiff relating to the introduction of evidence but they are outside the record and may not be considered.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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146 Cal.App.2d 473

APPLE VALLEY BUILDING AND DEVELOPMENT COMPANY, a corporation, Plaintiff and Appellant,

v.

Gordon L. SNIDER, Defendant and Respondent.

Civ. 5292.

District Court of Appeal, Fourth District, California.

Nov. 30, 1956.

Action by realty subdivider against purchaser of several lots to enforce a restrictive covenant, for an injunction, and for damages. The Superior Court, San Bernardino County, R. Bruce Findlay, J., entered judgment denying plaintiff relief and he appealed. Defendant moved to dismiss the appeal, and such motion was submitted for consideration in connection with other points raised on the appeal. The District Court of Appeal, Mussell, J., held that trial court's findings that breach of covenant might be enjoined or remedied by owners of the reversionary interest, that a display of signs and flags interfered with the comfortable enjoyment of all other property in the tracts subject to the covenant, and that the acts of defendant were likely to cause a general breakdown of the covenant and restrictions and that the covenant was not in restraint upon alienation, did not support conclusion that such restrictive covenant was unreasonable and unenforceable, and hence judgment dismissing action for enforcement was improper.

Judgment reversed.

Injunction 🔑208

Trial court's findings that a breach of restrictive covenant might be enjoined or remedied by owners of the reversionary interest, that a display of signs and flags interfered with the comfortable enjoyment of all other property in the tracts subject to the covenant, and that the acts of defendant were likely to cause a general breakdown of the covenant and restrictions and that the covenant was not in restraint upon alienation, did not support conclusion that such restrictive covenant was unreasonable and unenforceable, and hence judgment dismissing action for enforcement was improper.

Ball, Hunt & Hart, Long Beach, for appellant.

Wm. E. Burby, Los Angeles, and C. A. Broderick, Victorville, for respondent.

MUSSELL, Justice.

This is an action to enforce a restrictive covenant in a deed by injunction and for damages. In 1948 plaintiff subdivided real property in Apple Valley in San Bernardino county. Prior to the sale of lots therein, plaintiff recorded restrictive covenants affecting said property. Thereafter defendant purchased three lots from the plaintiff and upon payment of the purchase price, plaintiff executed and recorded deeds therefor to the defendant. The restrictive covenant involved herein provides as follows:

> "No billboard of any character shall be erected, posted, pasted, painted or displayed upon or about any of said property. This restriction shall not

> prohibit grantor or their agents from maintaining signs of any size for lot sale purposes. No sign shall be displayed upon or about said property except residence signs giving the name of the occupant and the street number in accordance with a uniform design approved by the Architectural Committee."

Defendant improved the lots so purchased, erected residential units thereon, and placed "for sale" signs of usual size and design in the windows of his houses. He also placed flags on the lots to attract attention of prospective purchasers. Plaintiff then commenced this action to enjoin the maintenance of the signs and flags and for damages.

The trial court concluded that "said restrictive covenant is unreasonable and unenforceable" and entered judgment denying the relief sought. Plaintiff appeals from the judgment.

On June 25, 1956, after plaintiff perfected its appeal herein and defendant had sold the lots involved, the defendant filed a motion in this court to dismiss the appeal on the ground that the issues in the case have become wholly moot.

Plaintiff conceded at the argument in this court that at that time there was no violation of the restrictions and that the signs had been removed from the property. However, it was argued that although the land has been sold and the signs may have been removed since the appeal was filed, plaintiff is entitled to at least an award of nominal damages if the covenant is enforceable and that a dismissal of the appeal will operate to affirm the judgment which held that the restrictive covenant was unenforceable. This motion has been submitted for our consideration in connection with the other points raised on this appeal.

The trial court found, among other things, that at the time defendant acquired title to the lots involved the said restriction was of record; that the sales contracts and deeds executed by plaintiff and defendant provided that defendant would abide by said restrictions and that a breach of said covenant would cause the real property to revert to the grantor or its successors in interest; that a breach of said covenant might be enjoined or remedied by the owners of the reversionary interest in the property; that defendant, since September 1, 1953, has continuously displayed a "for sale" sign upon each lot and has displayed flags on said lots designed to call the attention of the public to the "for sale" signs; that the display of said signs and flags interferes with the comfortable enjoyment of all other property in each of said tracts owned by plaintiff and injuriously affects the value of each and every lot in said tracts; that plaintiff has not suffered any measurable monetary damage by reason of the display of said signs as aforesaid; that the acts of defendant are likely to cause a general breakdown of the covenants, restrictions and rights of way of record imposed for the orderly community development of said tracts; that it is not true that "Since the alleged covenant expressly authorizes the plaintiff 'grantor or their agents' to maintain such a sign 'for lot sale purposes', there is a lack of mutuality with respect to both the obligation and the remedy and, for that reason the aforesaid covenant cannot be enforced in equity as against the defendant, the alleged promisee. For the same reason, defendant cannot be held liable in damages for breach of the aforesaid covenant"; that it is not true that "the covenant which plaintiff alleges to be binding upon the defendant is a covenant in restraint upon alienation and is contrary to public policy"; that it is not true that "Because of plaintiff's default in enforcing the alleged restrictions and because of changed conditions the alleged restrictions cannot be enforced against defendant." As conclusions of law from the foregoing facts, the court concluded; "1. That said restrictive covenant is unreasonable and unenforceable." "2. That defendant is entitled to judgment against plaintiff on the complaint and plaintiff is entitled to judgment against defendant on the counterclaim of defendant."

In Falk v. Falk, 48 Cal.App.2d 762, 769, 120 P.2d 714, 718, the court said:

> "It has been repeatedly held that an erroneous conclusion of the court which is drawn from and based upon facts previously found to be true cannot stand if the specific facts upon which the conclusion is based do not support it. McKay v. Gesford, 163 Cal. 243, 246, 124 P. 1016, 41 L.R.A.,N.S., 303, Ann.Cas.1913E, 1253; Corea v. Higuera, 153 Cal. 451, 455, 95 P. 882, 17 L.R.A.,N.S., 1018; In re Estate of Hill, supra, 167 Cal. [59] at page 63, 138 P. 690; Lee v. Hibernia Sav. & Loan Soc., 177 Cal. 656, 659, 171 P. 677; Steele v. Scott, 192 Cal. 521, 525, 221 P. 342. The preceding principle of law which is uniformly declared in the foregoing cases and in many others, is concisely stated in McKay v. Gesford, supra [163 Cal. 243, 124 P. 1017], as follows: 'It is, of course, well settled that a general and ultimate finding * * * which is drawn as a conclusion from facts previously found *cannot stand if the specific facts upon which it is based do not support it.'* (Italics added.)"

In the instant case specific facts upon which to base the conclusion that "said restrictive covenant is unreasonable and unenforceable" are not found, and it was specifically found that a breach of said covenant might be enjoined or remedied by the owners of the reversionary interest; that the display of said signs and flags interfered with the comfortable enjoyment of all other property in said tracts; that the acts of defendant are likely to cause a general breakdown of the said covenant and restrictions; and that the covenant is not in restraint upon alienation. These are findings which do not support the conclusions drawn and for that reason we conclude that the judgment must be reversed. In view of this conclusion, it is unnecessary to here decide whether the issues in the case have become moot.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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146 Cal.App.2d 381

Raymond J. BUSH and Madonna L. Bush, Plaintiffs and Appellants,

v.

Elwin LANE, Dorothy I. Lane and Leonard R. Nix, Defendants and Respondents.

Civ. 8638

District Court of Appeal, Third District, California.

Nov. 28, 1956.

Rehearing Denied on Motion to Recall Remittitur Dec. 27, 1956.

Hearing Denied Jan. 23, 1957.

Action for conversion of goods. The Superior Court, Mendocino County, Curtiss E. Wetter, J., rendered judgment for defendants and plaintiffs appealed. The District Court of Appeal, Peek, J., 139 Cal. App.2d 376, 293 P.2d 465, affirmed. Plaintiffs moved for recall of remittitur. The District Court of Appeal, Van Dyke, P. J., held that where plaintiffs, after the affirmance, filed a second action for unjust enrichment, plaintiffs were not entitled to recall of remittitur even if defendants in the pending second action were attempting to disregard the legal position they had assumed in the conversion action and the testimony they had given therein.

Motion denied.

Appeal and Error 🔑1218

Where District Court of Appeal affirmed judgment for defendants sued for conversion of goods and plaintiffs thereafter filed a second action for unjust enrichment, plaintiffs were not entitled to recall of remittitur even if defendants in the pending second action were attempting to disregard the legal position they had assumed in the conversion action and the testimony they had given therein. West's Ann.Rules on Appeal, rule 25(d).

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Broaddus & Golden, Ukiah, Wilmer W. Morse, Sacramento, for appellants.

Preston, Falk & Johnson, Thomas F. Cleland, Ukiah, for respondents.

VAN DYKE, Presiding Justice.

After this court's decision on appeal herein, see Bush v. Lane, 139 Cal.App.2d 376, 293 P.2d 465, appellants moved the court to recall its remittitur, Rules on Appeal, Rule 25(d), upon the ground that our affirmance was the product of fraud, mistake and inadvertence. The principles governing the recall of remittiturs were stated in Southwestern Investment Corporation v. City of Los Angeles, 38 Cal.2d 623, 241 P.2d 985. See also Davis v. Basalt Rock Co., 114 Cal.App.2d 300, 250 P.2d 254. In support of their motion, appellants have filed affidavits and have also referred this court to the record on appeal. Their contentions may be stated as follows: The judgment of the trial court and the decision of this court affirming that judgment were essentially based upon an implied determination by the trial court that respondents had, for alleged breach, terminated a contract whereby they had agreed to sell to appellants, and had placed appellants in the possession of, certain real property. Having resumed possession of the property, respondents caused certain goods of the appellants to be moved from the premises and stored at appellants' charge and expense. Notwithstanding appellants' contentions to the contrary, the trial court held that these actions of respondents had not amounted to conversion of goods as claimed by appellants. After this court had affirmed that judgment, appellants, accepting and relying upon this adjudication that respondents had terminated the contract for breach, filed a second action to recover a money judgment against respondents on the basis of unjust enrichment flowing from the termination of the contract. In their pleadings in the second action respondents took the position they had not terminated the contract but had only gone into possession for the purpose of preserving the property because appellants had abandoned the premises, leaving the improvements and the personal property of the respondents therein unprotected. By these pleadings respondents had further sought specific enforcement of the contract. On the trial of the second action respondents took the stand as witnesses and testified in proof of the foregoing allegations as to the conditions under which they had resumed possession and as to their intent in doing so; that this testimony was directly contrary to that which they had given in the first trial. The trial of the second action has not been completed and the same is still pending in the trial court; nevertheless respondents are therein seeking to disregard the legal position they had assumed in the first trial, and to falsify their prior testimony.

There is nothing presented to this court in support of this motion that justifies an order recalling remittitur. As matters now stand, there has been an adjudication by the trial court, affirmed by this court, that respondents were not guilty of converting the goods of appellants. We may assume that inferentially the trial court determined that appellants had breached their contract; that for that breach respondents had terminated the same and by virtue of the right thus arising had rightfully gone into possession of the property and stored the appellants' goods. We may further assume, as asserted by appellants, that respondents are now seeking to falsely and fraudulently escape from the predicament they find themselves in when sued for the fruits of unjust enrichment. That situation, if it exists, confers on us no jurisdiction on the showing here made to recall our remittitur. We cannot assume that appellants have failed to present these matters to the trial court in the second action. We cannot assume that the trial court will be led into permitting the respondents to assume these contradictory positions and thereby establish a defense in the second suit. On the contrary, we assume that whatever validity there may be in the contentions of appellants, they will have their full and proper effect in the trial court when it determines the second action. In saying this, we do not intend to intimate how that court should decide that action. There may be good reasons, unrelated to matters herein discussed, why a successful defense can be proved therein. And, conversely, appellants may prevail in that action. But speaking to the existing situation, we are not triers of fact. We cannot on the record of the first case and the affidavits in support of this motion decide as to when respondents told the truth. In that sense this motion is premature.

The motion for recall of remittitur is denied.

PEEK and SCHOTTKY, JJ., concur.

146 Cal.App.2d 183

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

ONE 1952 FORD SEDAN, Engine No. B2KC–137252, License No. 1F29783, Defendant, Morthrift Finance Company and David Russell, Defendants and Respondents.

Civ. 8916.

District Court of Appeal, Third District, California.

Nov. 20, 1956.

Hearing Denied Jan. 16, 1957.

Proceeding by the People to forfeit interests of registered owner and legal owner of automobile on ground automobile was used for illegal transportation of narcotics, wherein legal owner of automobile interposed defense that its interest in the vehicle was acquired in good faith following a sufficient investigation of the moral character of the purchaser. The Superior Court, Sacramento County, Jay L. Henry, J., entered judgment forfeiting the automobile to the People and also providing that legal owner was owner of the lien against the automobile. The People appealed from part of judgment determining that legal owner held lien on automobile. The District Court of Appeal, Schottky, J., held that evidence was sufficient to show that sufficient investigation had been made to satisfy a reasonably prudent man of the moral responsibility, character and reputation of purchaser before legal owner acquired interest in the automobile.

Judgment affirmed.

1. Forfeitures 🔑5

Under statute providing that a claimant of any right, title or interest in any vehicle may prove a claim, mortgage or conditional sales contract to be bona fide and that his right, title or interest was acquired after reasonable investigation of character of purchaser, and without any knowledge vehicle was to be used for unlawful purpose, assignee of conditional sales contract was entitled to rely upon investigation made by seller before issuing such contract, in asserting the statutory defense in forfeiture proceeding. West's Ann.Health and Safety Code, §§ 11610, 11620

2. Forfeitures 🔑5

Where defense that investigation of automobile owner's reputation and character has been made as required by statute is asserted in forfeiture proceeding brought for unlawful use of said automobile, burden of proof on issue rests with the party asserting the defense and claiming a lien on such automobile. West's Ann. Health and Safety Code, § 11620.

3. Forfeitures ⚷**5**

Whether a proper investigation was made before claimant's interest in automobile was created so as to protect such interest against forfeiture because of unlawful use of automobile, is a question of fact to be tested by the legal standards ordinarily applied to such questions. West's Ann.Health and Safety Code, § 11620.

4. Forfeitures ⚷**5**

What is a "reasonable investigation" of moral responsibility, character and reputation of purchaser within statute permitting proof of such investigation of claimant's interest in automobile as a defense against forfeiture of such interest because of use of such automobile for unlawful purpose, must be governed by the facts of each case. West's Ann.Health and Safety Code, § 11620.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Investigation".

5. Forfeitures ⚷**5**

Investigation into financial standing or credit rating of automobile purchaser is not a sufficient investigation to protect conditional vendor's or his assignee's interest against forfeiture because of unlawful use of the automobile. West's Ann.Health and Safety Code, § 11620.

6. Forfeitures ⚷**5**

In proceeding to forfeit interests of registered owner of automobile and finance company, which was legal owner thereof on ground automobile was used to unlawfully transport narcotics, wherein legal owner pleaded as defense that its interest in the automobile was created following a sufficient investigation of moral character of purchaser thereof, evidence was sufficient to support conclusion that sufficient investigation was made to satisfy a reasonably prudent man of moral responsibility, character and reputation of the purchaser and that defense was valid. West's Ann.Health and Safety Code, §§ 11610, 11620.

Edmund G. Brown, Atty. Gen., by F. G. Girard, Deputy Atty. Gen., Sacramento, for appellant.

James K. Bullock, Sacramento, for Morthrift Finance Co.

McAllister & Johnson, Sacramento, for David Russell.

SCHOTTKY, Justice.

A Notice of Seizure and Intended Forfeiture Proceedings against one 1952 Ford Sedan was filed in the Superior Court and service was made upon David Russell, the registered owner, and on the Morthrift Company, the legal owner. Both defendants filed answers denying that the vehicle was used to unlawfully transport narcotics, as prohibited by section 11610 of the Health and Safety Code, and Morthrift Finance Company also pleaded that their interest in the vehicle was created folowing a sufficient investigation of the moral character of David Russell, the purchaser. Following a trial before the court sitting without a jury judgment was entered forfeiting the vehicle to the People of the State of California. This judgment also provided that Morthrift Finance Company was the owner of a lien against the defendant automobile not to exceed the amount of $1,097. This appeal is by the plaintiff, the People of the State of California, from that portion of the judgment wherein it ordered that Morthrift Finance Company held a lien against the automobile.

The record shows that on June 5, 1954, David Russell entered into a conditional sales contract with Olson Motor Company for the purchase of the defendant vehicle and that prior to entering into the contract a purchaser's statement had been taken from David Russell, which said statement was reviewed by Mr. Olson prior to the execution of the contract. The statement revealed the purchaser had listed two personal references and three business references. One of the references, Chris Johnson, a Sacramento attorney, was contacted by Mr. Olson and after being informed that Russell was purchasing a car from Olson, was asked what he (Johnson) knew about Russell. Mr. Johnson stated in substance that Russell was a very fine looking boy; that he paid his bills and that he was O.K. Mr. Olson testified that it was unusual for an attorney to be shown as a reference; however, that after talking to Johnson and obtaining the above information, he did not inquire further for fear of violating the attorney-client relationship. Mr. Olson stated he did not contact the two personal references because he could not find telephone numbers for them. He did, however, telephone the father of the purchaser, whose name was shown on the purchaser's statement, and was by him informed that the boy was a good boy, made good money, had a steady job for the last one and a half years; that he received some compensation from the Veteran's Administration, and that he paid the parents $50 a month for subsistence. Olson had earlier in the conversation informed the father that his son was purchasing a car and asked if it would be all right. After this conversation, Olson then approved the order and had the sales contract executed and then assigned it to Morthrift Finance Company. Upon receipt of the conditional sales contract and purchaser's statement, Morthrift Finance Company telephoned the Retailer's Credit Association, one of the references, and requested a report on the purchaser. The report showed that the file was incomplete, however that the purchaser was making $1.56 an hour at his place of employment, that he received money from the Veteran's Administration, that he was living at the reported address and that two small collection accounts had been reported to the Bureau. There was nothing derogatory in the report. Morthrift Finance Company then telephoned another reference, Dynan Finance Company; however, they had no information on the purchaser. A check was then mailed to Olson Motor Company in payment of the contract. The evidence shows that the unpaid balance due Morthrift Finance Company was $1,097. The record also shows that neither the seller nor the finance company had any notice or knowledge that the vehicle was to be used for any illegal purposes.

Appellant contends that the evidence is insufficient to support the court's findings that the Olson Company conducted a reasonable investigation of the moral responsibility, character and reputation of the purchaser, Russell, prior to entering into the conditional sales contract, and that the interest of the Morthrift Company in the vehicle was created after a reasonable investigation of the moral responsibility, character and reputation of Russell had been conducted.

Respondent in reply contends not only that reasonable character investigations were made by the Olson Company and by respondent company independently, but also that respondent company is entitled to the benefit of the investigation of the Olson Company even though the results of said investigation were not communicated to it.

Health and Safety Code, section 11620, provided at the time this action arose:

> "The claimant of any right, title or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged".

[1] We shall first decide whether or not respondent Morthrift Company was entitled to the benefit of the investigation made by its assignor, the Olson Motor Company. Appellant contends that respondent was not so entitled and relies strongly upon People v. One 1938 Buick Sedan, 39 Cal.App.2d 42, 102 P.2d 447, in which case it was stated that an assignee of a conditional sales contract cannot receive the benefit of an undisclosed investigation made by the assignor.

Respondent states that this same question arose in the case of People v. One 1949 Ford Tudor Sedan, 115 Cal.App.2d 157, 251 P.2d 776, in which case a car was sold under a conditional sales contract and the court found that the seller had made a reasonable investigation prior to the sale. The contract was then assigned to the bank which failed to make any independent investigation whatsoever. The trial court had made no express finding that the information gained by the seller's investigation had been conveyed to the bank prior to or at the time of the assignment. The appellate court, however, after adding to the findings a finding to the effect that the information gained by the seller had been communicated to the bank, said, 115 Cal. App.2d at page 163, 251 P.2d at page 779:

> "Such finding is, however, not indispensable to support the judgment. It is our opinion that, under the law, assuming the investigation by S & C Motors was sufficient, the Bank can rely on that investigation whether or not the results of the prior investigation were communicated to it. If a proper investigation is in fact made by the seller of the automobile it does not matter that a subsequent assignee made no independent investigation or did not know of the prior investigation by his assignor. The statute does not require that the claimant make the required investigation personally. Section 11620 of the Health and Safety Code merely requires the claimant to show that his interest 'was created after a reasonable investigation', without specifying who must conduct that investigation. If the Legislature had intended that the claimant must make the investigation or must know of the results of a prior investigation, it would have been a simple matter to have so provided.
>
> "A rule that the assignee could not depend upon a prior proper investigation made by his assignor, even though unknown to the assignee, would lead to absurd results. The assignment to the Bank from S & C Motors, as is usual in such cases, contains an express guarantee that the purchaser, Cole, will make all payments due under the contract. If it be assumed that S & C Motors made a proper investigation, then, if it still held the conditional sales contract, its interest could not be forfeited. But if the Bank, even without knowledge, cannot rely on the assumed proper investigation made by S & C Motors, then the bank's interest will be forfeited, and then it could recover its total loss, including attorney's fees, from S & C Motors. Thus S & C Motors, a company that we have assumed fully complied with the statute, nevertheless would, in effect, have its validly created and forfeiture free interest in the car forfeited.
>
> "The policy of the statute is to prevent automobiles, as far as possible, from falling into the hands of persons who will use them to transport narcotics. Such policy is amply served by interpreting the statute so that all that is required is a prior proper investigation. No useful purpose would be served by requiring each successive assignee to make his own investigation or know of the prior one.
>
> "This point seems never to have been directly passed on in this state. It was discussed in People v. One 1938 Buick Sedan, 39 Cal.App.2d 42, 102 P.2d 447, 451, where the court expressed, by way of dicta, the opinion that an assignee could not rely on a prior investigation made by the seller and unknown to the assignee."

The court then proceeded to discuss People v. One 1938 Buick Sedan, expressing the view that the statement that an assignee could not rely upon a prior investigation by the seller and unknown to the assignee was unsound and should not be followed. In view of the fact that a hearing was denied by the Supreme Court in the later case we believe that it must be held that respondent Morthrift Company was entitled to rely upon the prior investigation made by the Olson Motor Company.

[2-5] In view of the foregoing conclusion the only remaining question that it is

necessary to decide is whether the investigation made by the Olson Company was sufficient to satisfy the requirement expressed in section 11620 of the Health and Safety Code. There have been many cases discussing the sufficiency of the investigation required by the statute and the general principles laid down are well summarized in People v. One 1940 Buick 8 Sedan, 70 Cal.App.2d 542, at page 548, 161 P.2d 264, at page 268, as follows:

> "1. The defense that the investigation required by the statute has been made is an affirmative defense, and the burden or proof on the issue rests with the claimant.
>
> "2. The question as to whether a proper investigation has been made is one of fact and is to be tested by the legal standards ordinarily applied to such fact questions.
>
> "3. The statute does not prescribe the maximum or minimum of the investigation that must be made. It requires a 'reasonable' investigation of the factors involved. What is reasonable must be governed by the facts of each case.
>
> "4. An investigation into the financial standing or the credit rating of the car purchaser is not sufficient—the law requires an investigation of the 'moral responsibility, character, and reputation of the purchaser.'"

Subject to these general rules it has been stated that a precise test is impracticable, that in the final analysis each case must be judged upon its own facts, and that the question of whether a proper investigation of the automobile purchaser as required by section 11620 of the Health and Safety Code has been made is one of fact and is to be tested by the legal standards ordinarily applied to fact questions.

[6] In People v. One 1953 Pontiac, 135 Cal.App.2d 195, 199, 286 P.2d 885, 887, cited by appellant, it is stated: "'A sincere investigation should disclose the home address of the prospective purchaser, his employer or place of business, the sources of his income, his family or social connections and his standing in his community.' [Citations.]" As pointed out by respondent, it ascertained from the purchaser's statement and from the purchaser's father, where the purchaser lived; the purchaser's statement, verified by the father, showed where the purhaser was employed, how long he had been employed and his total income. The family or social connections were ascertained by both the purchaser's statement and by the seller's conversation with the purchaser's father. The purchaser's standing in the community was ascertained by the seller's conversation with the father as well as with his attorney. It is fair to assume that if the purchaser's reputation in the community was bad, the attorney would have refused to discuss the matter rather than make the affirmative statement that the boy was O.K. Section 11620 requires only a "reasonable" investigation. What constitutes reasonableness is not a fixed rule governing all cases, but each decision must depend upon its own peculiar circumstances. The determination of reasonableness under this section is a question of fact and "it is beyond the power of the reviewing courts to interfere with the trial court's decision if the record discloses any evidentiary support therefor." People v. One 1939 Plymouth 6 Coupe, 41 Cal. App.2d 559, 107 P.2d 266, 267.

While it is perhaps true that the investigation in the instant case was not exhaustive it was sufficient to convince an experienced trial judge that the Olson Motor Company "did conduct a reasonable investigation of the moral responsibility, character and reputation of the purchaser." In view of the authorities hereinbefore cited, we are satisfied that the evidence in the instant case supports the conclusion that the investigation made was sufficient to satisfy a reasonably prudent man of the "moral responsibility, character and reputation of the purchaser."

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Matter of the ESTATE of Joseph C. POISL, Deceased.

Thomas W. HUGHES, Petitioner and Appellant,

v.

Emma POISL, Contestant and Respondent,

Clara Gottman, Helen Kern, John Werner and Charles Werner, Legatees and Respondents.*

Civ. 21991.

District Court of Appeal, Second District, Division 1, California.

Nov. 21, 1956.

Hearing Granted Jan. 16, 1957.

Action by attorney-appellant for $10,500 for alleged extraordinary services rendered in connection with probate matter. The Superior Court, Los Angeles County, Victor R. Hensen, J., entered judgment for appellant in the amount of $1,000 and he appealed. On motion to dismiss the appeal the District Court of Appeal, Fourt, J., held that where trial court found reasonable value of services rendered by attorney-appellant was $1,000, for which amount appellant was given judgment and which sum executor of estate paid to appellant, and appellant appealed from entire nonseverable judgment, appellant's acceptance of the benefits of the judgment was a bar to the prosecution of the appeal.

Appeal dismissed.

1. Appeal and Error ⚷161, 162(3)

General rule is that voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal, but exception exists where appellant is concededly entitled to the benefits which are accepted and a reversal will not affect the right to those benefits.

2. Appeal and Error ⚷162(2)

Where different portions of a judgment are severable, a party by voluntarily accepting the fruits of one portion thereof does not necessarily estop himself from attacking the other and severable portions thereof on appeal.

3. Appeal and Error ⚷162(2)

Where attorney-appellant had sued for $10,500 and trial court gave judgment for attorney-appellant for $1,000 as the reasonable value of extraordinary services performed in connection with representation of legatees and devisees in a probate matter, which sum was paid by the executor to appellant, appellant's appeal from entire judgment was barred by appellant's acceptance of benefits of the judgment, the judgment not being severable. West's Ann. Prob.Code, § 70.

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Alfred L. Bartlett and Thomas W. Hughes, Los Angeles, for appellant.

Ben M. Kochman, Los Angeles, for respondent Emma Poisl.

FOURT, Justice.

This is a motion to dismiss an appeal on the ground that prior to filing his notice of appeal the appellant received and accepted $1,000, in full payment of the judgment appealed from and that by reason of his acceptance of the benefits of that judgment appellant is barred from prosecuting his appeal.

Appellant, who is the attorney for the executor of the estate of Joseph C. Poisl, deceased, filed a petition wherein he sought from the estate extraordinary fees in the sum of $10,500. Objections to the allowance of any extraordinary fees were filed by Emma Poisl, the surviving spouse, and following a hearing thereon the court decreed that petitioner was entitled to $1,000, extraordinary fees. The appeal in question is from that judgment.

Appellant's petition for extraordinary fees was for services rendered in connection with a proceeding brought by decedent's widow, Emma Poisl, under section 70 of the Probate Code. The trial court found that appellant associated himself with and represented the legatees and devisees other than the widow as attorney in the trial of the issues in an effort to defeat the claim of the surviving widow that the will was revoked as to her under section 70 of the Probate Code; that appellant also performed legal services in the appeal of the judgment of the trial court; that after the parties have been brought before the court it is no part of the duties of an executor or his attorney to actively participate in the trial of the issues in such a proceeding; that appellant did render extraordinary attorney's services in that he brought the necessary parties before the court in compliance with the citation issued, and that the reasonable value of such services was $1,000. Judgment was rendered against the estate for $1,000, which sum the executor paid to appellant.

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* Opinion vacated 309 P.2d 817.

[1] As stated in Mathys v. Turner, 46 Cal.2d 364, 294 P.2d 947, "It is the general rule that the voluntary acceptance of the benefit of a judgment or order is a bar to the prosecution of an appeal, since the right to accept the fruits of the judgment and the right to appeal therefrom are wholly inconsistent, and an election to take one is a renunciation of the other. [Citing cases.] An exception to the general rule exists where the appellant is concededly entitled to the benefits which are accepted and a reversal will not affect the right to those benefits. [Citing cases.]"

Appellant contends that his appeal is directed only to that portion of the judgment which has denied him the full amount of the fees for which he petitioned and that therefore his acceptance of the benefits of the judgment does not preclude him from prosecuting this appeal. He asserts that since respondent Emma Poisl has not appealed from the judgment the determination of this appeal could not affect the award made to him and that therefore he comes within the foregoing exception. The same argument was advanced by the appellant in Mathys v. Turner, supra, and in holding such contention to be without merit the court said, 46 Cal.2d at page 365, 294 P.2d at page 948: "Plaintiff asserts that he comes within this exception and argues that defendant by failing to appeal has agreed that plaintiff is entitled to the amount of $1,500 awarded by the judgment, and hence the sole question presented by the appeal is whether plaintiff is entitled to a greater recovery. The controversy, however, concerned the value of services and the amount of payments made, and in case of a reversal and retrial the judgment could conceivably be smaller. [Citing cases.] As stated in Preluzsky v. Pacific Co-op. Cafeteria Co., 195 Cal. 290, 293, 232 P. 970, 971, 'if a party to a judgment accepts payment or satisfaction of a part thereof which is favorable to him, and that part is of such a character that the part adverse to him cannot be reversed without affecting the part which is in his favor and requiring the reversal of that part also, the party so accepting the fruits of a part of the judgment in his favor is estopped from prosecuting an appeal from those parts which are against him.' "

[2] It is true that "[w]here the different portions of a judgment are severable, a party by voluntarily accepting the fruits of one portion thereof does not necessarily estop himself to attack other and severable portions thereof upon appeal." Preluzsky v. Pacific Co-operative C. Co., 195 Cal. 290, 293, 232 P. 970, 971. However, "[w]here the judgment represents the complete award allowed to the prevailing party by the court and *disposes of the whole issue*, or in other words, where the provisions of a judgment are interdependent, the appellate tribunal cannot properly reverse the judgment as to the part complained of and permit the remainder to stand. * * * It is where a party accepts the benefit of an award and appeals for more relief *in kind* that he must seek a reopening of the whole issue or be precluded by the amount awarded. * * *" People v. Roath, 62 Cal.App.2d 241, 244–245, 144 P.2d 648, 649.

[3] The sole issue presented in appellant's petition for extraordinary fees was whether he rendered extraordinary services to the estate for which he should be compensated. The court found that he did render extraordinary services the reasonable value of which was $1,000, for which amount appellant was given a judgment.

He has appealed from the entire judgment and the judgment not being severable, his acceptance of the benefits thereof is a bar to the prosecution of his appeal.

The appeal is dismissed.

WHITE, P. J., and DORAN, J., concur.

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146 Cal.App.2d 166

Robert M. NEWELL, Plaintiff and Appellant,
v.
Gertrude B. NEWELL, Defendant and Respondent.

Gertrude B. RALPHS, Plaintiff and Respondent,
v.
Robert M. NEWELL, Defendant and Appellant.

Civ. 21089.

District Court of Appeal, Second District, Division 3, California.
Nov. 20, 1956.

Rehearing Denied Dec. 13, 1956.

Hearing Denied Jan. 16, 1957.

Divorce action, wherein hubsand was granted interlocutory decree by default and custody was awarded to husband, and wife subsequently filed petition for modification of such decree as to custody; and action by wife to enforce Idaho divorce decree, wherein wife also made application for custody and support of children. The two applications were consolidated for hearing, and the Superior Court of Los Angeles County, Kurtz Kauffman, J., entered orders in favor of wife, and the husband appealed. The District Court of Appeal, Vallée, J., held that trial court did not abuse its discretion in allowing custody to the wife.

Affirmed.

See also 303 P.2d 848.

1. Divorce 🔑305

Fact that divorced mother had been found in contempt for disobeying restraining order in California divorce action with respect to child custody did not preclude California court from entertaining mother's application for custody pendente lite in action to enforce Idaho divorce decree, nor from entertaining her application to modify the interlocutory California decree with respect to custody, where (1) court had purged mother of such contempt; (2) the order disobeyed had been made on default, solely on evidence presented by father, and when mother was a resident of Idaho and had been served with process there; and (3) Idaho court had held that California court was without jurisdiction to render personal order against mother.

2. Divorce 🔑303(2)

The "change of circumstance" rule with respect to modification of child custody provisions is not ironclad.

3. Divorce 🔑303(3)

Sufficient change of circumstances to warrant modification of interlocutory divorce decree by awarding custody of children to mother was shown, in view of evidence of children's welfare in custody of mother and husband's stipulation, in Idaho divorce suit, that mother was fit to have custody.

4. Divorce 🔑303(3)

Alleged failure of mother's affidavit, seeking modification of interlocutory divorce decree with respect to child custody, to allege sufficient facts to support modification, did not preclude allowance of modification.

5. Divorce 🔑298(4), 382

Pendency of appeal from Idaho decree of absolute divorce did not prevent such decree from being sufficiently final to permit wife to remarry, and hence wife's remarriage was not bigamous so as to preclude award of custody of children to her.

6. Divorce ⚷320

Rendition of final judgment of divorce at once restores parties to status of unmarried persons, regardless of fact that judgment is appealable and fact that it may be set aside on motion, and divorced person may at once contract another marriage.

7. Witnesses ⚷212

In proceeding to modify child custody provisions of divorce decree, court properly excluded testimony to show bad character of wife's second husband, by physician who had interviewed wife's second husband and made report to court in second husband's divorce action, since such testimony was confidential. West's Ann.Code Civ.Proc., § 1881, subd. 4.

8. Witnesses ⚷208(1)

The statute prohibiting examination of physician as to information acquired in attending patient is to be liberally construed in favor of patient. West's Ann.Code Civ. Proc., § 1881, subd. 4.

9. Witnesses ⚷219(4), 222

Patient may waive privilege against testimony by physician, but it must clearly appear that there is intention to waive and court will not run to such a conclusion. West's Ann.Code Civ.Proc., § 1881, subd. 4.

10. Divorce ⚷292

Court had power, in modifying divorce decree so as to award custody of children to mother, to make award for child support.

11. Parent and Child ⚷3(1)

The primary duty to support minor children rests on the father.

12. Divorce ⚷296

The amount to be awarded for care, support, education, and maintenance of children awarded to custody of mother is within trial court's discretion.

13. Parent and Child ⚷3(1)

Father's duty to support children does not end with furnishing the mere necessities of life if he is able to afford more, but children are entitled to be supported in a style and condition consonant with their parents' position in society.

14. Divorce ⚷303(3), 312.6(6)

An application for modification of award of custody is addressed to trial court's sound legal discretion, which will not be disturbed on review unless record presents a clear case of abuse thereof.

15. Divorce ⚷298(1)

Feelings and desires of parents are not to be considered in awarding custody of children except in so far as they affect child's best interests.

16. Divorce ⚷298(1, 4)

Child's welfare and not shortcomings of parents is determinative of right to custody.

17. Divorce ⚷298(3)

In deciding where custody of children shall lie, courts are not engaged in a disciplinary proceeding to punish parents for their weaknesses as individuals nor to reward the unoffending parent for any wrong suffered by the sins of the other.

18. Divorce ⚷298(1, 3)

Court should always adopt course that is for best interests of child, and if it be for child's best interests, there is no rule preventing award of custody to parent whose alleged offense caused divorce.

◆

Ernest J. Zack, Los Angeles, for appellant.

Glenn A. Lane, Los Angeles, for respondent.

VALLÉE, Justice.

Appeals from identical orders with respect to the custody and support of three minor children made in two actions.

On August 17, 1953 Robert M. Newell, to be referred to as the father, brought an action for divorce against Gertrude B. Newell, now Gertrude B. Ralphs, to be referred to as the mother, in the superior court of the County of Los Angeles. On August 22, 1953 the mother brought an action for divorce against the father in the

County of Gooding, State of Idaho. Simultaneously with the filing of the complaint the Idaho court restrained the father during the pendency of that action from molesting the mother, entering her home, interfering with the custody of the children, and from taking the children out of Idaho. The father made a general appearance in the Idaho action. On September 25, 1953 the superior court in the California action issued an order restraining the mother from taking any further proceedings in the action filed by her in Idaho. The mother and the children were in Idaho at that time and she was there served with process issued in the California action. She did not appear in the latter action. On September 25, 1953 the father was granted an interlocutory decree of divorce by default. The court found the mother was not a fit and proper person to have custody of the three minor children, awarded their custody to the father, and ordered the mother to deliver their custody to him. She did not comply with the order; she proceeded with the Idaho action.

On January 15, 1954 the father appeared personally and testified in the Idaho court at a hearing on his application for temporary custody of the children and temporary use and possession of the family automobile. At the conclusion of that hearing the court made an order denying his application for custody of the children and granted him temporary custody of the automobile.[1]

On June 11, 1954 the mother filed a petition in the superior court of the County of Los Angeles seeking a subpoena and subpoena duces tecum in order to take depositions of witnesses for use in the Idaho action. In that proceeding the court restrained her from prosecuting the Idaho action; from taking any deposition of any person for use in the Idaho action; and from taking any steps in any court in any state other than California leading to a determination of the rights of custody of the minor children. The mother appealed from that order. The Supreme Court dismissed the appeal as moot, saying:

> "The briefs filed by the parties in answer to our questions show that Gertrude, plaintiff and appellant here, received an Idaho decree of divorce on August 31, 1954, which was affirmed by the Supreme Court of Idaho on February 27, 1956. * * * It follows, therefore, that the provisions of the restraining order prohibiting her

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[1] The father testified at the hearing: "I would like to have one car to use in my work in Los Angeles, and the car I would want it to still be subject to the jurisdiction of this Court, the rights in the car, whether the Court follows the California judgment or not. I have generally appeared in Idaho, the car will be before the Court to decide."

On August 31, 1954 the Idaho court adjudged the father to be in contempt for selling the automobile in violation of the order of January 15. That order permitted him to purge himself of the contempt if within 30 days he returned the automobile to the custody of the court or paid the mother $825. In Newell v. Sutphen, 76 Idaho 148, 279 P.2d 405, decided January 24, 1955, the father obtained a writ of review to test the validity of the contempt order. The court quashed the writ, saying that the contempt proceeding should stand or fall dependent on the final determination of the question of jurisdiction of the trial court. The trial judge was enjoined from carrying out the execution of any judgment of fine or imprisonment relative to the automobile, the court saying, 279 P.2d 408: "Such restraining order will not prohibit the trial court in proceeding to judgment in the pending contempt proceedings or other contempt proceedings in the divorce action."

The father did not purge himself and on February 9, 1955 the court found that "by deliberate misrepresentation and falsehood said Robert M. Newell by a deceit upon the process and proceedings of this Court obtained possession of said Buick Station Wagon and removed the same from the jurisdiction of this Court in deliberate violation of the order of the Court of January 15, 1954, and in direct countervention of his statement to the Court," adjudged him guilty of contempt, and decreed that he "be fined $500.00 and sentenced to five (5) days imprisonment in the County Jail of this County for said contempt of this Court."

from seeking a decree of divorce in Idaho are no longer an issue. It also appears that there is no action pending in Idaho in which depositions of California witnesses would be needed. In answer to our question concerning the order presently in effect concerning the custody of the minor children of the parties, we are advised that on March 16, 1955, two identical custody orders were made by the Superior Court of Los Angeles County in which legal custody was awarded jointly to the parties. These two orders supersede the custody provision of the order which is the subject of this appeal. There are appeals presently pending in the District Court of Appeal from the orders of March 16, 1955.

"We conclude, therefore, that there is no issue involved in this appeal which requires a determination by this court." Newell v. Newell, 46 Cal.2d 861, 299 P.2d 849.

The Idaho action was tried July 12, 1954. The parties there stipulated the children were corporeally in Idaho in the care of the mother; and the mother "is a fit and proper person to be awarded the custody of the children, if the Idaho court has jurisdiction to make a custody award to her." On August 31, 1954 the mother was granted a final decree of divorce by the Idaho court. The judgment awarded her custody of the children and ordered the father to pay her $225 a month for their support. The court found on undisputed evidence the mother had conformed to Idaho's residence requirement before bringing her action for divorce; and while substituted service in the California action was made on her in Idaho, she did not appear or in any manner participate in the California action. The judgment contained the adjudication set out in the margin.[2] The father appealed from the Idaho judgment. The Supreme Court of Idaho affirmed, saying in part:

> "[The interlocutory decree granted the husband on September 25, 1953] shows on its face that it attempted to operate in personam as to custody of the children; whereas the findings in said action show that not only was respondent in Idaho at the time of service of summons upon her but also that the children were with her. Such judgment insofar as it attempts to operate in personam was and is void and subject to collateral attack since it was made and entered without the court having obtained jurisdiction of the person of respondent. An inspection of the judgment roll in said action, without further evidence, shows such portion of the judgment to be void for the reasons aforesaid. * * *
>
> "Substituted service is ineffective to confer jurisdiction as to the personal rights and liabilities of the defendant. * * *
>
> "A judgment wholly or in part in personam may not be awarded against a nonresident not personally served within the court's jurisdiction and not voluntarily appearing. * * *
>
> "The trial court properly made inquiry into the jurisdiction of the California Court in which the judgment

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[2] "It Is Further Ordered, Adjudged And Decreed that the Court has considered and recognized the interlocutory decree of divorce made and entered in the Superior Court of the State of California in and for the County of Los Angeles, Pasa-D-11260 on or about September 25, 1953, between the parties hereto and that the same be, and hereby is, declared and decreed to be interlocutory, ex parte or default, not final and on substituted service and is not res judicata or entitled to full faith and credit;

"It Is Further Ordered, Adjudged And Decreed that the Court has considered and recognized the restraining order in the special proceeding in said California Court, No. 629775 [the proceeding in which the Supreme Court of California dismissed the appeal], and the same be, and hereby is, declared and decreed to be not final and to have been issued without jurisdiction, not responsive to or within the special proceeding involved, not res judicata, not entitled to full faith and credit, and is a nullity."

> was rendered, and into the facts necessary to give jurisdiction. * * *
>
> "Respondent [the mother] produced as one of her witnesses an attorney at law, admitted to practice and for many years a practitioner in the courts of the State of California. He testified concerning the California law applicable to the proceeding, Case No. 629775, wherein respondent made application for a commission and subpoena to take depositions in that state for use in her Idaho divorce action; that such is a special statutory proceeding in which the court exercises no equity jurisdiction, nor any power beyond the scope of the application. 'Special proceedings established by statute must strictly follow the statute, and a court sitting therein has no general or equitable jurisdiction.' 1 Cal. Jur.2d 635. The California court, after hearing respondent's said application, made a minute entry granting appellant's motion 'to quash subpoenae and subpoenae duces tecum * * *, and plaintiff is restrained from taking depositions in this county to be used in the Idaho proceedings.'
>
> "The trial court then found, in accordance with the aforesaid evidence, which was undisputed, that appellant [the father], in spite of and in disregard of such minute entry, prepared and had signed an order, without notice and without findings or conclusions of law, and in such special proceeding, the additional injunctive order directed against respondent restraining her from proceeding further in her Idaho divorce action, contrary to the California law, Cal. Code Civ. Procedure, secs. 632 and 634; Rule 19, Superior Courts of California; Kaliterna v. Wright, 94 Cal.App.2d 926, 212 P.2d 32. The trial court then further found that at the time appellant obtained the California interlocutory judgment and at the time he obtained the restraining order, upon which he relies, he well knew that the Idaho trial court August 26, 1953, had issued its injunctive order (served upon appellant September 14, 1953), restraining him from molesting respondent or interfering with her custody and care of the minor children, and that he well knew said children were in respondent's care in the State of Idaho. The restraining order, being not responsive to, nor within the issues of, such special proceeding, was not entitled to full faith and credit and therefore was and is a nullity; the trial court properly so ruled and decreed." Newell v. Newell, 77 Idaho 355, 293 P.2d 663, 668–669.

The Supreme Court of the United States denied the father's application for certiorari. 77 S.Ct. 95.

On November 6, 1954 the mother married Ralphs. In January 1955 she came to Los Angeles. On application of the father in the California action, she was cited for contempt for not delivering custody of the children to him pursuant to the interlocutory decree and in not complying with the restraining order with respect to proceeding with the Idaho action. On February 8, 1955, after hearing, the court found the mother in contempt as to both counts, sentenced her to five days in jail, and suspended the sentence on condition she deliver the children to the father forthwith. She immediately complied with the order, and the court in the same order purged her of contempt.

In January 1955 the mother filed an action in the superior court of the County of Los Angeles, praying that the Idaho judgment be established as a foreign judgment and that it be enforced; that it be adjudged that the father owed her $3,013.15 with interest under the Idaho judgment; and for attorneys' fees and costs.

On February 17, 1955 the mother applied to the superior court for an order modifying the provision of the interlocutory decree which awarded custody of the children to the father and to award their custody to her. She also asked that the father be ordered to pay her a reasonable sum for the support of the children and for attorneys' fees and costs. She filed a similar application in the action to establish the Idaho judgment, praying for custody and support for the children, attorneys' fees and costs pendente lite. The two applications were consolidated for hearing. After an extended trial before the same judge who had originally made the order awarding custody of the children to the father, who found the mother to be in contempt and who had purged her of contempt, see Primm v. Primm, 46 Cal.2d 690, 299 P.2d 231, the court on March 16, 1955 made an order in the divorce action that the mother and the father are each fit and proper persons to have the custody and control of the children; awarded legal custody to the parties jointly, with physical custody to the mother during the school year and half of vacation periods, and ordered the father to pay $225 a month for the support of the children during the time they are to be in the physical custody of the mother. The mother's application for attorneys' fees and costs was denied. The same order was made in the action to establish the Idaho judgment. The father appeals from the order in each case.

The father makes various points but, with the exception of claimed errors in rulings of the trial court, they simmer down to the contention that the court abused its discretion in awarding any custody of the children to the mother.

[1] The parties separated in June 1953. At the time of the hearing the children were about 10, 7, and 6 years of age. They had been with their mother from birth until February 8, 1955. It is argued the court had no authority to entertain the application for custody pendente lite in the action to establish the Idaho judgment in this jurisdiction because the mother had been found in contempt and had not complied with the restraining order in the California divorce action, and for the same reason the court was under a duty to refuse to hear the mother's application to modify the provision of the interlocutory decree with respect to custody of the children. The argument overlooks the fact that the court purged the mother of all contempt, not only with respect to her failure to comply with the provision of the interlocutory decree with respect to custody but also with respect to her failure to comply with the restraining order. The argument also overlooks the fact that the Idaho court held the California court was without jurisdiction to render the personal orders respecting custody and restraining the mother on substituted service, a matter the court below had a right to take into consideration in proceeding to hear the applications. The order in the interlocutory decree was made on default. It was made solely on evidence presented by the father. The mother was a resident of Idaho; she was served with process in Idaho; she was not before the court to present evidence relative to the best interests of the children in the matter of custody; and the father had been restrained by the Idaho court from interfering with the mother's custody of the children. To say the court should not have proceeded to hear the applications is to say the court could not determine what is for the best interests of the children.

[2, 3] It is asserted the court could modify the interlocutory decree only on a showing of a substantial change of circumstances. The "Change of Circumstance" is not an ironclad rule. Foster v. Foster, 8 Cal.2d 719, 728, 68 P.2d 719; Peterson v. Peterson, 64 Cal.App.2d 631, 633, 149 P.2d 206; Bemis v. Bemis, 89 Cal.App.2d 80, 91, 200 P.2d 84; Bernstein v. Bernstein, 80 Cal.App.2d 921, 924, 183 P.2d 43; Disney v. Disney, 121 Cal.App.2d 602, 607, 263 P.2d 865. The father appeared in and contested the Idaho action. In the trial of that action he stipulated the children were in Idaho in the care of their mother and that she was a fit and proper person to have their custody and care.[3] A

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[3] The stipulation in part reads: "That Robert M., Christine Lindsey, and William Charles, the minor children of the parties hereto, are presently corporeally in the State of Idaho in the care of their mother, plaintiff herein, and said plaintiff now is and since, at least from the time of, the hearing before the above en-

sufficient change of circumstances was shown as indicated by the comments of the trial judge in the present proceedings set out in the margin.[4] They settle the question. There was abundant evidence the children were mentally and physically healthy; the relationship between the mother and the children was one of love and affection; they had an excellent home with their mother; she had them attend Sunday school every Sunday; and they received the best of care and attention by her. There was evidence that she is "a wonderful little mother."

[4] The father asserts the mother's affidavit failed to allege sufficient facts to support a modification. The claim has no merit. The same contention was made in Sturm v. Sturm, 138 Cal.App.2d 25, 291 P.2d 527. The court answered, 138 Cal.App.2d at page 28, 291 P.2d at page 529:

> "An order to show cause is simply a notice of a motion. [Citations.] It is in the nature of a citation to a party to appear at a stated time and place to show why the requested relief should not be granted. [Citation.]
>
> "Appellant has cited no authority in support of his contention that the court exceeded its jurisdiction in issuing the order to show cause, or in proceeding to hear the motion for modification of the order re custody. Our research has found no such limitation upon the power of the court. There is no statute prescribing any showing required for modification of an order re custody. [Citation.] Nor is there any statute requiring that the date of an order sought to be modified appear in the order to show cause. It follows that whether a citation shall be issued to a party to appear and show why such modification should not be granted and the form of such citation are both matters within the discretion of the court.
>
> "In the instant action, all interested parties were present in court and all questions of fact pertinent to the modification of the portion of the interlocutory judgment relating to custody of the minor child of the parties were fully tried. The claimed deficiencies in the affidavit and the order to show cause did not confuse appellant as to the nature of the hearing or the relief sought."

[5, 6] The father says the court erred in awarding substantial custody to the mother at a time when she had contracted and was living in a bigamous marriage. The assumption that the wife had contracted a bigamous marriage is predicated on the erroneous premise that at the time she married Ralphs the Idaho judgment was not final because the appeal therefrom was pending. The judgment of divorce rendered by the Idaho trial court was a decree of absolute divorce. There is no interlocutory decree in Idaho. "It is the

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titled court on defendant's motion for custody of said children on or about January 15, 1954. has been a fit and proper person to be awarded the custody and care of said children, if the Court has jurisdiction to make such a custody award to her."

[4] The trial judge commented: "I could point out quite a few changes in condition. Now after this judgment in Newell versus Newell there was this proceeding in Idaho which is still pending, as I understand it, on appeal; and in that proceeding Mr. Newell appeared. And that raises a question, a different situation than might be raised if he never appeared in the action. That is one situation. And in connection therewith he entered into a stipulation which was introduced yesterday which refers to the fitness of the mother to have these children, which is a change of condition after the interlocutory judgment was granted in the California case. That is just part of the change of circumstances."

"This first paragraph (reading from said stipulation) '* * * Defendant's motion for custody of said children on or about January 15, 1954, has been a fit and proper person to be awarded the custody and care of said children if the Court of jurisdiction makes such custody award to her.' Now I think that is some evidence in regard to her fitness in regard to the children, at least at that time."

settled law of this state that the effect of the rendition of a final judgment of divorce is to at once restore the parties to the state of unmarried persons, regardless of the fact that the judgment is appealable, and regardless of the fact that it may be set aside on motion. The divorced person becomes unmarried immediately upon the rendition of the decree, and may at once contract another marriage." Deyoe v. Superior Court, 140 Cal. 476, 484, 74 P. 28, 30. We have not been cited any law of Idaho indicating that it is different from the law of California. The mother has not contracted and was not living in a bigamous marriage at the time the orders appealed from were made.

It is next contended the court erred in refusing to hear evidence asserted to have been offered by the father as to the claimed bad moral character of the mother's new husband. The new husband, Ralphs, had been divorced from a former wife. Dr. Gerty, a licensed physician called by the father, was on the witness stand. He testified he interviewed Ralphs on June 14, 1954 and had made a written report to the court in the Ralphs divorce action. The report was not introduced in evidence in that action; it had been sealed and had remained sealed at the time of the present proceedings. The following occurred:

> "Q. By Mr. Zack [attorney for the father]: When you interviewed Mr. Ralphs were you—Had you ever consulted with Mr. Ralphs before? A. Your Honor, I don't want to get myself entangled in a situation here. I have met Mr. Ralphs before.
>
> "The Court: You mean in your relationship as a Doctor? A. Yes, as a doctor."
>
> "Mr. Zack: Your Honor please, I would like to make an offer of proof in chambers as to what would be proved by the contents of the report. But so that my offer may be accurate I want to make use of a copy of that report which I have never seen. * * *
>
> "The Court: I am willing to take the offer in chambers. Do you want to make the offer now?
>
> "Mr. Zack: Yes, your Honor. Let me explain: I have no personal desire to insert myself into the thing. What I want to do is: If it is all right, I will make an offer of the report which I have not seen, but I will not have seen it, I will just offer it and say if the Doctor were allowed to testify he would testify as follows as contained in this report. I want to make it perfectly clear to everyone here I have no desire out of idle curiosity to see the report but I want to lay a foundation for evidence which is decidedly material.
>
> "The Court: You may make an offer of proof. Do you have any other evidence?
>
> "Mr. Zack: No, your Honor. His testimony will be with reference to that report.
>
> "The Court: Do you want to excuse him?
>
> "Mr. Zack: Yes, Thank you so much. * * * I hereby make offer of proof that Dr. Gerty who has been produced in this Courtroom would if permitted to testify would testify substantially in accordance with a report which he filed with the Court in the case of Ralphs versus Ralphs. I don't know the number on that, I don't know what the number is.
>
> "The Court: You can get it outside when you have the file.
>
> "Mr. Zack: That is all right. Which report was submitted to the Court, Judge Thurmond Clarke, and which report after it was received by Judge Thurmond Clarke was ordered sealed. I offer to prove that Dr. Gerty would testify as to so much of that report as reflects the background and emotional tendencies and propensities of Mr. Ralphs, who will be the foster father of these children if this motion

is granted. I understand that this report indicates—

"Mr. Lane [attorney for the mother]: Pardon me.

"Mr. Zack: I understand that Dr. Gerty's testimony—

"Mr. Lane: If he is going to make an offer of proof he should make an offer of proof and not argue as to his understanding.

"The Court: Finish your offer of proof.

"Mr. Zack: My offer of proof further is Dr. Gerty will testify that Mr. Ralphs is a marginal homosexual, that he is amoral, that he cannot be believed in that Mr. Ralphs told Dr. Gerty that he—"

"Mr. Zack: I want the record further to show for any purpose that may subsequently be material that I have—If the Court should direct me I will state the reason upon which I make this offer, the person from whom the information was obtained, and I want the record to show it was not by me from Dr. Gerty or by Mr. Newell from Dr. Gerty, but I want it understood that my offer is not the report. My offer is that the doctor if permitted to testify would testify substantially in conformance with the report your Honor has sealed on his desk."

[7–9] An objection to the offer on the ground, among others, that it called for confidential information, was sustained. Error is asserted. We think the ruling was proper. It is clear from the record that the testimony the father sought to elicit from the doctor was confidential. The doctor so indicated. "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person can not be examined as a witness in the following cases: * * * 4. * * * A licensed physician or surgeon can not, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient." Code Civ.Proc., § 1881. The statute is to be liberally construed in favor of the patient. Turner v. Redwood Mutual Life Assn., 13 Cal.App.2d 573, 576, 57 P.2d 222. The privilege may be waived by the patient but it must clearly appear there is an intention to waive "and a court will not run to such a conclusion." Kramer v. Policy Holders' Life Ins. Ass'n, 5 Cal. App.2d 380, 391, 42 P.2d 665, 670. There was nothing in the offer of proof to indicate the father proposed to prove that Ralphs had or would waive the privilege. The offer was manifestly insufficient and the court correctly so ruled. It is in evidence that the court in the Ralphs divorce case awarded custody of a minor female child to Ralphs. The father complains of other rulings of the court in the reception and rejection of evidence. None of them is of any consequence and they do not merit discussion. See Gantner v. Gantner, 39 Cal.2d 272, 277, 246 P.2d 923; Valentine v. Valentine, 47 Cal.App.2d 438, 440, 118 P.2d 17.

[10–13] The orders require the father to pay the mother $75 a month for the support of each child while she has physical custody. The father contends the court was without authority to make, and the evidence does not support, an award of child support to the mother. The court had power to make the award. Warren v. Superior Court, 132 Cal.App.2d 392, 393–394, 282 P.2d 207. The primary duty to support minor children rests on the father. Metson v. Metson, 56 Cal.App.2d 328, 333, 132 P.2d 513. The amount to be awarded for the care, support, education, and maintenance of children awarded to the custody of a mother is within the discretion of the trial court. McMahan v. McMahan, 130 Cal.App.2d 736, 738, 279 P.2d 767; 16 Cal. Jur.2d 574, § 279. The father's duty to support the children does not end with furnishing the mere necessities of life if he is able to afford more. Children are entitled to be supported in a style and condition consonant with the position in society of their parents. Bailey v. Superior Court, 215 Cal. 548, 555, 11 P.2d 865.

There was much evidence with respect to the standard of living which the parties maintained when living together and which the mother maintains for the children, and as to their needs. The order of the Idaho court requiring the father to pay $225 a month for the support of the children was in evidence. No question is raised as to his ability. While the mother did not testify to a specific amount required for the support of the children, the court was warranted on the evidence in concluding that the amount ordered was reasonable. Cf. Ross v. Frank W. Dunne Co., 119 Cal.App.2d 690, 700, 260 P.2d 104; Johnson v. Snyder, 99 Cal.App.2d 86, 90, 221 P.2d 164; Merrill v. Dustman, 97 Cal.App.2d 473, 477, 217 P.2d 998.

[14–18] It is hornbook law that an application for a modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on review unless the record presents a clear case of an abuse of that discretion. Holsinger v. Holsinger, 44 Cal.2d 132, 135, 279 P.2d 961; Munson v. Munson, 27 Cal.2d 659, 666, 166 P.2d 268. The feelings and desires of the parents are not to be considered except insofar as they affect the best interests of the child. Taber v. Taber, 209 Cal. 755, 756, 290 P. 36. It is the welfare of the child, not the shortcomings of the respective parents, which is determinative. Holsinger v. Holsinger, 44 Cal.2d 132, 135, 279 P.2d 961; Young v. Young, 117 Cal.App.2d 735, 738, 256 P.2d 1009. In deciding where custody of children shall lie, the courts are not engaged in a disciplinary proceeding to punish parents for their weaknesses as individuals nor to reward the unoffending parent for any wrong suffered by the sins of the other. Ashwell v. Ashwell, 135 Cal.App.2d 211, 217, 286 P.2d 983, in which the facts were similar to those claimed by the father to exist in the case at bar; Biles v. Biles, 107 Cal.App.2d 200, 201–202, 236 P.2d 621. The court should always adopt the course that is for the best interests of the child. Bemis v. Bemis, 89 Cal.App.2d 80, 90, 200 P.2d 84. If it be for the best interests of the child, there is no rule preventing an award of its custody to the parent whose alleged offense caused the divorce. Kettelle v. Kettelle, 110 Cal.App. 310, 313, 294 P. 453.

Applying these rules to the record, there is no showing whatever that the court abused its discretion in making the orders appealed from.

The order in each case is affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

146 Cal.App.2d 180

Robert M. NEWELL, Plaintiff and Respondent,

v.

Gertrude B. NEWELL, Defendant and Appellant.

Gertrude B. RALPHS, Plaintiff and Appellant,

v.

Robert M. NEWELL, Defendant and Respondent.

Civ. 21812, 21813.

District Court of Appeal, Second District, Division 3, California.

Nov. 20, 1956.

Action by husband for divorce, and action by wife to enforce Idaho divorce decree. The Superior Court of Los Angeles County, John Gee Clark, J., made orders in both actions providing for enforcement of child support, but not including period from time of orders for child support to the effective date of statute providing that appeal does not stay proceedings involving child custody, and the wife appealed from both such orders. The District Court of Appeal, Vallée, J., held that the husband's appeals from orders allowing custody and child support had the effect of staying such orders and husband was not obliged to make payments for support during such time, when he had physical custody of the children.

Affirmed.

Divorce ⚿312.4

Appeals from orders allowing custody of children and child support to mother suspended trial court's power to enforce the orders, and where children remained in father's physical custody from time of such orders to effective date of statute providing that appeal should not stay proceedings or affect custody, he was not obliged to make child support payments for such period. West's Ann.Code Civ.Proc., §§ 946, 949, 949a.

◆

Glenn A. Lane, Los Angeles, for appellant.

Ernest J. Zack, Los Angeles, for respondent.

VALLÉE, Justice.

These are companion cases to Newell v. Newell, Cal.App., 303 P.2d 839, in which we affirmed orders made March 16, 1955 which awarded custody of three minor children to Gertrude B. Ralphs, their mother, for specific periods and required their father, Robert M. Newell, to pay the mother $75 a month for the support of each of them during such periods. The opinion in that case is referred to for further facts. After the father had appealed from the orders affirmed in the companion cases, he refused to make the payments for the support of the children therein ordered. On September 1, 1955 $1,080 had accrued.

On September 14, 1955 the mother moved the superior court for an order determining the amount accrued and unpaid, and directing the clerk to issue a writ of execution for that amount. The court made the following findings and order in the action brought by the wife to establish the Idaho judgment:

> "That on March 16, 1955, the defendant appealed from said Order of March 16, 1955, and that thereupon an automatic statutory stay of said Order was effected by reason of Section 949 of the Code of Civil Procedure; that thereafter the Legislature enacted Section 949a of the Code of Civil Procedure which became effective September 8, 1955; that on September 8, 1955, by reason of the provisions of said Section 949a, C.C.P., the automatic statutory stay of proceedings under said Order of March 16, 1955, was dissolved;
>
> "The Court further finds that the plaintiff was not entitled to the physical custody of the children prior to September 8, 1955, by reason of the stay provided by Section 949 of the Code of Civil Procedure, and that the plaintiff had no right for support of said children prior to September 8, 1955; and, that the defendant, Robert M. Newell, is liable to the plaintiff, Gertrude B. Ralphs, for the support of said children as of September 14, 1955, the date of said Motions, for two days' support, to wit, from September 12, 1955, the beginning of the fall school term, until the date of filing of said Motions herein, to wit, September 14, 1955, and that said sum is 2/30ths of $75.00 for each child.
>
> "It is therefore ordered that the amount of accrued and unpaid child support under the Temporary Order pendente lite of March 16, 1955, herein, is 2/30ths of $75.00 for each child of the parties hereto, and that plaintiff's Motion for Writ of Execution for the sums found due from defendant to plaintiff herein is hereby granted; a stay of ten days is hereby granted."

Substantially the same order was made in the divorce action. The mother appeals from both orders.

Section 949a of the Code of Civil Procedure, enacted in 1955, in pertinent part reads:

> "An appeal does not stay proceedings as to those provisions of an order or judgment which award, change or otherwise affect the custody, including the right of visitation, of a minor child in any civil action * * *."

Section 949a went into effect September 7, 1955. Stat.1955, c. 170, p. 639.

The question is whether the mother is entitled to enforce the orders for support of the children from their date, March 16, 1955, to the effective date of section 949a.

The children were in the custody of the father at the time the orders of March 16, 1955 were made and so remained until the orders appealed from were made. The appeals from the orders of March 16, 1955 suspended the power of the trial court to enforce the order modifying the custody provisions of the interlocutory divorce decree and its power to enforce the order pendente lite in the action to establish the Idaho judgment. Code Civ.Proc., §§ 946, 949; Lerner v. Superior Court, 38 Cal.2d 676, 680, 242 P.2d 321; 29 So.Cal.L.Rev. 113. A perfected appeal in a proceeding for custody of a child automatically constituted a stay of proceedings and precluded a trial court from interfering with custody as it existed at the time of appeal. In re Barr, 39 Cal.2d 25, 27, 243 P.2d 787. The orders of March 16, 1955 did not provide for custody alone or for support alone. They were for custody and support. The support provisions of the orders are not severable from the custody provisions. The provision for support of the minor children was impliedly conditioned on the mother having their custody. Since the children remained in the physical custody of the father from March 16, 1955 to the effective date of section 949a, he was under no obligation during that period to make the payments to the mother for support of the minor children required by those orders. The trial court was right in finding that from March 16, 1955 to the effective date of section 949a there was an automatic stay of the orders appealed from in the companion cases.

The orders appealed from are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

146 Cal.App.2d 337

Robert M. NEWELL, Plaintiff, Cross-Defendant and Respondent,

v.

William H. BRAWNER, Defendant, Cross-Complainant and Appellant,

Civ. 21572.

District Court of Appeal, Second District, Division 1, California.

Nov. 28, 1956.

Rehearing Denied Dec. 14, 1956.

Hearing Denied Jan. 23, 1957.

Action against plaintiff's divorced wife's father to quiet title to land which had been awarded to plaintiff under divorce decree but which his wife had attempted to deed to her father. From a judgment of the Superior Court of Los Angeles County, John Gee Clark, J., in favor of plaintiff, defendant appealed. The District Court of Appeal, Fourt, J., held that under statute providing that judgment is conclusive between parties and their successors in interest by title subsequent to commencement of action, where, after wife and her father had actual knowledge of pendency of divorce action wherein husband contended that property was community property, wife deeded such property to husband, interlocutory decree rendered therein awarding to husband such property as his sole and separate property made issue of title to such property res judicata.

Judgment affirmed.

1. Divorce 🔑255

In divorced husband's action to quiet title to realty which wife had attempted, before suing in Idaho for divorce, to convey to her father on theory that it was her separate property or joint tenancy property, California divorce decree, which was obtained by husband after wife's failure to answer complaint alleging that the realty was community property and which determined the realty to be community property and awarded it to husband, was admissible.

2. Lis Pendens 🔑22(2)

In quiet title action, against plaintiff's divorced wife's father, involving title to property which had been set apart to plaintiff in divorce decree but which his wife had attempted to convey to father by deed dated prior to institution of divorce action, evidence supported trial court's finding that deed was actually executed and delivered after wife and father had actual notice of pendency of divorce action and after each had notice that plaintiff claimed property as community property.

3. Divorce 🔑255

Where, after wife and her father had actual knowledge of pendency of divorce action and of allegation therein that certain property was community property, wife deeded such property to father, interlocutory decree awarding to husband such property as his sole and separate property made issue of title res judicata in father's subsequent quiet title action against divorced wife's husband. West's Ann.Code Civ. Proc., § 1908, subd. 2.

4. Divorce 🔑254

Description of property, in divorce judgment as "the house and lot situated at 1300 Virginia Road, in the City of San Marino, County of Los Angeles, State of California", was sufficient.

5. Appeal and Error 🔑762

Under rule on appeal relating to additional briefs, appellate courts are not disposed to consider points raised for first time in appellant's closing brief. West's Ann. Rules on Appeal, rule 14.

6. Divorce 🔑255

Fact that at time divorced husband commenced quiet title action against divorced wife's father only an interlocutory divorce decree awarding him property in question had been entered did not preclude such decree from making issue of ownership of such property which wife had sought to deed to her father after commencement of such action res judicata on any theory that no decree a vinculo matrimonii had been entered.

Glenn A. Lane, Ernest W. Pitney, Paul Barksdale d'Orr, Los Angeles, for appellant.

Ernest J. Zack, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from a judgment in favor of the plaintiff wherein the title to certain real property in the County of Los Angeles was quieted in the plaintiff.

A fair resumé of the facts of the case are hereinafter set forth. The respondent herein was married on or about November 1, 1942, to Gertrude Newell, now known as Gertrude Ralphs, the daughter of the appellant. The property which is the subject of this action was the place formerly occupied by Mr. and Mrs. Newell as a home. Each of the parties to this action is a practicing attorney at law. About May 20, 1948, respondent and his then wife acquired a parcel of real property which was then vacant. The deed recited that they were husband and wife and they took title to the said property as joint tenants. In about 1950, Mr. and Mrs. Newell caused a house to be constructed upon the lot. They had approximately $9,000 in community funds. A construction loan was secured for the major part of the balance of the cost of the building. The mother-in-law, Mrs. Brawner, assisted in providing funds for the completion of the house.

About June 30, 1953, the respondent and his wife separated. She left the state of California with their three children and, among other places, went to the state of

Idaho (where a final decree of divorce can be secured upon six weeks residence). The appellant herein conferred with an attorney in Idaho who subsequently represented his daughter in the Idaho divorce proceedings.

On August 17, 1953, the respondent filed a divorce action in Pasadena, Case No. Pasadena D-11260. In that complaint he alleged that, "The community property of the parties consists of the following: (1) The house and lot situated at 1300 Virginia Road, San Marino, California. (2) The furniture and furnishings in the family home." The prayer of that complaint prayed for judgment against the defendant, "that the community property of the parties be distributed pursuant to law, and in such manner as the court deems proper". The then Mrs. Newell was served in the state of Idaho with a copy of the complaint and a copy of the summons on August 24, 1953. On August 22, 1953, the then Mrs. Newell filed an action in divorce in Gooding County, Idaho, the complaint therein being verified on August 15, 1953, wherein among other things, she alleged that she was a resident of the state of Idaho and that, "there is * * * community property comprising * * * an equity in the house". This apparently referred to the house in Los Angeles county, the real property involved in this case. On August 28, 1953, the appellant recorded in the office of the county recorder of Los Angeles county a grant deed executed by his daughter, the respondent's wife, wherein she purported to convey her interest in the property to her father, the appellant. The deed set forth on its face that it was made on the 14th day of August, 1953.

The then Mrs. Newell appeared in the divorce action in California on September 25, 1953, but did not answer the complaint, and on that date findings of fact and conclusions of law were made and filed, wherein the court, upon good and sufficient evidence, found that the plaintiff was a resident of Los Angeles county and that the defendant in that action had been for six years prior to the filing of the case, and was on the date of the commencement of such action, a resident of the county of Los Angeles, state of California, and further, that the parties had accumulated certain community property consisting of the house and lot in question and other property. An interlocutory decree of divorce was granted the respondent herein on September 25, 1953, and said decree was entered on September 29, 1953. The decree provided, among other things, that the property described as "[t]he house and lot situated at 1300 Virginia Road, in the City of San Marino, County of Los Angeles, State of California", and then more particularly described, was awarded to the respondent herein as his sole and separate property.

No appeal was taken from that interlocutory judgment and no proceedings were had under section 473 of the Code of Civil Procedure.

The appellant never informed the respondent of the existence of the deed from his daughter to him, he paid no taxes on the property and the records of the company which had the loan against the property indicated that they had received no communication from the appellant as the new owner, or otherwise. The respondent had no actual knowledge of the existence of the deed until April, 1954, and shortly thereafter started this action to quiet title against the appellant. The appellant filed a cross-complaint to enforce a resulting trust in the real property and for an accounting and partition. The name of Ernest W. Pitney appeared in the cross-complaint as counsel for appellant. It further appears, from various documents, that appellant and Pitney are officed at the same address.

The appellant testified that the deed from his daughter, the former Mrs. Newell, was prepared by the Idaho attorney who was representing the daughter in her Idaho divorce proceedings, and that he, the appellant, had nothing to do with its preparation. It should perhaps be noted here that it was eight days after the supposed execution of the deed that the then Mrs. Newell brought her action for a divorce in Idaho, wherein she alleged that the property in question was the community property of herself and her husband. It should further be noted that the lawyer who supposedly prepared and acknowledged the deed as a notary public was the same person who prepared the divorce complaint for Mrs. Newell, and as a notary, took the verification of Mrs. Newell on the divorce complaint.

David Black, who qualified as an expert on questioned documents testified that he examined the deed and the cross-complaint of the appellant filed in this cause on May 21, 1954, that he made a study of the typewriting on the documents and that it was his opinion that the portion of the deed which contained the particular description of the property, namely paragraphs two and three of the deed, and the words "William H. Brawner, 621 South Spring Street, Los Angeles 14, Calif.", on the reverse side of the deed were typed on the same individual typewriter as typed the typewriting in the cross-complaint in the present lawsuit. He further testified that the first part of the deed was typed on an Underwood typewriter, pica type, and the part containing the particular description in the deed in paragraphs two and three, and the cross-complaint were typed on an I.B.M. electric typewriter bearing pica type. The deed was a printed form titled at the top "613—Warranty Deed", and obviously was prepared for general usage in the state of Idaho, as the words "State of Idaho" were printed on the face of the document, and on the reverse side in the acknowledgment form the words "State of Idaho" are printed twice. In the preparation of the deed in the first instance the word "Idaho" was not crossed out on the face of the deed, so that it then read "all of the following described real estate, situated in the, County of Los Angeles, State of Idaho,". This was later corrected in October of 1953.

[1] The appellant contends that the judgment is unsupported by and contrary to the evidence. It is his theory that the funds which went into the purchase and improvement of the property were the separate property of his daughter, the respondent's wife, or joint tenancy property of the respondent and his then wife. As heretofore set forth, the court in the California divorce proceeding found the property to be the community property of Mr. and Mrs. Newell and made a judgment accordingly. In our opinion that judgment was properly received in evidence in this case. There was further evidence in the case, which, if believed, and the trial court did obviously believe such testimony, that the property was the community property of the respondent and his wife.

Furthermore, Mrs. Newell, in her Idaho divorce action alleged under oath that the property was community property. The respondent, in his divorce complaint, alleged that it was community property, and Mrs. Newell failed to answer such allegation. It was appropriately said in Cairo v. Cairo, 87 Cal.App.2d 558, at page 562, 197 P.2d 208, at page 211: "Since the complaint alleged the real property to be community and there is no denial of that fact no additional proof of that fact is necessary. Sec. 462, C.C.P.; Beatty v. Pacific States S. & L. Co., 4 Cal. App.2d 692, 698, 41 P.2d 378." And in Christiana v. Rose, 100 Cal.App.2d 46, at page 50, 222 P.2d 891, at page 894, the court said: "Under the decided cases, it is the law of this state, at least where a defendant is personally served in a divorce action and defaults, that, by such default, he admits all of the allegations of the complaint, and is estopped from thereafter challenging them."

In Brown v. Brown, 170 Cal. 1, at page 5, 147 P. 1168, at page 1170, the court said: "Where a defendant is served with a summons and complaint stating the facts upon which he is required to act, and he makes default, he is presumed to admit all the facts which are well pleaded in the complaint. The judgment which follows upon this sort of admission is, in contemplation of law, a complete adjudication of all the rights of the parties embraced in the prayer for relief and arising from the facts stated in the complaint, including the facts in his favor as well as those against him. The defendant here is presumed to have acceded to the proposition embraced in the complaint and to have consented that plaintiff should obtain the relief therein prayed for, upon the conditions and facts set forth in the complaint. The proceeding is equivalent to a statement by Brown to plaintiff that he did not object to a divorce for the cause alleged, based upon the theory that there was no community property existing at the time the action was begun. When judgment is rendered upon such a complaint and default, it becomes, in effect, a contract between the parties that the judgment shall be final with respect to everything properly embraced within the allegations of the complaint and in the prayer for relief. [Citing cases.]"

[2] Appellant next contends that the trial court relied upon the default divorce decree and that it was error for the court so to do. Appellant sets forth that the judgment in divorce was not pleaded as res judicata, that he was not a party to the divorce action and therefore his title was not adjudicated in that action.

Code of Civil Procedure, section 1908, subd. 2, provides as follows:

"Two—In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and *their successors in interest by title subsequent to the commencement of the action* or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding." (Emphasis added.)

The court found in the instant action that: "Gertrude B. Newell executed a deed to the above described real property to William H. Brawner, said deed being dated August 14, 1953, but in truth and in fact said deed was executed and delivered about August 26, 1953, after Gertrude B. Newell and William H. Brawner each had actual notice of the pendency of the hereinabove mentioned divorce action, being Los Angeles Superior Court case No. Pasadena D.–11260, and after each had actual notice that Robert M. Newell claimed the above described real property as community property in said divorce action."

There was ample evidence to sustain the finding made by the court. The court could easily have inferred that it was Mrs. Newell's original intent to litigate all of the matters between the parties in her Idaho action, including the question of their community property, for she set forth under oath on August 15, 1953, that the property was community property and she prayed that all of the same be decreed to her as her sole and separate property.

The respondent filed his divorce action in California on August 17, 1953, and served the wife with a copy of the complaint and summons on August 24, 1953. He alleged the matters heretofore considered. The appellant in this case and his daughter, Mrs. Newell, could well have been in a quandary as to what to do about the property. Appellant knew that to litigate in California might result in the very thing Mr. Newell had prayed for in his complaint. Respondent has suggested that on or about August 25th or 26th, 1953, immediately following Mrs. Newell's being served with a copy of the California divorce proceedings, that Eberle, the Idaho lawyer for Mrs. Newell, prepared so much of the deed in question as he was able to do with the information he had at hand, namely, the name of the grantor and grantee and the general address of the former home of Mr. and Mrs. Newell; that he then mailed such document to appellant herein, who completed it by typing in the legal description, using the same typewriter in his office that he used to type his cross-complaint in this action; that by arrangement between appellant and the Idaho attorney the deed was antedated to August 14th, and the acknowledgment taken accordingly. Respondent points out that any such conspiracy was necessarily frustrated from the beginning because Mrs. Newell's Idaho divorce action was on file August 22, 1953.

Appellant, in attempting to explain the situation and in testifying after the questioned document expert had testified, stated that he might have possibly picked up a blank form of an Idaho deed when he was in Idaho with his daughter and had typed in the legal description and mailed the same back to her in Idaho for signature. Respondent, quite properly, put the query that if such be the case, why did appellant omit the first paragraph of the description which was written on a different typewriter (apparently in Idaho), or if he did omit the first paragraph, how was he able to tell in advance exactly the right amount of space to leave to the end that the second paragraph would appear to follow the first uninterruptedly? We have carefully examined the deed in question, and from a casual or ordinary inspection it appears to be an ordinary, usual deed on a printed form. However, upon a minute inspection, it is apparent that the testimony of the expert could well be and probably is correct. In any event, the trial court apparently considered that the expert was telling the truth, and that the testimony of the appellant was thoroughly impeached, and from the record we believe that the trial court had good cause therefor.

The facts herein are similar to those in Karlein v. Karlein, 122 Cal.App.2d 113, 264 P.2d 221, wherein Viola Karlein filed a complaint for divorce against her husband, in which she alleged that the family house on a certain lot owned by them in joint tenancy was community property. A default judgment was entered on January 12, 1950, and subsequently set aside upon motion of the husband. While the divorce was still pending the husband quitclaimed his interest in the property to the appellant, Hilda Greis, his sister. The deed was recorded October 22, 1951. A second interlocutory decree of divorce, based upon the finding that the residential property was community property, awarded it to the wife. No appeal was taken. The wife sued to quiet title to the property. The court quoted section 1908, subd. 2, of the Code of Civil Procedure and said, 122 Cal.App.2d at page 114, 264 P.2d at page 222: "This statute is applicable to the case at bar and is conclusive of the questions on appeal." It further said 122 Cal.App.2d at pages 114–115, 264 P.2d at page 222: "The status of the title of the property was placed in issue by the complaint in the divorce action. The interlocutory decree adjudged the home place to be community property and awarded it to the wife. Since no appeal was taken from the decree, the award of the property to Viola is final. [Citing case.] The authorities relied on by appellant which hold that the disposition of property by interlocutory decree is not final, Slavich v. Slavich, 108 Cal.App.2d 451, 460, 239 P.2d 100, and Wilson v. Wilson, 76 Cal.App.2d 119, 129, 172 P.2d 568, are actions in which an appeal *was taken* from the interlocutory decree." Also, see, Spahn v. Spahn, 70 Cal. App.2d 791, 162 P.2d 53.

[3] Furthermore, the determination of the interlocutory decree is res judicata. Klebora v. Klebora, 118 Cal.App. 613, 5 P.2d 965.

[4] Appellant next contends, in effect, that the judgment in the California divorce action is void because the description of the real property is insufficient. In Henderson v. Henderson, 85 Cal.App.2d 476, at pages 479 and 480, 193 P.2d 135, at page 138, the court said: "The description of the real property in the complaint, 'equity in real * * * property, situated in Shasta County, California, and standing in the joint names of the plaintiff and defendant,' would be a sufficient description for a deed. 9 Cal.Jur. 306. It complies with the requirement of section 455, Code of Civ.Proc. in that it is described with such certainty as to enable an officer, upon execution, to identify it. So far as pleading is concerned the description is sufficiently certain to give the court jurisdiction over it. 'It is generally held that an insufficient description of real estate in a pleading does not subject the resulting judgment affecting the title to or an interest in such property to collateral attack, even though the description may have been too general, or uncertain, and indeed, even though the petition may not have stated a sufficient cause of action to be good on demurrer.' 31 Am.Jur. 187; and cf. Scarf v. Aldrich, 97 Cal. 360, 368, 32 P. 324."

In this connection the appellant relies upon Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657, 12 A.L.R.2d 333. In Christiana v. Rose, supra, 100 Cal.App.2d 46, at page 52, 222 P.2d 891, at page 895, there is an appropriate reference to the Burtnett case wherein it is said: "Appellant places considerable reliance on Burtnett v. King, 33 Cal.2d 805, 205 P.2d 657 [12 A.L.R.2d 333]. There the complaint in a divorce action had alleged that there was certain specified community property, but the prayer of the complaint asked for no relief in reference to such property. Defendant defaulted. The decree awarded the property to plaintiff. The Supreme Court properly reversed, holding that the trial court, in a default case, cannot award a plaintiff greater relief than that demanded in the complaint. See § 580, Code of Civ.Proc.

"That case involved a different problem than that here involved. In the instant case, the court did not, as in the Burtnett case, give the plaintiff in the divorce action relief not prayed for. Here, the divorce decree gave the plaintiff relief that was in exact accord with the prayer of the complaint."

[5] In appellant's closing brief new matters are raised that are not set forth in the opening brief. Under Rule 14, Rules on Appeal, appellate courts are not disposed to consider points raised for the first time in an appellant's closing brief, and it has been generally understood that it is not proper practice in the reply brief on appeal to raise a question for the first time. In spite of such failure to properly raise such matters in the first instance, we have deemed it proper to consider some of the contentions raised in the reply brief.

[6] It is contended that at the time of the trial of this action the interlocutory decree of divorce of the respondent had become final in that the time for appeal and time for attack under Code of Civil Procedure, section 473, had elapsed, but that no decree of divorce *a vinculo* had been entered. (*A vinculo matrimonii* is defined in Bouvier's Law Dictionary [Rawles Third Revision, page 2] as "A kind of divorce which is a dissolution of the marriage contract or relation.", and in Black's Law Dictionary, 3d ed., "Lat. from the bond of matrimony. A term descriptive of a kind of divorce, which effects a complete dissolution of the marriage contract.") In other words, it is contended that Newell did not have a title by virtue of the interlocutory decree of divorce which could be quieted; that all Newell got by the divorce decree was an adjudication that he would be entitled to have the whole interest in the property put over to him as community property in a final decree dissolving the marriage, and that all he could get was the provisional, contingent, defeasible right to have the property vest in interest and enjoyment if, eventually, the bonds of matrimony should be severed.

Before the system of interlocutory decrees was established in this state, the property rights and the marriage relation were completely disposed of in a single judgment. Grannis v. Superior Court, 146 Cal. 245, 79 P. 891. Some of the history and background of the legislation is set forth in Pereira v. Pereira, 156 Cal. 1, at pages 9 and 10, 103 P. 488, at page 491, 23 L.R.A.,N.S., 880, where the court stated: "From these provisions it is argued by the appellant that the court's power to make a disposition of the property rights of the parties exists only at the time when the divorce judgment becomes final, and that any act attempted to be accomplished before that, in the way of a trial or interlocutory judgment declaring the property rights or the rights to the custody of children, is *coram non judice* and void.

"We do not think that the Code provision requires such a narrow construction. When the history of legislation on the subject and the conditions existing at the time of the adoption of the amendment of 1903 are considered, the purpose, meaning, and effect of that amendment are not difficult to discover. While the law deems it necessary to provide that a divorce may be granted when conditions are such as to make the marriage relation intolerable, it is nevertheless true that the policy of the law does not favor the dissolution of marriages. It has been generally believed that many divorces were sought, not in good faith, but because a roving fancy had found another affinity more attractive, and that a dissolution was often desired solely for the purpose of forming a new marital connection. With the design of providing conditions under which it would be understood that ardent passions of this character must perforce have time to cool before a new marriage relation could be actually formed, the Legislature, in 1897, enacted a law in effect providing that no marriage should be entered into by any divorced person until at least one year had elapsed after the decree of divorce was rendered. St.1897, p. 34, c. 36. It had become customary to avoid the provisions of this act by the expedient of going to an adjacent state for the purpose of entering into a new marital relation. This court was compelled to hold that marriages contracted in another state were valid in this state, although they were entered into within less than a year after a divorce had been granted in this state to one of the parties. Estate of Wood, 137 Cal. 129, 69 P. 900. The purpose of the amendment of 1903 was to carry into effect the object attempted to be attained by the statute in 1897. To do this the expedient was adopted of delaying the final judgment in divorce cases for the period of one year after it was judicially ascertained that a divorce should be granted. By thus making the right to a divorce ineffective for the period of one year, it became impossible for the parties to contract a valid new marriage anywhere until at least a year after the trial of the action of divorce had taken place. Except so far as was necessary to accomplish this object, it was not the intent of the statute to change in any respect the practice and procedure in actions for divorce. We do not doubt that the court has the same power now that it has always had to try and determine the issues between the parties in a divorce action with respect to property and custody of children, and that this may, and generally should, be done at the same time as the issues with respect to the cause for divorce are tried and determined."

In many instances, the trial court has been directed to dispose of the property in the final decree as determined in the interlocutory decree. Gould v. Superior Court, 47 Cal.App. 197, 191 P. 56; Remley v. Remley, 49 Cal.App. 489, 193 P. 604; Strupelle v. Strupelle, 59 Cal.App. 526, 211 P. 248; Radich v. Radich, 64 Cal.App. 605, 222 P. 182.

In Abbott v. Superior Court, 69 Cal.App. 660, 664, 665, 666, 667, 232 P. 154, 156, the court said: "But when each and every period has expired within which an attack could have been made by motion or by appeal, then and in that event the so-called interlocutory decree, in so far as it adjudges the property rights of the parties, becomes a conclusive decree. [Citing cases.] In the latter case [Huneke v. Huneke, 12 Cal.App. 199], at page 203, 107 P. [131] 133 the court said: 'The primary contention of appellant is that, under the statutes of this state, the court had no jurisdiction to enter a judgment establishing the rights of the parties to the property involved until the expiration of one year from the date of the interlocutory judgment decreeing the divorce, or until such time as the entry of a final judgment came on to be heard. This contention has been met and determined adversely to appellant by this court in John v. Superior Court, 5 Cal.App. [262] 264, 90 P. 53, and subsequently by the Supreme Court in Pereira v. Pereira, 156 Cal. 1, 103 P. 488 [23 L.R.A.,N.S., 880], in both of which cases it is determined that, in the absence of an order continuing the hearing as to the property rights involved, the opportune time for hearing and final determination of the rights of the parties as to the property is at the time and place of the trial of the principal issue involved in the divorce. * * * In so far, then, as the action involving the conflicting claims to real property is concerned, the judgment of the court thereon became final as to all parties six months after the entry thereof, in the absence of an appeal.'

* * * * * *

"It is claimed that interlocutory decrees, no matter how worded, should be held as merely interlocutory as to property rights and not conclusive until adopted and inserted in a final decree. If so, it must follow that, in the vast majority of cases that have heretofore been decided, the property rights of those litigants have not been disposed of because the final decrees were silent on the subject, and that such parties are tenants in common. Brown v. Brown, supra. Every principle involved in the rule of *stare decisis* constrains us not to make such a ruling unless compelled to do so. Sacramento Bank v. Alcorn, 121 Cal. 379, 382, 53 P. 813. For the reasons hereinabove stated we think the principle applied in the Gould case applies to this case, and we are not disposed to depart therefrom."

In the case of Leupe v. Leupe, 21 Cal.2d 145, the court said, at pages 148 and 149, 130 P.2d 697, at page 699: "Even though a final decree is not entered, the interlocutory decree becomes a conclusive adjudication and is res judicata with respect to all issues determined. [Citing cases.]

"Language may be found in certain decisions which cannot be reconciled with the foregoing cases. In re Estate of Boeson, 201 Cal. 36, 40, 255 P. 800, relied upon by respondent, it was said that the entry of an interlocutory decree does not sever the marital relation, and that any disposition of property made thereby becomes effective only upon entry of the final decree, until which time property rights remain as before the interlocutory decree. The court cited In re Estate of Dargie, 162 Cal. 51, 121 P. 320, and In re Estate of Seiler, 164 Cal. 181, 128 P. 334, Ann.Cas.1914B, 1093, but these support only the reference to severance of marital relations. Further, the language in Estate of Boeson, supra, is dictum, for although the appellant therein was said not to be barred by the decree, she was held barred upon other grounds. Roberts v. Wehmeyer, 191 Cal. 601, 615, 218 P. 22, 27, suggests the law to be that 'community property may be divided only upon a dissolution of the marriage and * * * an interlocutory decree is not such a dissolution.' This statement of the law has not been followed and has also been characterized as dictum. Klebora v. Klebora, supra, 118 Cal.App. at page 621, 5 P.2d 965. Similarly, in Radich v. Radich, 64 Cal.App. 605, 607, 222 P. 182, it was said by way of dictum that the court could not dispose of community property or a homestead until the final decree. Insofar as the language of these cases suggests that a court is without jurisdiction to make an unqualified disposition of property in an interlocutory decree of divorce, it is in opposition to the cases previously cited and must be disapproved.

"An immediate disposal of property upon an interlocutory decree of divorce is thus within the jurisdiction of the trial court. It has been held in certain cases that the trial court *should not* assign and dispose of the community or homestead property immediately by an interlocutory decree of divorce, but should wait until such time as the marriage is absolutely dissolved. [Citing cases.] These cases, however, dealt with direct appeals from interlocutory decrees in which error only was claimed and do not involve questions of jurisdiction or the effect of such decrees after the time for appeal has passed. Furthermore, it has been said that the court generally should determine the property issues at the same time it determines the issues with respect to the divorce, although the court may specify that its determination should not become effective or final until the entry of the final decree. [Citing cases.]"

The Leupe case has been consistently followed by the appellate courts of this state. In re Estate of Teel, 34 Cal.2d 349, 353–354, 210 P.2d 1; Warburton v. Kieferle, 135 Cal.App.2d 278, 284–285, 287 P.2d 1.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

146 Cal.App.2d 149

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Steve SORRENTINO, Frank Mendes and Adolph Edward Bigarani, Defendants and Appellants.

Cr. 3222.

District Court of Appeal, First District, Division 2, California.

Nov. 20, 1956.

Rehearing Denied Dec. 5, 1956.

Hearing Denied Dec. 19, 1956.

Defendants were convicted of conspiracy to rob and of robbery. The Superior Court, City & County of San Francisco, Orla St. Clair, J., entered judgment, and defendants appealed. The District Court of Appeal, Kaufman, J., held that evidence sustained convictions of all defendants.

Affirmed.

1. Criminal Law 🔑1023(8)

Defendant was not aggrieved or prejudiced by dismissal of indictment and could not appeal therefrom for purpose of including in record before District Court of Appeal the proceedings in the prosecution prior to dismissal of the indictment.

2. Conspiracy 🔑43(6)

Count of indictment alleging that defendants conspired and agreed with each other and with other persons to violate section of the Penal Code dealing with robbery, and that, in pursuance of the object of the conspiracy, two of the defendants entered jewelry store armed with pistols, sufficiently alleged a conspiracy. West's Ann.Pen.Code, §§ 182, 211, 950.

3. Constitutional Law 🔑265

An indictment setting forth the acts constituting the offense in ordinary and concise language such as would enable a person of ordinary understanding to know what is intended, is not a violation of due process. West's Ann.Pen.Code, § 950.

4. Conspiracy 🔑23

The gist of the crime of conspiracy is the unlawful agreement to commit any crime accompanied by an overt act in furtherance of such agreement. West's Ann.Pen.Code, § 182.

5. Robbery 🔑17(1)

Counts of indictment alleging that defendants, while armed with deadly weapons, robbed named persons of lawful money of the United States, jewelry, and personalty, were sufficient. West's Ann.Pen.Code, §§ 211, 951, 952.

6. Criminal Law 🔑641(1)

A defendant may waive the aid of counsel if defendant does so with a clear understanding of what he is doing.

7. Criminal Law 🔑641(1)

A defendant is entitled to effective representation of counsel, but not to the most effective representation of counsel.

8. Indictment and Information 🔑196(3)

Where attorney for one of the defendants made no attempt to make use of knowledge which he then had as a baisis of an attack on the indictment, by requesting permission of the court to withdraw plea in order to make motion attacking the indictment, any objections on basis of irregularity of proceedings before grand jury were waived.

9. Criminal Law 🔑264

One of the defendants was not denied effective representation of counsel on his arraignment because his regular attorney, who knew of alleged perjury before grand jury, was absent, and such defendant was represented by another attorney, where such defendant's regular attorney had previously waived any objections on the basis of alleged irregularity in proceedings before grand jury.

10. Criminal Law 🔑1128(2)

Facts outside the record cannot be considered on appeal from judgment of conviction.

11. Constitutional Law 🔑265

Where counsel for one of the defendants waived any right to have indictment set aside on ground that indictment was based on allegedly perjured testimony, and witness who gave allegedly perjured testimony before grand jury did not testify in the prosecution, such defendant could not successfully contend on appeal that he was deprived of due process within meaning of the Fourteenth Amendment because indictment was based on allegedly perjured testimony. U.S.C.A.Const. Amend. 14.

12. Conspiracy ⇒47

The existence of a conspiracy may be established by circumstantial as well as direct testimony. West's Ann.Pen.Code, § 182.

13. Conspiracy ⇒47

In a conspiracy prosecution, it need not be shown that defendants actually came together to agree on a common plan, if there are facts and circumstances from which a jury can infer that they had a mutual understanding to commit a crime. West's Ann.Pen.Code, § 182.

14. Conspiracy ⇒45

In prosecution for conspiracy to commit robbery, evidence that defendants were frequently together before the robbery was not irrelevant, since it might in some degree tend to establish a conspiracy. West's Ann. Pen.Code, §§ 182, 211.

15. Robbery ⇒24(1)

When a person is shown to be in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances, which tend to show guilt, supports conviction of robbery. West's Ann. Pen.Code, § 211.

16. Conspiracy ⇒47

Evidence sustained conviction of defendant, who was not present when robberies were committed, for conspiracy to commit robbery of jewelry store. West's Ann.Pen.Code, §§ 182, 211.

17. Robbery ⇒24(1)

Evidence sustained robbery convictions of defendant, who was not present when the robberies were committed. West's Ann. Pen.Code, § 211.

18. Criminal Law ⇒351(1)

In prosecution of defendant, who was not present when robberies were committed, for conspiracy to commit the robberies and for robbery, evidence concerning division of loot and guilty conduct of such defendant after actual commission of the robberies was admissible against defendant. West's Ann.Pen.Code, §§ 182, 211.

19. Conspiracy ⇒45

In prosecution of defendant, who was not present when robberies were committed, for conspiracy to commit robbery and for robbery, evidence that such defendant shortly before the robbery made telephone calls to residence of one of those who actually committed the robberies, was properly admitted against such defendant. West's Ann. Pen.Code, §§ 182, 211.

20. Conspiracy ⇒45

In prosecution of defendant, who was not present when robberies were committed, for conspiracy to commit robbery and for robbery, evidence that day prior to robberies one of those, who actually committed the robberies made a telephone call to hotel where defendant resided, was properly admitted as against such defendant. West's Ann.Pen.Code, §§ 182, 211.

21. Criminal Law ⇒434

In prosecution for conspiracy to commit robbery and for robbery, telephone company's records of telephone calls made by defendants to each other were properly admissible as records made in regular course of business. West's Ann.Pen.Code, §§ 182, 211.

22. Criminal Law ⇒434

In prosecution for conspiracy to commit robbery and for robbery, hotel records, which showed telephone calls by one of the defendants to residence where one who committed the robberies had lived, were admissible as records kept in regular course of business. West's Ann.Pen.Code, §§ 182, 211; West's Ann.Code Civ.Proc. § 1953 f.

23. Criminal Law ⇒698(1)

Stipulations ⇒14(7)

Where counsel for one of the defendants stipulated to the fact that telephone call had been made on certain date and did not object when hotel manager testified to telephone call on another date, he would be deemed to have waived any objection that he might have to admission of evidence concerning telephone calls.

24. Criminal Law 🔑696(6)

Unless question is such that opposing counsel cannot anticipate that answer will be inadmissible, a motion to strike comes too late.

25. Criminal Law 🔑1170½(2)

There was no prejudicial error committed in overruling an objection to a question where answer was favorable to the defendant.

26. Conspiracy 🔑45

In prosecution for conspiracy to rob and for robbery, evidence tending to establish friendly association between defendants and tending to establish a link of communication between them was relevant. West's Ann.Pen.Code, §§ 182, 211.

27. Criminal Law 🔑1169(3)

Where one of the defendants was asked on cross-examination if anything that a certain witness had said on the witness stand was untrue, and that defendant replied in the negative, and that defendant's counsel on redirect fully developed the matter by referring again to the question, and quoting line after line of testimony of witness to that defendant, asking him if he had that portion of the testimony of the witness in mind when he testified that it was true, such defendant was not prejudiced by the cross-examination.

28. Criminal Law 🔑448(4)

It was not error to sustain objections to questions directed to defendant by his counsel concerning matters of which defendant had no knowledge.

29. Criminal Law 🔑1171(3)

In prosecution of defendant, who was not present when robberies were committed, for conspiracy to rob and for robbery, wherein it was shown that those who committed the actual robberies were armed and were narcotic addicts, it was not prejudicial error for District Attorney in argument to jury to theorize that if someone had offered resistance during the robberies someone might have been killed as was a police inspector a year previously when he had attempted to arrest a robber. West's Ann. Pen.Code, §§ 182, 211.

30. Criminal Law 🔑178

A dismissal under Section of the Penal Code dealing with dismissal for failure to file information or bring case to trial within time limit, is not a bar to another prosecution for the same felonies. West's Ann. Pen.Code, §§ 1382, 1387.

31. Indictment and Information 🔑15(1)

Two indictments returned at different times by the same grand jury, charging the same offense and based on the same evidence, are just as much separated proceedings as if one accusation was by indictment and the other by information.

32. Criminal Law 🔑573

Where first indictment was dismissed on August 8 under Section of the Penal Code dealing with dismissal for failure to file information or bring case to trial within time limit, and in the meantime on August 1 a second indictment was returned, and defendants were arraigned on August 5 on the new indictment, and defendants were brought to trial within 15 days of the voting of the second indictment, defendants were not denied a speedy trial. West's Ann. Pen.Code, § 1382.

33. Conspiracy 🔑47

Evidence sustained conviction of all defendants for conspiracy to rob. West's Ann.Pen.Code, §§ 182, 211.

34. Robbery 🔑24(1)

Evidence sustained conviction of all defendants for robbery. West's Ann.Pen. Code, § 211.

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Edises, Treuhaft, Grossman & Grogan, Bertram Edises, Oakland, for appellant Sorrentino.

Morris M. Grupp, San Francisco, for appellant Bigarani.

Emmet F. Hagerty, San Francisco, for appellant Mendes.

Edmund G. Brown, Atty. Gen., of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., Thomas C. Lynch, Dist. Atty., of the City & County of San Francisco, Norman Elkington, Asst. Dist. Atty., San Francisco, for respondent.

KAUFMAN, Justice.

Appeal of Bigarani

[1] This is an appeal from a judgment of conviction after jury trial, on each of five counts of an indictment. The first count charged appellant Edward Bigarani and Frank Mendes, Steve Sorrentino and Edmund Lindsay with conspiracy to violate the provisions of Section 211 of the Penal Code (robbery). The remaining counts charge all appellants with certain armed robberies that took place on February 18, 1955, at 185 Post Street, San Francisco. He appeals also from the order denying a new trial and from orders denying his motion to set aside and dismiss the indictment Appellant states that he is appealing in action 51,169 for the purpose of including in the record here the proceedings had in action 51,169, prior to the dismissal of the indictment in that action. As to the attempt to appeal from the dismissal of indictment 51,169, it may be said at the outset, that appellant cannot appeal from a decision in his favor, not being aggrieved nor prejudiced thereby. (3 Cal.Jur.2d 566, sec. 110.)

On February 18, 1955, at about eleven o'clock in the morning, the jewelry establishment operated by Paul de Vries, Inc., at 185 Post Street, San Francisco, was robbed of jewels valued at between $100,000 and $300,000, and $3,000 cash. The two armed robbers were later identified by employees of the establishment as Mendes and Sorrentino, two of the appellants. A postman who entered the premises during the course of the robbery, was also robbed. Lindsay, who was charged as a defendant, but not placed on trial, and who testified before the Grand Jury, acted as a lookout. It is admitted that appellant Bigarani was not present while the robbery was taking place, and the theory upon which he is held is that he conspired with one or more of the other appellants prior to its commission by encouraging or advising them to commit the crimes.

It is appellant's first contention that each count of the indictment is void for failure to inform appellant of the nature and cause of the accusation against him. The indictment charges appellants with a "felony, conspiracy (violation of Section 182 of the Penal Code of California), committed as follows," that Mendes, Bigarani, Sorrentino and Lindsay on or about the 18th day of February, 1955, at the City and County of San Francisco, State of California, did conspire and agree with each other and with other persons to violate the provisions of Section 211 of the Penal Code of the State of California. The first overt act is then alleged, that "Thereafter, in the City and County of San Francisco, in pursuance of the object of said conspiracy, and on February 18, 1955, Frank Mendes entered the premises at 185 Post Street." The second overt act, that in pursuance of the object of said conspiracy on that same date and at that same place, Steve Sorrentino entered the premises at 185 Post Street. Finally, the count contains an allegation that "at the time of the commission of said offense, each of said defendants was armed with a deadly weapon, to wit, a pistol."

[2-4] Count I of the Indictment obviously meets the test of Section 950, Penal Code, in that it sets forth the acts constituting the offense in ordinary and concise language such as would enable a person of ordinary understanding to know what is intended. It is well established that an indictment drawn in this fashion is not a violation of due process. People v. Gordon, 71 Cal.App.2d 606, 163 P.2d 110. In People v. Black, 45 Cal.App.2d 87, 97, 113 P.2d 746, 752, it was said that "the gist of the crime of conspiracy is the unlawful agreement to commit any crime accompanied by an overt act in furtherance of such agreement."

In People v. Roberts, 40 Cal.2d 483, 486, 254 P.2d 501, 503, appellant and another were charged by the first count of the information with conspiracy to violate section 11500 of the Health and Safety Code, and in the other three counts with illegally transporting, selling, furnishing and giving away, and possessing heroin. Appellant contended that the first count was insufficient because it did not specify the particular act, such as transporting, selling, or possessing, that was the object of the conspiracy. The count was held to be sufficient, the court stating that "Notice of the particular circumstances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate (or the grand jury); defendant is entitled to such transcript under section 870 (or section 925) of the Penal Code. [Citations.] * * * The information alleges a single conspiracy with the object of accomplishing one or more types of violation of section 11500, and there was evidence which tends to show that several objects of this single conspiracy were accomplished."

[5] As to the remaining counts of robbery in the indictment, they clearly meet the requirements prescribed by sections 951 and 952 of the Penal Code. These counts each allege that appellants committed a felony, robbery (violation of section 211, Penal Code). Count II alleges that they "did rob John De Leeuw of lawful money of the United States; Count III, that they "did rob Paul deVries of the sum of $50.00 lawful money of the United States, and one ring;" Count IV, that they "did rob William Vossbrinck of personal property entrusted to his care, to wit: United States mail; Count V, that they "did rob Paul de Vries, Inc., a corporation of diamonds, jewelry and lawful money of the United States." Each count contained allegations that appellants were armed with a deadly weapon at the time of commission of the offenses. In People v. Israel, 91 Cal.App.2d 773, 206 P.2d 62, the phrase "did rob" was attacked as being insufficient to give notice of the offense for which defendants must stand trial, and it is similarly attacked in this case. The court there, while it did not commend the form of the charge, held that it sufficiently apprised appellants of the offense with which they were charged, and was a substantial compliance with sections 951 and 952, Penal Code.

Appellant Bigarani maintains that he was deprived of effective representation of counsel upon his arraignment. The trial on the prior indictment, number 51169, had been set for August 15, 1955. The court, the district attorney, and Mr. Hagerty, counsel for appellants Sorrentino and Mendes apparently all knew that Mr. Grupp, counsel for Bigarani, would be absent from the city in the interim. While action number 51169 was still pending, the grand jury on August 1, 1955, voted a new indictment, 51564, on which the present action is based. On August 5, 1955, appellants were all called up for arraignment and for plea to this new indictment. The court, knowing of Mr. Grupp's absence from the city, appointed Mr. Hagerty, counsel for Mendes and Sorrentino, to represent Bigarani for the purposes of arraignment. The court made it clear that the trial would begin, on one or the other of the indictments on August 15, and no later. The court took under submission a motion by Mr. Hagerty to dismiss the indictment in 51169, which he stated would be decided on August 15. The district attorney assured counsel for appellants that the new indictment was based upon the same evidence as 51169. When Mr. Hagerty asked for a week to plead to it, the court gave him to August 8, or three days. He protested that he didn't know where to get in touch with Mr. Grupp in the meantime, but since the court insisted on August 8, he finally assented.

On August 8, 1955, when Bigarani was asked for his plea, he stood mute. The district attorney pointed out that Mr. Grupp, Bigarani's counsel, was not in court, and that his counsel should have an opportunity to make any motions that were proper in regard to the indictment. The court replied that he accepted Mr. Hagerty's statement that he represented Mr. Bigarani at the prior hearing and at the present one, and said "That is true, isn't it, Mr. Bigarani?" He answered, "Yes". Prior to this, Mr. Hagerty had stated that he renewed his motion to dismiss the indictment on the grounds that defendants were not properly arraigned nor brought to trial within the 60-day period on behalf of all the defendants which he represented, Sorrentino and Mendes, and added, "I believe I'm standing in for Mr. Bigarani at this time, because of the absence of Mr. Grupp." Mr. Hagerty said to the court, "You recall that last week you appointed me to represent him." The court said, "Well, Mr. Bigarani agreed to it as I recall," and Bigarani answered, "That's right." The court then asked for the pleas, and Mr. Hagerty made a motion for continuance. The court asked that he have the pleas before any more motions were made. Mr. Hagerty responded that he would like a continuance before the pleas were entered to further study the matter and consult with Mr. Grupp. The court replied that since all of them had been studying this transcript for six weeks, he should know it by heart. Mr. Hagerty said that his ideas might differ on it from "opposing counsel's", but the court said, "Well, you represent them" and Hr. Hagerty answered "That is why I am making the motion." Pleas of not guilty were entered for appellants.

The trial court, at this hearing, acted on Mr. Hagerty's motion and dismissed Indictment 51169.

The argument that appellant Bigarani was denied effective representation of counsel, appears to be based on the assertions of Mr. Grupp, that he, the court and the district attorney all knew, since sometime in July, 1955, that the testimony of Lindsay before the grand jury was perjured, that this was the testimony on which the conspiracy charge was based, and that if Mr. Grupp had been in the picture, he could have attacked the indictment on this ground before trial. Mr. Grupp represented Bigarani when the trial opened on August 15, 1955, and made a motion to amend the indictment to state Bigarani's name correctly. Mr. Grupp did not ask the court for permission to withdraw the plea in order that he might then attack the indictment on the above ground, nor did he raise the point that his client had been deprived of his right to effective counsel.

[6, 7] Undoubtedly a defendant may waive the aid of counsel if he does so with a clear understanding of what he is doing. In re Berry, 43 Cal.2d 838, 846, 279 P.2d 18. The proceedings outlined above show that there was a basis for the court's belief that there was an understanding that Bigarani was to be represented in the absence of Mr. Grupp by Mr. Hagerty. The argument appears to be that Mr. Grupp could have represented appellant *more* effectively. The cases hold, however, that a defendant is entitled to *effective* representation of counsel, and no one can question that he was intelligently and vigorously represented here by experienced counsel. We know of no holding that a defendant is entitled to the *most* effective representation of counsel.

[8, 9] Since Mr. Grupp made no attempt to make use of the knowledge which he then had as a basis of an attack on the indictment, by requesting permission of the court to withdraw the plea in order to make such motion, it must be held that any objections on the basis of irregularity of the proceedings have been waived. People v. Ahern, 113 Cal.App.2d 746, 750, 249 P.2d 63. Since Mr. Grupp made no attempt to use the information he had to request a withdrawal of the plea, we fail to see how Mr. Hagerty's representation of Bigarani was prejudicial to his rights, even if Mr. Hagerty did not have the knowledge of the alleged perjury possessed by Mr. Grupp. See, People v. Stroble, 36 Cal.2d 615, 627, 629, 226 P.2d 330. The cases of Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680, and People v. Lanigan, 22 Cal. 2d 569, 140 P.2d 24, 148 A.L.R. 176, cited by appellant are distinguishable, for in those cases the complaining defendant was represented throughout the trial of the case by a co-defendant's counsel who was forced

upon him by the court in situations where the co-defendant's interests were possibly conflicting. Here, Mr. Grupp represented Bigarani throughout the trial, hence he had the undivided assistance of his counsel during trial.

[10, 11] It is urged that appellant was deprived of due process within the meaning of the Fourteenth Amendment because the indictment was based upon perjured testimony. He contends that insofar as appellant Bigarani is concerned, his indictment was based solely upon the testimony of Lindsay, whose testimony before the grand jury, he asserts, was perjured. Lindsay did not testify at the trial. Appellant bases his charge of perjury on some remarks exchanged between the district attorney and present counsel at an earlier trial of Bigarani on a charge of receiving stolen property. The statements referred to are no part of this record on appeal. The record herein is completely devoid of any facts showing that perjured testimony was knowingly used to procure the indictment of this appellant. Facts outside the record cannot be considered on appeal. People v. Henderson, 121 Cal.App.2d 298, 300, 262 P.2d 871; People v. Collins, 117 Cal.App.2d 175, 184, 255 P.2d 59. Furthermore, as noted earlier, the failure to make any attempt to have the indictment set aside on this ground, constituted a waiver of the right to do so. In re Berry, 43 Cal. 2d 838, 844, 279 P.2d 18; People v. Gilliam, 39 Cal.2d 235, 341, 246 P.2d 31. Appellant has shown no prejudice, since the allegedly perjured testimony was not introduced at the trial. If his conviction can be upheld, it must be based only on the evidence received during trial. The numerous authorities cited by appellant holding that a conviction cannot be upheld which is secured through the use of perjured testimony knowingly presented by the prosecution, are not here in point, for appellant admits that the allegedly perjured testimony was not introduced at the trial.

Appellant maintains that the evidence was insufficient to justify his conviction on the charge of conspiracy, or on the four counts of robbery.

The record shows that in November 1954, Mendes moved into a furnished apartment in a house on California Street in San Francisco, under the alias of Joe Costa. In moving, he used the automobile of Cardinelli, who was a friend of Bigarani. Although the apartment had been vacant for months, it had not been advertised, and Mendes said he learned of it through friends. He resided at this apartment until January 31 or February 1, 1955. On February 1 or 2 and on February 5 telephone calls were placed by Bigarani to Evergreen 6–7507, the telephone number of Cardinelli's fiancee at the California Street residence, and which phone number Cardinelli had given Bigarani. Mendes did not have a phone in his apartment. On February 1, 1955, Mendes and Sorrentino, using the names Costa and Sullivan, rented an apartment at 1555 Oak Street, together with Lindsay who used the alias, Murray. They told the landlady that they were commercial fishermen just back from Alaska.

On February 16, 1955, Sorrentino and Lindsay rented an apartment in Pittsburg under the aliases of Sullivan and Lowry. The same day Mendes, under the name of Willis, checked into Room No. 5 at the El Rancho Hotel in Antioch. That day two telephone calls were placed from that room to the Embassy Hotel in San Francisco. Appellant Bigarani lived at this hotel. Bigarani admitted that he had met Mendes three times prior to February 18, 1955, the date of the robbery, the first occasion being about February 3 or 4, and that he had given him his address and phone number. They met in downtown bars. Mendes, he said told him that he was a jewelry salesman, and Bigarani told him he knew quite a few jewelers. He said that he asked him if he might know somebody who would buy jewelry if he got something that was attractive, and Bigarani told him that he'd try.

On February 17, Sorrentino and Mendes told their landlady that they would be leaving town on the 18th and would be gone for three or four days. On the 18th, the robberies previously described were committed. There can be no question as to the sufficiency of the evidence to sustain the convictions of Sorrentino and Mendes on the robbery counts, since they were positively identified by several witnesses and caught with part of the loot.

At 12:30 on the day of the robbery, Mendes telephoned Bigarani at his hotel and Bigarani immediately went to the Oak Street apartment of Mendes. He and Mendes took certain packages to Bigarani's room at the Embassy Hotel. Bigarani then phoned Dr. James Brumback, then went to the doctor's office. Dr. Brumback returned to the Embassy with Bigarani. They took part of the jewelry to the Day and Night Branch of the Bank of America where Dr. Brumback placed it in his safety deposit box. Bigarani took a suitcase containing part of the jewelry to a girl friend's apartment where he hid it.

The police traced the robbers to the Oak Street address before 6:00 p. m. on the day of the robbery, since a handkerchief had been dropped at the scene bearing Sorrentino's laundry mark. Shortly thereafter Lindsay was picked up when he returned there, and some hours later, Sorrentino. It was learned that Mendes had rented an automobile, and he was apprehended south of Salinas. Some $7,420 cash and jewelry were found on his person, and a 32 calibre automatic was in the glove compartment of the car. He told the officers that he was getting out of the country as fast as he could.

On Saturday morning, February 19, 1955, the police went to Bigarani's room at the Embassy Hotel. They found a 25 calibre gun in his possession. In his automobile they found an imitation leather bag inside a paper bag. When he was shown this bag and told that it was used in the robbery he became very excited and claimed to have no knowledge of it, saying that someone must have left it there the day before. He would not say who that someone was. When told that the robbers had been caught, he asked to see the newspaper. After reading it, he said he would help police recover the stolen property. He also said that if the police had not taken his gun, he would have blown his brains out. Bigarani took them to the girl friend's apartment where the suitcase of jewelry was recovered. He did not wish to disclose where the remainder was hidden, first offering the police a $10,000 bribe. When they declined the bribe, he took them to Dr. Brumback's office. On Monday, February 21, the safety deposit box was opened. Jewelry still in the de Vries envelopes and other jewelry in envelopes from the Hotel Embassy were found therein. There were also 12 or 15 bundles of money in denominations of twenty, fifty and one-hundred dollars.

Bigarani later told police that the bag discovered in his automobile had been used by Mendes to bring the stolen property to his hotel room. He said that after he had introduced Dr. Brumback to Mendes, there was a heated argument between them over the price. Again he said that the loot was to be sold and split between Mendes and Bigarani, that Dr. Brumback took only the diamonds, and that the old gold was to be kept by Bigarani. When he returned from the bank Bigarani gave Mendes some money. When asked how much, he held up five fingers. He said that he had then told Mendes to clear out, and when he went downstairs to drive him home, he saw Mendes' picture in the newspaper. He said that after he parted with Dr. Brumback at the bank, he had made no definite arrangement to meet the doctor again in regard to this transaction.

Both Mendes and Sorrentino were narcotic addicts and had prior criminal records.

[12–14] It is well established that the existence of a conspiracy may be established by circumstantial, as well as direct testimony. Because of the nature of conspiracy, it is seldom possible to secure independent evidence of a formal agreement. It does not have to be shown that the parties actually came together to agree on a common plan, if there are facts and circumstances from which a jury could infer that they had a mutual understanding to commit a crime. People v. Griffin, 98 Cal. App.2d 1, 219 P.2d 519; People v. Robinson, 43 Cal.2d 132, 136, 271 P.2d 865; People v. Steccone, 36 Cal.2d 234, 237, 223 P.2d 17. While many of the circumstances here may be consistent with the theory that Bigarani was known to Mendes as a receiver of stolen jewelry, they are also subject to the inference that he acted in the planning of the robbery. In February just prior to the robbery, there were admittedly three meetings between Mendes and Bigarani. Bigarani attempted to reach someone by telephone at the residence from which Mendes had just moved, early in February. While there must be some evidence of participation or interest in the conspiracy, which cannot be established simply by suspicion or association, the fact that defendants were frequently together is not irrelevant and may in some degree tend to establish a conspiracy. People v. Childs, 127 Cal. 363, 59 P. 768; 11 Cal.Jur.2d 252, sec. 30.

[15] It is settled that when a person is shown to be in possession of recently stolen property slight corroborative evidence of other inculpatory circumstances which tend to show guilt supports the conviction of robbery. People v. Vidal, 121 Cal. 221, 53 P. 558; People v. Bonner, 5 Cal.App. 2d 623, 631, 43 P.2d 343; People v. Swanson, 120 Cal.App. 173, 7 P.2d 380; People v. Cataline, 54 Cal.App. 36, 200 P. 1060. In People v. Swanson, supra, one such inculpatory circumstance mentioned was defendant's participation in the sale of the stolen property. In the instant case the proceeds of the robbery were placed on display in appellant's room for inspection by Dr. Brumback, whom he immediately contacted. He admitted that a split of the proceeds was to be made between himself and Mendes. In People v. Sandoval, 119 Cal.App.2d 777, 260 P.2d 153, a statement by defendant that the party who robbed the victim handed defendant $200 telling him that was his "part", was held to qualify as an admission that defendant participated in the robbery. In People v. Kennedy, 101 Cal.App.2d 709, 712, 226 P.2d 359, the proceeds of the robbery were sold by appellant to a long time acquaintance, appellant negotiating the sale. This was considered a corroborative circumstance that he was a participant in the robbery, plus the fact that the men who actually staged the holdup drove the stolen truck and loot immediately to appellant's home. In the instant case, appellant was available at his hotel at 12:30 p. m. just after the robbery. He left immediately upon receipt of the call to transport the loot to his room with Mendes and then contacted Dr. Brumback.

In People v. Braun, 31 Cal.App.2d 593, 88 P.2d 728, strongly relied upon by appellant, where a murder was committed during the course of a robbery, association of appellant before and after the crime with the known perpetrators was held to be insufficient evidence of participation in the crime. There, however, no evidence was introduced showing that appellant had any fruits of the robbery in his possession at any time.

Bigarani told conflicting stories as to how he acquired the jewelry. One story was that the proceeds were to be split half and half between himself and Mendes. Then at trial he testified that Mendes brought the property to him only so that it might be stored over the week end in Brumback's safe deposit box. There was the discovery in Bigarani's automobile of the brown bag used in the robbery, and of which he first denied any knowledge. Later, he said the bag had been used by Mendes to bring the stolen property to his room.

There was also evidence of consciousness of guilt on the part of appellant, since he stated that he would have committed suicide if the officers had not taken his gun. He also admitted having flushed some of the diamonds down the drain after Mendes had left his room.

[16, 17] It therefore appears that there was sufficient circumstances of guilt in addition to possession of the stolen property to show appellant Bigarani's implication in the conspiracy, and therefore he is guilty of the robberies committed in pursuance of the conspiracy, even though he was not present during the actual commission of said robberies. People v. Harper, 25 Cal. 2d 862, 156 P.2d 249; People v. Fratianno, 132 Cal.App.2d 610, 628, 282 P.2d 1002; People v. Brown, 131 Cal.App.2d 643, 652, 281 P.2d 319.

[18] It may be said that while the division of the loot, and some of the guilty conduct of appellant Bigarani occurred after the actual commission of the robbery, it was evidence admissible against him, for as was said in People v. Brown, supra, 131 Cal.App.2d at page 656, 281 P.2d at page 328, "the conspiracy 'may, for various purposes, extend in point of time beyond the actual commission of the substantive crime, providing there is some evidence showing that subsequent activities of the conspirators were part of their scheme or plan.' 11 Cal.Jur.2d 223 and cases there cited. Examples are division of the loot and payment for participation in the crime * * * and acts contemplating escaping punishment. People v. Tinnin, 136 Cal.App. 301, 306, 28 P.2d 951."

We believe that the evidence pointed out above distinguishes this case from People v. Howard, 58 Cal.App. 340, 208 P. 1022; Dong Haw v. Superior Court, 81 Cal.App.2d 153, 183 P.2d 724; People v. Zoffel, 35 Cal.App.2d 215, 95 P.2d 160; People v. Collier, 111 Cal.App. 215, 295 P. 898 and Boyd v. Superior Court, 113 Cal.App.2d 443, 248 P.2d 106, all discussed at considerable length by appellant.

[19–22] Prejudicial error is alleged in the admission into evidence of the two telephone calls made from Bigarani's hotel room to Evergreen 6–7507, and the two telephone calls on February 16, 1955, placed from the Antioch motel room rented by Mendes to the Embassy Hotel where Bigarani lived. The telephone calls on February 1 or 2 and 5 by Bigarani to the residence where Mendes had lived up till February 1, would be admissible, since, although it might be of slight weight in view of the testimony that Bigarani's friend, Cardinelli, also lived there, it tends to prove that Bigarani tried to contact someone at that residence on a date not long before the robbery. The call from Mendes on the day prior to the robbery to someone at the Hotel Embassy was a relevant circumstance. The Hotel Embassy was the residence of Bigarani. If he had resided with a family in a private residence, the fact that a call had been made by one of the robbers to that residence would have been admissible. Mendes had been given the hotel's phone number by Bigarani himself. Although numerous other persons resided at the hotel, and there is always the possibility that the call could have been directed to someone else, that argument would go to the weight of the evidence, not to the admissibility. The telephone company's records of these calls were properly admissible as records made in the regular course of business. People v. Vacarella, 61 Cal.App. 119, 123, 214 P. 237; Wharton's Criminal Evidence 691. The records of the hotel, likewise, were admissible as records kept in the regular course of business. Section 1953f, Code of Civil Procedure.

[23] The authorities cited by appellant in regard to the exclusion of telephone conversations because of lack of identification of the speaker, are not here in point. Furthermore, it may be said that these calls are not the only evidence of some association between Mendes and Bigarani, for in the period of from February 1, 1955 up to the date of the robbery, Bigarani admitted to at least three meetings with Mendes. Counsel for Bigarani stipulated to the fact that the February 5th call was made to Evergreen 6–7507, and stated that he had no objection to the introduction of the motel records showing the Antioch calls. He did not even object when the Embassy Hotel manager testified to the February 1st call, and only raised objec-

tion to the introduction of hotel records. It may therefore be said, that he had waived any objection he might have had to this testimony.

[24–26] Appellant complains of the refusal of the court to grant his motions to strike certain portions of the testimony. In some of these instances appellant had failed to object when such testimony was introduced, and he is therefore presumed to have waived the objection. Unless the question is such that opposing counsel cannot anticipate that the answer will be inadmissible, a motion to strike comes too late. People v. Williams, 127 Cal. 212, 59 P. 581. There was no prejudicial error committed in overruling an objection to a question where the answer was favorable to appellant. People v. Bigelow, 104 Cal. App.2d 380, 386, 231 P.2d 881. Other questions objected to tended to establish the friendly association between Mendes and Cardinelli and Bigarani. This tended to establish a link of communication between Mendes and Bigarani, and was therefore relevant.

[27, 28] No prejudice could have possibly resulted to appellant from the rulings of the court complained of on cross-examination of Bigarani. He was asked if anything Captain Lee had said on the witness stand was untrue. The district attorney said the question would be offered only as binding on Bigarani and not on the other defendants. Bigarani replied that "As pertains to me, I don't think he said any untruths about me." He was there given the opportunity to refute any conversations he had had with Captain Lee which were not correctly reported. Appellant's counsel on redirect fully developed the matter, by referring again to the district attorney's question, and quoting line after line of Lee's testimony to appellant, asking him if he had that portion of the testimony in mind when he gave this answer to the district attorney. Since appellant fully developed the matter on redirect which he claims was prejudicial, People v. Darby, 114 Cal.App.2d 412, 438, 250 P.2d 743, no prejudicial error appears therefrom. Nor was error committed in sustaining objections directed to appellant by his counsel of which appellant had no knowledge. Such questions were certainly irrelevant. People v. Kynette, 15 Cal.2d 731, 104 P.2d 794.

[29] Finally, it is urged that prejudicial error was committed by the district attorney in his argument to the jury when he theorized as to what might have happened at the scene of the robbery if someone had offered resistance. There might have been shooting, he said, and someone might have been killed. He pointed out that a year before Inspector Bradley had been killed trying to arrest a robber, and that in this case Captain Lee might have been killed by Mendes or the "hopped-up" Sorrentino if they had been home when their apartment was raided, and that this was the sort of thing that the wise fellow, Bigarani didn't wish to participate in.

In the present case there was no question but that the robbers were armed, and they both were admittedly narcotic addicts. It was clear that the district attorney was theorizing, and the jury must have so understood it. The language is not susceptible of the construction that any of these appellants had anything to do with the Bradley killing. For this reason, the cases cited by appellant are not in point. People v. Albertson, 23 Cal.2d 550, 576, 145 P.2d 7; People v. Anthony, 185 Cal. 152, 196 P. 47; People v. Derwae, 155 Cal. 592, 102 P. 266. It has been said that it is permissible for counsel to "illuminate his argument by illustrations which may be as various as the resources of his talents. He may refer to matters of common knowledge, not special to the case, and to well known historical incidents." People v. Kynette, 15 Cal.2d 731, 757, 104 P.2d 794, 808. Prejudice could not have resulted from the district attorney's theorizing on what might have been. Furthermore, the jury was clearly instructed that the statements and arguments of counsel were not evidence in the case, and must be disregarded where inconsistent with such evidence.

Appeal of Sorrentino

Appellant Sorrentino has filed a separate brief devoted to the argument that he has been deprived of his constitutional right to a speedy trial. His motion to dismiss indictment 51169 was granted. Thus his constitutional right in regard to that indictment was protected. That indictment was dismissed on August 8, 1955. In the meantime on August 1, 1955, indictment 51564, the indictment on which he was tried and convicted, was returned. Indictment 51169 does not appear in the record now before the court, but from the discussions of court and counsel, it may be assumed that it was very similar to the prior indictment, and was based on the same evidence. Appellants were arraigned on August 5, 1955 on the new indictment, three days prior to the dismissal of indictment 51169. They were brought to trial within fifteen days of the voting of the second indictment.

[30] Appellant's basic argument is that he had a right to a discharge from custody before he could be again indicted. In view of Section 1387, Penal Code, he cannot argue that a dismissal under Section 1382 is a bar to another prosecution for the same felonies.

Appellant admits that there are cases wherein an indictment has been returned, charging defendant with the same crime that is pending against him on an information, and that it has been held that the fact that the indictment has been returned before the information was dismissed, did not affect the situation. People v. Grace, 88 Cal.App. 222, 263 P. 306. The case of People v. MacCagnan, 129 Cal.App.2d 100, 276 P.2d 679, also so holds. He maintains, however, that there is a distinction between cases where the first accusation is by indictment and the second by information or vice versa, and those where both accusations are by indictments. In People v. Grace, supra [88 Cal.App. 222, 263 P. 309], it is said that there was no "legal relation or connection between the information and indictment. Each was a separate proceeding authorized by the statute, and complete in itself." It is urged that the voting of indictment 51169 and 51564 were not such separate proceedings.

[31] It appears to be well established in this state that two indictments returned at different times by the same grand jury charging the same offense and based upon the same evidence, are just as much separated proceedings as if one accusation was by indictment and the other by information. See, People v. Follette, 74 Cal.App. 178, 240 P. 502, and authorities there reviewed. And, see, Stern v. Superior Court, 78 Cal. App.2d 9, 14, 177 P.2d 308.

[32] It is conceivable that this power to return new indictments for the same offense might be abused. For example, if a new indictment were returned on the fifty-ninth or sixtieth day, and the prior one dismissed, and that process was rejected again and again, undoubtedly the constitutional right to a speedy trial would be nullified. See, People v. Godlewski, 22 Cal.2d 677, 140 P.2d 381. But no such abuse is shown in the present case.

As provided for in Rule 13 of the Rules on Appeal, appellant Mendes has filed no briefs on his own behalf, but has adopted the briefs of appellant Bigarani. The points involved in the Mendes appeal have already been discussed in the appeal of his co-defendants.

[33, 34] We are satisfied from the record that the evidence is sufficient to support the judgment of conviction as to all appellants and that no prejudicial error appears in the record before us.

Judgment of conviction affirmed.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.

146 Cal.App.2d 93

Frank J. MATULA, Jr., Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY of LOS ANGELES, Respondent.

Civ. 22069.

District Court of Appeal, Second District, Division 1, California.

Nov. 19, 1956.

Hearing Denied Jan. 16, 1957.

Proceeding on a petition for a writ of prohibition to restrain the Superior Court, Los Angeles County, from taking any further steps or proceedings in regard to petitioner, as defendant under an indictment for perjury. The District Court of Appeal, Fourt, J., held that where the governmental efficiency and economy committee of the Assembly conducted a valid investigation in regard to garbage and rubbish collection and disposal service in the Los Angeles area, questions put to a witness in an attempt to determine the possible necessity of recommending amendment to or change in existing legislation to increase the efficiency and effectiveness of state and local governments in collection of garbage and rubbish, did not exceed the scope of the committee's power to inquire, and it therefore had jurisdiction to receive or consider such testimony, and an indictment of petitioner for perjury in testifying before such committee, was not subject to demurrer.

Petition denied.

1. Municipal Corporations ⚷607

Constitutional provision vesting in counties and cities the power to make and enforce all local sanitary regulations not in conflict with the general laws vests broad authority in the cities and counties, and municipal ordinances giving a city the exclusive right to gather and collect garbage within city are a valid exercise of the police power conferred by such constitutional provision. West's Ann.Const. art. 11, § 11.

2. Municipal Corporations ⚷607

A city may, instead of collecting and disposing of garbage and rubbish itself, grant an exclusive privilege to engage in such activities.

3. Municipal Corporations ⚷607

Cities, under their police power, can choose to regulate activities of private garbage and rubbish collectors rather than engage in such activities themselves, or may grant exclusive contracts to do so.

4. Health ⚷20

The police power of a state includes power to make regulations for collection and disposal of garbage and rubbish, even in chartered cities.

5. Municipal Corporations ⚷607

It is a duty and not just a power of government to either collect the garbage of a political subdivision, or cause it to be collected.

6. Municipal Corporations ⚷607

Whatever powers a city possesses to remove garbage and refuse are predicated upon the assumption that a failure in this respect would result in a menace and danger to the people of the whole state, and the authority or power to prevent such endangerment stems from the police power of the state.

7. Perjury ⚷9(2)
States ⚷34

Where the governmental efficiency and economy committee of the Assembly conducted a valid investigation in regard to garbage and rubbish collection and disposal service in the Los Angeles area, questions put to a witness in an attempt to determine the possible necessity of recommending amendment to or change in existing legislation to increase the efficiency and effectiveness of state and local governments in collection of garbage and rubbish, did not exceed the scope of the committee's power to inquire, and it therefore had jurisdiction to receive or consider such testimony, and an indictment of witness for perjury in testifying before such committee was not subject to demurrer. West's Ann.Pen.Code, § 118.

Grant B. Cooper, by Harold Rhoden, Los Angeles, for petitioner.

S. Ernest Roll, Dist. Atty., of Los Angeles County, Jere J. Sullivan and Lewis Watnick, Deputy Dist. Attys., Los Angeles, for respondent.

FOURT, Justice.

Frank J. Matula, Jr., petitioned for a writ of prohibition to be issued to restrain the Superior Court of Los Angeles County from taking any further steps or proceedings as regards the petitioner in the case of People of the State of California v. Frank J. Matula, Jr. (S.C. No. 181844).

An indictment charging petitioner with perjury in violation of section 118 of the Penal Code was filed in Los Angeles county on June 7, 1956. On July 25, 1956, a demurrer and motion under section 995 of the Penal Code were heard. On September 19, 1956, the demurrer was overruled and the motion denied and petitioner pled not guilty to the indictment and the case was set for trial on October 25, 1956. Petitioner thereupon filed the present proceeding.

The indictment, in part, reads as follows:

"The said Frank J. Matula, Jr. is accused by the Grand Jury of the County of Los Angeles, State of California, by this indictment of the crime of Perjury in Violation of Section 118, Penal Code of California, a felony, committed prior to the finding of this indictment, and as follows:

"That on or about the 6th day of June, 1955, the Assembly of the State of California duly and legally enacted House Resolution No. 177; that said House Resolution No. 177 reads as follows:

"'House Resolution No. 177

"'Relative to constituting the Assembly Standing Committee on Governmental Efficiency and Economy an interim committee

"'Resolved by the Assembly of the State of California, As follows:

* * * * * *

"'1. The Assembly Standing Committee on Governmental Efficiency and Economy of the 1955 Regular Session is hereby constituted an interim committee and is authorized and directed to ascertain, *study and analyze all facts relating to the State Government and the government of counties, cities, and districts of this State* and of any department, agency, or subdivision thereof, *particularly with respect to their* organization, *functions, and administration, for the purpose or recommending changes and proposing legislation in order to promote efficiency, to reduce and eliminate costs,* to provide for the consolidation of functions and removal of duplication, *and otherwise to increase the efficiency and effectiveness of the state and local governments* and the agencies and subdivisions thereof, *including but not limited to the operation, effect, administration,* enforcement *and needed revision of any and all laws in any way bearing upon or relating to the subject of this resolution,* and to report thereon to the Assembly, including in the reports its recommendations for appropriate legislation.'" (Emphasis added.)

It is further set forth in the indictment that in pursuance of the authority and power granted by Resolution No. 177, said committee "* * * conducted a hearing to determine if it should recommend to the Assembly of the State of California the enactment of new laws, the repeal of existing laws, or the amendment of the existing laws governing the collection and disposal of rubbish and garbage."

The defendant was duly and regularly sworn and certain questions were put to him. Testimony was given to the effect that many of the men who drive the trucks which collect rubbish in Los Angeles county are members of the Teamsters Union; that many of the checkers who work at the rubbish dumps are also members of the Union; that the defendant is the secretary-treasurer of the Union; that many of the rubbish collectors in the county were and are members of rubbish collectors' associations; and further, that the rules, regulations, by-laws, and customs of said rubbish collectors' associations provide and define the terms and conditions under which one rubbish collector may take a customer away from another rubbish collector, and further, that said rules, regulations, by-laws, and customs of said rubbish collectors' associations provide that under certain circumstances the rubbish collector who takes a customer away from another rubbish collector must return the customer to the latter; and further, that said rules, regulations, by-laws, and customs of said rubbish collectors' associations provide that under certain circumstances the rubbish collector who takes a customer away from another rubbish collector must give the latter one or more other customers for the customer originally taken; and further, that said rules, regulations, by-laws, and customs of said rubbish collectors' associations provide that under certain circumstances the rubbish collector who takes a customer away from another rubbish collector must pay to the latter a certain sum of money as compensation for taking said customer; and further, that the said defendant, Frank J. Matula, Jr., had enforced and attempted to enforce the said rules, regulations, by-laws, and customs of said rubbish collectors' associations in the particulars above mentioned by telling and threatening the rubbish collector who had taken a customer away from another rubbish collector in substance that if he did not comply with said rules, regulations, collectors who had taken a customer from another rubbish collector out of business by preventing the rubbish collector who had taken a customer away from another rubbish collector from joining said Union, by preventing said rubbish collector who had taken a customer away from another rubbish collector from dumping his rubbish in said rubbish dumps, and by picketing the customer whose rubbish collection account had been taken by one rubbish collector from another rubbish collector.

The petitioner set forth in his petition that, "The sole issue presented by said demurrer and motion was, and by this petition is, whether or not the legislative committee had jurisdiction to hear testimony on, and the power to validly raise, the issue upon which it heard petitioner's testimony."

Petitioner concedes that the allegedly perjurious testimony given by petitioner was pertinent to issues raised by the Committee hearing the testimony. He contends, however, that the issues were not validly raised by the Committee, and in raising such issues the Committee exceeded the scope of its power to inquire, and therefore was without jurisdiction to receive or consider such testimony.

From the questions put it is apparent that among other things the Committee was attempting to determine whether there was a monopoly existent in the garbage and rubbish collection and disposal service in the Los Angeles area; whether such a monopoly (if any) functioned in a manner contrary to the best interests of the general public and whether such a monopoly acting legislation. This power is expressly conferred by the Constitution. This power necessarily presupposes that the members of each house of the legislature must investigate the necessity for legislation. It is impractical that the entire membership should participate in such preliminary investigation. Consequently, it is well settled by practice and decision, that incidental and auxiliary to the express power conferred, the legislature and each house thereof has the inherent and implied power to appoint committees for the purpose of obtaining information concerning proposed legislation, and reporting back their findings to the body appointing them. From a practical standpoint this implied power must exist in order that the legislature may properly discharge its functions.'"

In the case of In re Battelle, 207 Cal. 227, 277 P. 725, 65 A.L.R. 1497, the court held that the legislature had the power to appoint a committee to investigate whether a monopoly existed in the cement industry. The court, among other things, stated, 207 Cal. at pages 240–241, 277 P. at page 730:

> "The power and duty reposed in the Legislature and in each and every member of both houses thereof is obviously that of enacting, and hence, necessarily, of preparing and proceeding to enact wise and well-formed and needful laws. * * * and hence, in many instances, in order to the preparation of wise and timely laws the necessity of investigation of some sort must exist as an indispensable incident and auxiliary to the proper exercise of legislative power. This has been recognized from the earliest times in the history of American legislation, both federal and state, and from even earlier epochs in the development of British jurisprudence. [Cases cited.]"

In 11 Cal.Jur.2d, page 512, section 137, it is stated:

> "The preliminary ascertainment of facts as a basis for the enactment of legislation is not of itself a legislative function, but is simply ancillary to legislation. Thus, the duty of correlating information and making recommendations is the kind of subsidiary activity which the legislature may perform through its own members, or which it may delegate to others to perform. Intelligent legislation upon the complicated problems of modern society is impossible in the absence of accurate information on the part of the legislators, and any reasonable method for securing such information is proper." See, also, Parker v. Riley, 18 Cal.2d 83, 90–91, 113 P.2d 873, 134 A.L.R. 1405.

Under the present law, so far as we are able to determine, the state has, with the exception of the provisions of articles 1, 2, 3 and 4 of Part 2, Chapter 4, Division V of the Health and Safety Code (which purport to regulate and control the pollution of waters in public places), imposed the duty of collecting and disposing of garbage upon the local political subdivisions.

[1] Section 11 of Article XI of the California Constitution vests in counties and cities the power to "make and enforce within its limits all such local, police, *sanitary* and other regulations as are not in conflict with general laws." (Emphasis added.) This provision has been held to vest broad authority in the cities, and municipal ordinances giving a city the exclusive right to gather and collect garbage within the city have been held to be valid as resting upon the police power conferred by the constitutional provision. In re Zhizhuzza, 147 Cal. 328, 81 P. 955; Glass v. City of Fresno, 17 Cal.App.2d 555, 62 P.2d 765. The same conclusion has been reached with respect to the collection and disposal of rubbish. In re Pedrosian, 124 Cal.App. 692, 13 P.2d 389.

[2, 3] It has also been held that a city may, instead of collecting and disposing of garbage and rubbish itself, grant an exclusive privilege to engage in such activities. In re Santos, 88 Cal.App. 691,

264 P. 281; In re Sozzi, 54 Cal.App.2d 304, 129 P.2d 40; Ponti v. Burastero, 112 Cal.App.2d 846, 247 P.2d 597. It would seem clear that cities under their police power could choose to regulate the activities of private garbage and rubbish collectors rather than engage in such activities themselves, or grant exclusive contracts to do so. Glass v. City of Fresno, supra, 17 Cal.App.2d 555, 62 P.2d 765.

Counties would appear to possess the same powers since section 11 of Article XI of the State Constitution is applicable to counties as well as to cities. In re Lyons, 27 Cal.App.2d 182, 184–186, 80 P.2d 745; 19 Cal.Op.Atty.Gen. 61.

The legislature has enacted various statutory provisions giving specific authority to cities, counties and special districts with respect to rubbish collection and disposition. Cities, by gift, purchase, or condemnation, may acquire land within the county where the city is located for garbage disposal sites and rights of way for roadways to the site. Garbage is defined to include inorganic rubbish and refuse. Gov.Code, § 38790. Cities may contract for the collection or disposal or both, of garbage, waste, refuse or rubbish under such terms and conditions as may be prescribed by the legislative body of the city. Health & Saf.Code, § 4250. Counties are authorized to acquire, construct and operate dump sites, incinerators, and other disposal plants for the disposal of combustible or noncombustible garbage or rubbish, or both, and for that purpose may acquire by gift, condemnation or otherwise such property and rights of way as are necessary. Gov.Code, §§ 25820, 25822, and 25824. The board of supervisors may permit cities or other governmental agencies to use such dump sites, incinerators, or other disposal plants. Gov.Code, § 25821. The board may make and enforce all necessary and proper regulations for the use of such disposal facilities. It may charge fees for the use of such facilities and may restrict the use to the inhabitants of the county. Gov.Code, § 25823.

A county may grant franchises or privileges for the collection, disposal, or destruction of garbage, waste and debris only under specified terms and conditions. Such franchises, exclusive or otherwise, may be granted by a county to the best bidder. Health & Saf.Code, §§ 4200 and 4201, as amended by 1955 Stats. ch. 928, §§ 1, 2.

Section 25827 of the Government Code, as added by Chapter 928, § 3 of the 1955 Statutes, gives the board of supervisors of Los Angeles County specific power to collect or contract for the collection, or both, of garbage, waste, or other refuse matters under such terms and conditions as may be prescribed by the board, and, for that purpose, to levy a yearly tax on property within the unincorporated area of the county, excluding territory within existing garbage disposal districts.

The present law also provides for various types of special districts with powers relating to the collection and disposition of garbage and rubbish. Garbage disposal districts, including both incorporated and unincorporated territory, may be formed to provide for the collection and disposal of garbage and other refuse matter in the district. Health & Saf.Code, §§ 4100–4112. The district may enter into contracts for the disposal of garbage and other refuse matter. Health & Saf.Code, § 4121. An annual tax may be levied upon the taxable property in the district to pay the cost of the disposal of garbage and other refuse matter. Garbage and refuse disposal districts may be formed to provide a site for the disposal of garbage and refuse. Health & Saf.Code, §§ 4170–4197. Cities may be included in such districts only with the consent of two-thirds of the members of their governing bodies. Health & Saf.Code, § 4171.

The district may acquire and operate a garbage and refuse disposal site and make and enforce all rules and regulations necessary for the administration of the government of the district and for the operation and maintenance of the site. Health & Saf.Code, § 4180. The district levies an annual property tax. Health & Saf.Code,

§§ 4181–4185, and may issue general obligation or revenue bonds. Health & Saf. Code, §§ 4186 and 4186.30. County sanitation districts may be formed with power to acquire and operate a sewerage system and sewage disposal or treatment plant or a refuse collection and disposal system or both. Health & Saf.Code, §§ 4700–4859. Such district may include incorporated areas. Health & Saf.Code, § 4711. However, a refuse collection and disposal system established by such a district may include incorporated territory only upon a majority vote of the governing body of the city. Health & Saf.Code, § 4741.1. The district may levy and collect taxes upon real property in the district and may issue bonds. Health & Saf.Code, §§ 4746, 4747 and 4805. A district may also be organized under the Sanitary District Act of 1923, Health & Saf.Code, §§ 6400–6916, to acquire, construct, and operate garbage dump sites and garbage collection and disposal systems. Health & Saf.Code, § 6512. Garbage is defined to include inorganic refuse and rubbish. Health & Saf.Code, § 6406. It is a misdemeanor for any person to operate in any city or town any crematory for the destruction by fire heat of garbage or other refuse except in such a manner as will prevent the propagation of disease through a contamination of the atmosphere of any city or town. Health & Saf.Code, §§ 4300–4302.

It is apparent from the foregoing that generally speaking, in California, the regulation and control of garbage and rubbish collection and disposal has been left entirely to the local agencies.

Obviously, any study of the general subject matter which would have as its purpose the recommending of any needed revision of the state laws, first should concern itself with whether the existing state law is sufficient to enable the local governments to cope with the problem. Or, in short, are the local governmental agencies efficiently and adequately providing for, or regulating the collection and disposal of garbage and rubbish in their respective jurisdictions? If the committee determined that such local control or regulation is inadequate, inefficient or ineffective in any way, is this due to any deficiency, inadequacy or ineffectiveness in the state law giving local governments authority over the general subject matter, or is it due to the fact that the subject is of such a nature that the state itself should undertake to regulate the subject matter directly or in its entirety?

[4] Assuming that the committee found that the present system is inadequate or inefficient, then the question would arise as to what course should be followed by the state and that in turn would be affected by what the reasons were for the inadequacy or inefficiency, if any. It might well be that the committee would find that because the local agencies were restricted to their particular territorial limits, the problem is one in which there should be a wider base of operation, if there is to be any solution to it. If this be so, then the state could well adopt certain minimum standards and rules governing such activities, but not occupying the field of regulating and controlling the collection of garbage and rubbish, thereby preserving substantially the present plan. An example of such an approach is set forth in the present law with reference to the operation of crematories. Health & Saf.Code, §§ 4300, 4301 and 4302. Or, if it was found that the subject is one which cannot be controlled effectively and efficiently by local government, it might well be that legislation would be recommended which would subject such activities to regulation by a state agency. In our opinion, the police power of the state would include the power to make such regulations, even in chartered cities and certainly in all others. In enacting sections 24198 to 24341, inclusive, of the Health and Safety Code, providing for the creation of air pollution control districts, the legislature determined that there is a state-wide interest in atmospheric purity and prohibition of air pollution, and that it is not practical or feasible to prevent or reduce such pollution by local, county and city ordinances. Health & Saf.Code, §§ 24198 and 24199. Therefore, it would appear that legislation which regulates in some manner the disposition

of rubbish in order to protect against air pollution might well be valid. There are, of course, many other possibilities.

The petitioner herein contends that the Committee was investigating a supposed conspiracy between a labor union and certain private business associations, and thereby neither the efficiency nor the economy of any governmental operation was in any way involved—that he in no way interfered with the efficiency or economy of any governmental agency and that therefore the Committee had no power or jurisdiction to investigate any such supposed conspiracy.

Petitioner concedes that the indictment is sufficient if the Committee had the authority to make the investigation under the terms of the resolution setting up the Committee. He sets forth that "the government * * * does not become vested with the *obligation* to perform a service merely because it *may* perform that service, and a private business operation does not become a governmental operation merely because there is enabling legislation which allows the government the option of performing or not performing that operation." Perhaps, in general, the petitioner is correct in his contention, however, in this particular instance, dealing with the particular subject matter in question, we do not believe that any such general rule applies.

Garbage has been defined as, "Refuse organic matter in general, more specifically, offal; the refuse animal and vegetable matter from a kitchen, market, or store; the entrails of an animal or fish, refuse parts of flesh, the bowels of an animal, that which is purged or cleansed away, but the term does not necessarily imply the presence of such organic matter, and in its broadest sense, it is sometimes loosely used as meaning anything worthless or filthy, refuse, any worthless, offensive matter; waste material from a house, market or store, consisting of offal mixed with other refuse, as ashes, paper, tin cans, * * *." 38 C.J.S., p. 189.

In former days, in small towns and communities, the work of collecting garbage was done primarily by private concerns or each household took care of its own. There are undoubtedly places in California presently where such conditions still prevail. In more populated centers, however, it became impractical for everybody to so conduct themselves, and it became necessary for the political subdivision to assume, on its own account, and for the state, the duty of providing for the disposition of garbage one way or the other. The accumulation of decomposed garbage which is offensive to the smell, of substances which if permitted to remain uncared for would poison the atmosphere and breed diseases, infectuous and contagious, among the people of one city, and might well spread statewide, is of course a concern to the entire state.

It was appropriately said in Gorman v. City of Cleveland, 26 Ohio App. 109, 159 N.E. 136, 137–139:

> "It might be vegetable or animal refuse, or both. It also might be a combination of all the articles named, which, if left uncollected, would ferment, sour, rot and decay, and consequently, unless collected and disposed of, become injurious and deleterious to the public health, to the extent even of producing an epidemic, which might involve not only the community, but the state, because every one coming in contact with it, no matter where residing, might become affected and diseased, and thus a contagion be spread over a much larger territory. Distance would be no bar, because the disease or contagion might be carried wherever a person afflicted might travel. Hence it is not violence to say that it would become the *duty of government*, whether municipal or state, on account of its far-reaching effect, to take cognizance of such a condition, and by the collection and disposal of the refuse prevent disastrous effects by checking it in its incipiency; and it is not unreasonable to suppose that, as a matter of self-defense, in behalf of the body politic,

it becomes the paramount duty of the government itself, whether municipal or state, to prevent any impending peril by taking immediate steps for the collection and disposal of garbage and rubbish, and not to depend upon people not charged with the public responsibility to eradicate the evil.

"Were the city to leave such an important function to each individual property owner, dire results might follow from indifference and neglect. Is not that conclusion the inevitable sum and substance of human experience the inevitable logic of the situation? In other words, the necessities of the case make this duty a paramount one to be performed by the government on account of the universal peril that might follow in case of neglect or indifference throughout the entire city and the entire state, for the reasons above given.

* * * * * *

"It is a well-settled proposition that with respect to health measures *the duty rests upon the government* * *.

"That the [state of California] is directly affected by the sanitary condition of the city of * * * [Los Angeles] cannot be denied, for the reason, as above stated, that contagion spreads wherever there is freedom of human locomotion and over any territory where the wind blows. The condition of Cuba and Porto Rico affected the people of all countries, because yellow fever, before its eradication, was a menace not only to this country, but to all others, and if it had been left for the inhabitants to take care of themselves, the contagion would have become universal. We quote this episode because it has become a part of universal history of which courts can take judicial notice.

"If the city of * * * [Los Angeles] should abandon its collection of garbage and refuse [either by making the collection itself, or contracting the work to be done, or otherwise causing the garbage to be collected] within the next 24 hours, the danger of the community and its people within the next 6 months is obvious, for it is a well-established proposition of government that when it comes to public health the community must take care of itself, and that includes the inhabitants and the body politic, and this is based upon the wisdom of the ages, that what is the duty of everybody is the duty of nobody, especially when it pertains to questions of public health and public welfare." (Emphasis added.)

[5, 6] It is a duty of government to either collect the garbage of the political subdivision, or cause it to be collected, and not just a power of government to collect it or cause it to be collected. Whatever powers a city possesses to remove garbage and refuse are predicated upon the assumption that a failure in this respect would result in a menace and danger to the people of the whole state, and the authority or power to prevent such endangerment stems from the police power of the state. It appears to us that if it is a duty of government under the circumstances, then clearly the Committee was proper, and within its powers and jurisdiction, to investigate into whether any of the laws with reference to the subject matter of garbage collection needed revision.

In Pittan v. City of Riverside, 128 Cal.App. 57, at page 62, 16 P.2d 768, at page 770, the court said:

> "It is well established that the disposal of garbage by a city is the exercise of a governmental function. Miller v. City of Palo Alto, supra [208 Cal. 74, 280 P. 108]; Manning v. City of Pasadena, 58 Cal.App. 666, 209 P. 253. The municipality derives the right to provide for garbage disposal from its sovereign powers of preserving the public health. In re City and County of San Francisco, 191 Cal. 172, 215 P. 549; 13 Cal.Jur. 291. The same power gives to the city the right to prevent

the destruction of the property of its citizens by fire. Coleman v. City of Oakland, supra [110 Cal.App. 715, 295 P. 59]. The collection and disposal of waste materials which constitute a fire hazard should be just as much a governmental function as the collection and disposal of garbage which is a menace to health. In re Pedrosian, 124 Cal.App. 692, 13 P.2d 389."

[7] For the reasons heretofore set forth we hold that the Governmental Efficiency and Economy Committee of the Assembly conducted a valid investigation in a matter over which it had jurisdiction, and that the questions put were material and proper, intended as they were to elicit information as to the existence of evils in the present administration of pertinent statutes, and the possible necessity arising therefrom, to recommend amendment to, or a change in existing legislation, to the end that the efficiency and effectiveness of the state and local governments, in the collection of garbage and rubbish, might be enhanced.

The petition for the writ of prohibition is denied.

WHITE, P. J., and DORAN, J. concur.

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146 Cal.App.2d 360

Burnell R. CHADEK, Plaintiff and Respondent,

v.

Virginia Rose SPIRA, Defendant and Appellant.

Civ. 21770.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1956.

Action for personal injuries sustained by plaintiff when his automobile collided with defendant's automobile at an intersection controlled by traffic signals. The Superior Court, Los Angeles County, Edward R. Brand, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fox, J., held that where there was evidence that when defendant was ten to fifteen feet south of a crosswalk the traffic signal changed to red for her but she continued on and was unable to avoid the collision because her automobile was going too fast to stop, instruction pertaining to duty of driver to keep vehicle under such control that he can avoid collision was applicable to both parties, found support in the evidence, and was appropriate.

Judgment affirmed.

1. Automobiles 🔑146

It is the duty of the driver of a motor vehicle, using a public highway, to be vigilant at all times and to keep his vehicle under such control that, to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position.

2. Automobiles 🔑246(56, 58)

In action for personal injuries sustained by plaintiff when his automobile collided with defendant's automobile at an intersection controlled by traffic signals, where there was evidence that when defendant was ten to fifteen feet south of crosswalk the traffic signal changed to red for her but she continued on and was unable to avoid the collision because her automobile was going too fast to stop, instruction pertaining to duty of driver of motor vehicle to keep his vehicle under such control that he can avoid a collision was applicable to both parties, found support in the evidence, and was appropriate.

3. Automobiles 🔑246(25)

In personal injury action arising from intersectional automobile accident, instruction pertaining to fact that a person exercising ordinary care has a right to assume that others will perform their duty under the law and that it is not negligence for a person to fail to anticipate injury which can come to him only from a violation of law or duty by another was proper, notwithstanding fact that the word "injury" was not supplemented by the words "an accident," since the terms were virtually interchangeable.

4. Automobiles ⚷246(9, 25)

In action for personal injuries sustained by plaintiff when his automobile collided with defendant's automobile at an intersection controlled by traffic signals, instruction pertaining to right of a person in the exercise of ordinary care to assume that others will perform their duty under the law was applicable to both parties involved in the collision.

5. Appeal and Error ⚷1170(9)
Automobiles ⚷246(60)

In action for personal injuries sustained by plaintiff when his automobile collided with defendant's automobile at an intersection controlled by traffic signals, instruction on inference of negligence by a person who looks but does not see what is in plain sight was responsive to question of whether defendant was negligent in her attention to the traffic controls governing the intersection, and therefore it was appropriate for trial court to give such instructions, and even if not appropriate, it was not prejudicial. West's Ann.Const. art. 6, § 4½.

6. Automobiles ⚷243(7)

Force of an impact and similar, pertinent physical facts in connection with an automobile accident are competent for the jury to consider as circumstantial indicia of speed.

7. Automobiles ⚷246(56)
Trial ⚷244(4)

In action for personal injuries sustained by plaintiff when his automobile collided with defendant's automobile at an intersection controlled by traffic signals, instruction pertaining to fact that jury might consider force of impact and other physical facts as well as testimony of defendant driver as to estimate of her speed properly directed attention of jury to factors it might legitimately consider on issue of defendant's management and control of her vehicle and did not improperly give particular prominence to the evidence.

8. Damages ⚷212

A court may instruct a jury in general terms that in assessing damages it may consider the diminishing purchasing power of the dollar in our contemporary economy.

9. Damages ⚷134(2)

Award of $9,000 to twenty-seven year old man who had been working at an occupation requiring physical exertion, and who suffered painful injuries and a continuing incapacity to engage in strenuous labor and underwent surgery for the removal of part of his ribs, and who had special damages of $2,900, was not excessive.

10. Appeal and Error ⚷1170(9)

In personal injury action arising from automobile accident, instruction that jury in awarding damages could take notice that the purchasing power of the dollar had decreased approximately one-half, although technically objectionable as being too specific, was not prejudicial, the matter of the depreciated value of the dollar being essentially a matter in which the jury was oriented within the framework of its own experience. West's Ann.Const. art. 6, § 4½.

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Bauder, Gilbert, Thompson & Kelly, Los Angeles, for appellant.

William Barnett Spivak, Beverly Hills, for respondent.

FOX, Justice.

Defendant appeals from a judgment in favor of plaintiff after a verdict in a personal injury action arising out of an intersection collision.

Defendant assigns as prejudicial error the giving of five instructions.

The accident occurred around 5:00 p.m. on August 21, 1954, at the intersection of Crenshaw Boulevard and Rodeo Road, in the city of Los Angeles. Crenshaw is a six-lane thoroughfare running in a north-south direction, and is approximately 72 feet wide in the area here involved. Rodeo Road, which is 56 feet wide, is laid out in an east-west direction. The intersection was controlled by traffic signals located at each of its four corners. These signals are of the semaphore type, which flash red and green in conjunction with an arm bearing the legends Stop and Go as the lights change. When a green signal changes to red, all four corners are controlled by the red light and Stop indicator-arm for three seconds before the next Go signal appears.

At the time in question, plaintiff was 27 years old, married and employed. He was traveling west on Rodeo and had been stopped by a red traffic light immediately before the accident. In front of him was another vehicle which was at an angle preparatory to making a right turn into Crenshaw. The second vehicle behind plaintiff's was occupied by one Donald Bigbee, who had also been stopped by the red light and who witnessed some of the subsequent proceedings. Plaintiff testified that his car remained stationary until the signal changed to green for east-west traffic on Rodeo. At that time, the car in front of his turned right into Crenshaw. Plaintiff then proceeded forward in low gear at a speed of between 5 and 10 miles an hour and was at a point 20 feet west of the east prolongation of Crenshaw and 17 feet south of the north curbline of Rodeo Road when his car was struck by defendant's vehicle, which was northbound on Crenshaw. The front of defendant's car smashed into the left side of plaintiff's car, damaging the fender, hood, forward door, door post, and floorboard. Plaintiff testified he first saw defendant's car when it was three to five feet away and that it was traveling between 30 and 45 miles an hour. He testified he had no time to avoid the crash.

Mr. Bigbee testified that plaintiff's car did not move until the signal changed to green. He stated that when that happened, the car in front of plaintiff executed a right turn into Crenshaw. Plaintiff then drove into the intersection.

Defendant testified that she was driving north in the middle lane of Crenshaw. Her infant child was in the front seat beside her. When she was about 25 feet from the intersection she was traveling between 15 and 20 miles an hour. She had driven past this intersection 20 or more times and was aware the light signal changed with no intervening cautionary light. She was somewhat hazy and unsure whether she saw the traffic lights as she approached the intersection. She could not remember for certain whether she saw the lights but testified she observed the arm-signal on the southeast corner. When she was about 10 or 15 feet north of the crosswalk the indicator-arm said Go. According to her testimony, after she entered the intersection she noticed the light on the northwesterly side changing to red just before the collision. She testified she saw plaintiff's car when it was about 15 feet away and swerved to her left to avoid it. She stated: "I put my foot on the brakes, but it happened so fast that my car was going too fast to stop that sudden." To the question as to what she observed about traffic going east and west on Rodeo, defendant replied: "I didn't see— I was looking straight ahead." The impact jolted defendant's child and bruised its lip. She had the child examined by a doctor and later took it to a hospital for further examination.

Police Officer Deiro testified to a contradictory conversation he had with defendant after the accident. Defendant stated to him that "she believed she was right at the time she entered the intersection, and that she was in the intersection when it turned to red." However, the officer testified defendant also told him that as she approached a point about 10 to 15 feet south of the south crosswalk of the intersection "the light turned to red for her direction of travel, and that she continued on into the intersection, and the next she knew there was a car in front of her. Upon cross-examination by defendant's counsel, the officer testified defendant told him: "At this point, 10 to 15 feet south of the crosswalk, it was just starting to turn red for me and I continued." Frank Pipp, another investigating police officer, testified he found brush marks extending two feet to the north made by plaintiff's car. He testified defendant's car was damaged "quite excessively. The fender was pushed in and the grille had been apparently popped out from the impact, and part of it was broken."

Plaintiff testified he was healthy, active, and engaged in an occupation requiring manual labor prior to the accident. He had passed physical examinations prior to military service in World War II and Korea.

Plaintiff was injured in the region of the lower rib cage by reason of the collision, which caused ache and discomfort. X-rays taken immediately following the accident showed that plaintiff's ribs "were pushed in." Plaintiff resumed his labors after the accident, but his chest pains were so severe that he could not continue to work.

Dr. McMasters, a medical doctor specializing in orthopedic surgery, testified his examination of plaintiff disclosed a definite concavity type of deformity in the rib area of the left side which was not present on the right side. Although the X-ray did not demonstrate the presence of injury to the ribs, Dr. McMasters stated the deformity was caused by a traumatic separation of the ribs where they join the cartilage, which does not show up as a positive shadow on X-ray pictures. It was Dr. McMaster's opinion that plaintiff had a permanent deformity, but that in the course of time plaintiff would be capable of normal activity which did not require strenuous forms of physical exertion. He thought also surgery might probably be indicated to alleviate plaintiff's condition.

During the month's period after the accident, plaintiff was hospitalized three times, once for observation, then for a spinal test, and lastly for an operation by Dr. Grant, an orthopedic surgeon, for the resection of three ribs. Dr. Grant found an abnormality in the attachment of the seventh, eighth and ninth ribs to the costal cartilage. He testified that these three ribs were attached by one costal cartilage, "so that apparently the blow must have hit him here [indicating] and it sprang the ribs from the costal cartilages, so all three of them sprung together * * *" Dr. Grant performed an operation in which he removed two inches of each of the three ribs. Plaintiff wore a metal and leather brace for four and one half months after the operation.

Dr. Cass, a medical witness called by defendant, found no significant physical impairment of plaintiff. He observed that plaintiff had a modified pigeon-breast deformity, which he stated could be of congenital origin. He stated: "If it wasn't there before he was hurt, it was probably due to an injury to the cartilage." He testified such a deformity could be produced by a separation of the juncture of the cartilage with the ribs caused by a blow. He had no record of bruises or marks on plaintiff's chest to indicate the deformity was of traumatic origin.

Plaintiff was awarded damages of $9,000. His medical expenses were approximately $1,700. Loss of earnings over a period of some four months was placed at $1,200.

[1, 2] Defendant contends the court gave five erroneous instructions. She challenges the wording of the following instruction: "It is the duty of the driver of a motor vehicle, using a public highway, to be vigilant at all times and to keep the vehicle under such control that, to avoid a collision, he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent driver in like position." Defendant specifically states she does not complain of the form of this instruction, but asserts it is inapplicable to the evidence and thus tended to mislead the jury. This is without merit. Defendant herself requested a very similar instruction reading as follows: "It is the duty of every person using a public highway, whether a pedestrian or the driver of any kind of vehicle, to exercise ordinary care at all times to avoid placing himself or others in danger and to exercise

ordinary care at all times to avoid a collision." The challenged instruction was clearly responsive to the evidence that when defendant was 10 to 15 feet south of the crosswalk, the signal changed to red, but she continued on and was unable to avoid the collision because her car was "going too fast to stop that sudden." The giving of the instruction, which was correctly phrased as a proposition of law, was applicable to both parties, and found support in the evidence, was entirely appropriate. This instruction imposes the duty only to keep a reasonable lookout to avoid eventualities that should be anticipated by the ordinarily prudent person. Reich v. Long, 97 Cal.App.2d 657, 660, 218 P.2d 589; Koon v. Sher, 98 Cal.App.2d 530, 534–535, 220 P.2d 784.

[3, 4] Defendant attacks the following instruction:

"A person who, himself, is exercising ordinary care has a right to assume that others, too, will perform their duty under the law, and he has a further right to rely and act on that assumption. Thus it is not negligence for such a person to fail to anticipate *injury* which can come to him only from a violation of law or duty by another. However, an exception should be noted: the rights just defined *to* not exist when it is reasonably apparent to one, or in the exercise of ordinary care would be apparent to him, that another is not going to perform his duty. (One is not justified in ignoring obvious danger although it is created by another's misconduct, nor is he ever excused from exercising ordinary care.)" (Italics added.) Her argument is that the italicized word "injury" should have been supplanted by the words "an accident" as recommended in the Book of California Jury Instructions—Civil (4th ed.), No. 138, page 334.[1] This borders on mere quibbling. As used in this context and in terms of the instructions as a whole, the terms are virtually interchangeable. This instruction has been approved in many cases as the embodiment of a well established principle of law. Cucuk v. Payne, 140 Cal.App.2d 881, 891, 296 P.2d 7; Crowder v. Atchison, T. & S. F. Ry. Co., 117 Cal.App.2d 568, 572, 256 P.2d 85; Ribble v. Cook, 111 Cal.App.2d 903, 908, 245 P.2d 593, citing numerous cases. Defendant's objection that as given the instruction was applicable only to plaintiff rather than to both parties is without merit. The instruction does not reasonably bear that construction. The instruction complained of was not susceptible of limitation only to plaintiff but was applicable to both parties involved in the collision. La Branch v. Scott, 82 Cal.App.2d 1, 13, 185 P.2d 823. It is noteworthy that defendant also suffered injury, namely, damage to her car, and her child was injured and required medical attention.

[5] It is asserted the court erred in giving BAJI No. 140, the so-called "looking and not seeing" instruction.[2] Defendant testified that though she observed the arm-signal she could not remember "for sure" whether there were traffic lights. There was testimony that such lights were working in good order. There was no obstruction to defendant's view. Hence, the instruction was responsive to the question of whether defendant was negligent in her attention to all the traffic controls governing the intersection. In any event, defendant could not have been prejudiced by the challenged instruction. The instruction is a mere commonplace, a truism that contributes little of any significant consequence

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[1] It is interesting to note that in alternate instruction No. 138.1 (p. 335), which is a repetition of the first two sentences of No. 138, the word "injury" is used in place of "an accident."

[2] Instruction 140 reads: "General human experience justifies the inference that when one looks in the direction of an object clearly visible, he sees it, and that when he listens, he hears that which is clearly audible. When there is evidence to the effect that one did look, but did not see that which was in plain sight, or that he listened, but did not hear that which he could have heard in the exercise of ordinary care, it follows that either some part of such evidence is untrue or the person was negligently inattentive."

to the understanding of any person qualified to serve as a juror. Powell v. Bartmess, 139 Cal.App.2d 394, 406, 294 P.2d 150. Since it is merely a statement of a self-evident proposition within the ken of any layman, it has been held that where the jury has been adequately instructed, no prejudice ordinarily results either from refusing to give the instruction, Cooper v. Smith, 209 Cal. 562, 566, 289 P. 614; Rickey v. Kardassakis, 110 Cal.App.2d 291, 295, 242 P.2d 384; Schwenger v. Gaither, 87 Cal.App.2d 913, 914, 198 P.2d 108, or from giving the instruction. Bischell v. State of California, 68 Cal.App.2d 557, 563, 157 P.2d 41; La Branch v. Scott, supra, 82 Cal.App.2d at pages 9–10, 185 P.2d at page 828; Collier v. Los Angeles Ry. Co., 60 Cal.App.2d 169, 175–176, 140 P.2d 206. See Powell v. Bartmess, supra. We fail to see how the reading of this elementary, even rudimentary, formulation of the obvious could have had any prejudicial effect on defendant's case.

[6, 7] Touching the rate of speed at which defendant's car was being driven across the intersection, the court instructed as follows: "You are instructed that you are not compelled to accept the testimony of the defendant driver as to her estimate of her speed but may consider the force of the impact as well as any other testimony or physical facts in determining whether defendant's actual speed was greatly in excess of that to which she testified." Under the evidence herein the jury, in determining the question of negligence, had a right to consider the speed at which defendant was operating her automobile at the time and place in question as bearing on the question whether, under the circumstances, she was operating her car in a prudent manner. The instruction correctly embodies the controlling law and is not vulnerable to the objection that it gave particular prominence to the evidence. In Briscoe v. Pacific Elec. Ry. Co., 89 Cal.App.2d 439, 443, 200 P.2d 875, 878, the court stated: "The jury was not compelled to accept the estimate of the driver of the coach as to his rate of speed. It could infer from the testimony of Briscoe, that of the boy, the force of the impact, and the condition of the car after the accident, that his actual speed exceeded that estimate." In Finley v. Steiner, 40 Cal.App.2d 331, 337, 104 P.2d 819, 822, appears the following language: "The trial judge was not compelled to accept defendant Steiner's estimate of his speed, but was entitled to infer from the length of the skid marks and the force of the impact, as well as the testimony of Mr. and Mrs. Jones, that his actual speed was greatly in excess of that to which he testified." Thus in Douglass v. Crabtree, 57 Cal.App.2d 568, 573, 134 P.2d 912, the court held it was proper to instruct that the jury might consider the length of the skid marks made by defendant's car as one of the circumstances in determining defendant's speed. The force of an impact and similar, pertinent physical facts in connection with an automobile accident are competent for the jury to consider as circumstantial indicia of speed. Kastel v. Stieber, 215 Cal. 37, 45, 8 P.2d 474. While not as felicitously worded as might be desired, the instruction properly directed the attention of the jury to factors it might legitimately consider on the issue of defendant's management and control of her vehicle, and we see no sound reason for complaint in the manner of its submission to them.

[8] Lastly, defendant predicates error on the reading of the following instruction on the depreciated value of the dollar: "You are instructed that it is a matter of common knowledge and of which you may take notice, that the purchasing power of the dollar has decreased approximately one-half of what it was prior to the present inflationary spiral, and that this factor should be taken into consideration in determining the amount of damages, if any, necessary to compensate plaintiff for the loss, if any, which he sustained as a result of the injuries, if any, which he suffered as a direct and proximate result of the defendants' negligence, providing that you find the defendants were negligent." It is now well settled that the court may instruct

the jury in general terms that in assessing damages it may consider the diminished purchasing power of the dollar in our contemporary economy. Guerra v. Balestrieri, 127 Cal.App.2d 511, 520, 274 P.2d 443; Gist v. French, 136 Cal.App.2d 247, 274, 288 P.2d 1003; Risley v. Lenwell, 129 Cal.App. 2d 608, 650, 277 P.2d 897; Burke v. City & County of San Francisco, 111 Cal.App. 2d 314, 320, 244 P.2d 708. In each of the last three cases cited, the Supreme Court denied a petition for a hearing. In Gist v. French, supra [136 Cal.App.2d 247, 288 P. 2d 1020], in which the instruction told the jury that "the value of the dollar has materially decreased", this court commented: "It is plain common sense and simple honesty for a court or a jury in appraising the damages suffered by reason of any tortious act of defendant to compute the amount of damages according to the current value of the dollar [citations]." In Risley v. Lenwell, supra, the court held it was not error to instruct the jury that "the purchasing power of the dollar has substantially decreased in recent years" and that it might "take this factor of reduced purchasing power into consideration" in determining damages. The matter is well epitomized in Burke v. City & County of San Francisco, supra, as follows, 111 Cal.App.2d at pages 320–321, 244 P.2d at page 713: "Defendant recognizes it is proper for a reviewing court to take into consideration the increase in the cost of living and the decreased purchasing power of the dollar when considering whether or not a money verdict is excessive. It claims, however, it is not legally proper to advise a jury it may take those factors into consideration. With the latter view we do not concur. If the reviewing court may consider such factors it would seem eminently fitting for the trier of the facts to do so. This was indicated recently in Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal.2d 176, 195 P.2d 427. In considering whether or not a certain verdict was excessive, the court said: 'It is a matter of common knowledge, and of which judicial notice may be taken, that the purchasing power of the dollar has decreased to approximately one half what it was prior to the present inflationary spiral [citations], and *the trier of fact should take this factor into consideration in determining the amount of damages necessary to compensate an injured person for the loss sustained* as the result of the injuries suffered.' * * * When the jury is the trier of the fact, it would seem quite proper for the court to bring this factor to the attention of the jury."

[9, 10] While conceding that a general instruction calling the attention of the jury to the fluctuation in value of money is proper, defendant contends that reference to a definite percentage in the instruction was objectionable and had the effect of doubling plaintiff's award. As to the wording of the instruction, we agree that the instruction should have been less specific in its reference to the current value of the dollar. We do not recommend language as particularized as that here employed, which was extracted from the opinion in Kircher v. Atchison, T. & S. F. Ry. Co., supra. We are far from persuaded, however, that in this case the instruction prejudiced defendant by any tendency to increase the verdict. The award was $9,000. Plaintiff's special damages were $2,900. The balance did not exceed just compensation. Plaintiff was a young and virile man working at an occupation requiring physical exertion. His injuries were painful and apart from suffering a continuing incapacity to engage in strenuous labor, he underwent surgery for the removal of part of his ribs. The amount assessed as damages is in harmony with the realities of the present day market familiar to every layman engaged in the quotidian activities of an ordinary breadwinner or homemaker. Thus, although technically objectionable, the instruction was clearly not prejudicial, it being essentially a matter on which the jury was oriented within the framework of its own common experience. In re Estate of Nelson, 132 Cal. 182, 193, 64 P. 294; People v. Newcomer, 118 Cal. 263, 269, 50

P. 405. Clearly it did not produce a miscarriage of justice warranting a reversal. California Constitution, Article VI, section 4½.

The judgment is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

146 Cal.App.2d 207

Julia C. SPEAR, Petitioner and Appellant,

v.

The BOARD OF MEDICAL EXAMINERS OF the DEPARTMENT OF PROFESSIONAL AND VOCATIONAL STANDARDS of the State of California et al., Defendants and Respondents (two cases).

Civ. 21364, 21365.

District Court of Appeal, Second District, Division 3, California.

Nov. 21, 1956.

Proceeding, for writ of mandate, against board of medical examiners to compel filing accusation of unprofessional conduct against doctor of medicine based on his allegedly making false statement as to cause of death of petitioner's mother. Petitioner appealed from order of Superior Court of Los Angeles County, Arnold Praeger, J., denying, without hearing, writ, and purported appeal from order denying motion to correct and augment transcript. The District Court of Appeal, Parker Wood, J., held that transcript of hearing incorporated in petition showed no abuse of discretion in refusing to file accusation, and that order denying motion to correct and augment clerk's transcript and record of proceedings before board was not appealable.

Order denying writ affirmed; purported appeal from order denying motion to correct and augment transcript and record dismissed.

1. Evidence 🔑70

Death certificate, being public record, is presumed to be true.

2. Evidence 🔑87

Presumption that death certificate as public record was true was evidence.

3. Physicians and Surgeons 🔑11(3)

The Board of Medical Examiners was not required to file an accusation of unprofessional conduct against doctor solely upon statements of accuser that doctor had made false statements regarding a cause of death, but question of whether to file such accusation was matter within discretion of board, to be determined upon consideration of all evidence presented at hearing. West's Ann.Bus. & Prof.Code, §§ 2361, 2411; West's Ann.Gov.Code, § 11503.

4. Physicians and Surgeons 🔑11(3)

The Board of Medical Examiners, in determining whether to file an accusation of unprofessional conduct against a physician, was not required to exercise its discretion in any particular manner. West's Ann.Bus. & Prof.Code, §§ 2361, 2411; West's Ann.Gov.Code, § 11503.

5. Mandamus 🔑72

Court may compel an administrative agency to act, but it may not substitute its discretion for the discretion vested in the agency. West's Ann.Gov.Code, § 11503.

6. Mandamus 🔑72

A writ of mandate will not lie to control official discretion. West's Ann.Gov. Code, § 11503.

7. Mandamus 🔑154(4)

In mandate proceeding to compel Board of Medical Examiners to file accusation against physician for alleged unprofessional conduct in making allegedly false statements as to a cause of death of petitioner's mother, transcript of hearing before board, incorporated by reference in petition, indicated that board had not abused its discretion in refusing to file accusation. West's Ann.Bus. & Prof.Code, §§ 2361, 2411; West's Ann.Gov.Code, § 11503.

8. Mandamus ⚷154(4)

In proceeding for writ of mandate to compel Board of Medical Examiners to file accusation of unprofessional conduct against physician, for his allegedly making false statement in connection with death of petitioner's mother, transcript of hearing before board, incorporated by reference in petition, showed that petitioner had received full hearing on evidence and failed to substantiate her contention that board had been prejudiced by statements made by Assistant Attorney General, before evidence was presented, that file did not indicate any evidence which would warrant accusation. West's Ann.Bus. & Prof.Code, §§ 2116, 2361, 2411; West's Ann.Gov.Code, § 11503.

9. Mandamus ⚷169

Court was not required to hold hearing or to permit argument on petition for writ of mandate but was empowered to deny it out of hand. West's Ann.Code Civ.Proc. § 1094.

10. Mandamus ⚷169

Petition alleging abuse of discretion of board, incorporating transcript before board by reference, will be examined in light of evidence contained in transcript to determine whether cause of action is stated, and court may exercise its discretionary power to dismiss petition on merits or deny issuance of writ upon theory that petition and transcript show no cause of action. West's Ann.Code Civ.Proc., § 1094.

11. Appeal and Error ⚷82(1)

Order denying motion to correct and augment clerk's transcript and record of proceedings before board to which petitioner sought writ of mandate was not appealable.

◆

Marion P. Betty, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Howard S. Goldin, Deputy Atty. Gen., for respondents.

PARKER WOOD, Justice.

Petitioner sought an alternative writ of mandate in the superior court to compel the Board of Medical Examiners to file an accusation of unprofessional conduct against a doctor of medicine. There was no hearing in the superior court. Petitioner appeals from an order denying the petition for the writ.

Petitioner made a motion in the superior court for an order to correct and augment (1) the clerk's transcript and (2) the record of the proceedings before the Board of Medical Examiners. The motion was denied. Petitioner filed a notice which states that she appeals from the order denying the motion.

The appeal from the order denying the petition for the writ and the purported appeal from the order denying said motion will be considered in this opinion.

Petitioner contends that the trial court erred in denying the petition for the writ without an argument, a hearing, or a trial de novo. She argues that it was the mandatory duty of the Board of Medical Examiners (hereinafter referred to as the board) to file an accusation against the doctor; that the board acted arbitrarily, capriciously and in abuse of its discretion in failing to file an accusation against the doctor; that the board acted arbitrarily, capriciously and in abuse of its discretion in refusing to hear further evidence of appellant regarding an accusation against the doctor.

The petition alleges: that Fannie May Crawley died in Los Angeles about July 9, 1949; about June 21, 1954, petitioner requested the board to file an accusation against J. Park Dougall, M.D., a licensee of the board; petitioner offered evidence before the board showing that the doctor violated section 2411 of the Business and Professions Code; it was the ministerial duty of the board to file the accusation;

at the hearing before the board on June 21, 1954, which lasted 47 minutes, petitioner presented uncontradicted evidence that about July 10, 1949, the doctor made a false death certificate regarding the cause of death of Mrs. Crawley in that he falsely stated that the causes of her death were "Carcinoma, Metatastic [Metastatic] A.B.D. 2 years. Due to 'Carcinoma, pyloro-hepatic + 5 years'"; said statements were false and were not based upon any fact regarding the actual cause of death of Mrs. Crawley; the facts shown in the hearing before the board were that she never had a history or diagnosis of such diseases, but all tests made of her body were contrary thereto; it was shown at the hearing that during the nine weeks the doctor had treated Mrs. Crawley he never treated her for the causes set forth in the death certificate; petitioner did not have a fair hearing; before petitioner was heard, a deputy attorney general erroneously advised the board not to file an accusation against the doctor; two of the board members read the hospital record of Mrs. Crawley incorrectly to the other members; petitioner was interrupted constantly and prevented from presenting her case fully; petitioner never received any findings from the board; the president of the board stated in substance there was no history in the hospital record to show that she died of cancer as stated in the certificate; about December 6, 1954, petitioner received a letter from the board advising her that the board had considered the petition that she had presented requesting the filing of an accusation against the doctor, and had considered all the testimony presented at the meeting of the board on June 21, 1954, and after such consideration the board had determined that the petition and the evidence presented did not indicate that the doctor had violated any provisions of the Medical Practice Act which would warrant or justify the filing with the board an accusation charging the doctor with unprofessional conduct and justifying disciplinary action against his physician's and surgeon's certificate under said act.

The petition further alleges that the petitioner is beneficially interested in the petition as the daughter of Mrs. Crawley, as administratrix of her estate, and as a citizen, resident, taxpayer of Los Angeles, California; she has no plain, speedy or adequate remedy in law to set aside the decision of the board; she has no recourse in law or equity unless the board is ordered to show cause why it should not exercise its ministerial duty by filing an accusation against the doctor because he knowingly and in bad faith filed such false death certificate, and why the doctor should not correct the said false death certificate; the board acted wrongfully, arbitrarily, capriciously and violated its administrative or ministerial duty in refusing to file an accusation for unprofessional conduct against the doctor.

The petition also alleged that the record of the hearing before the board, consisting of the transcript of the testimony given at the hearing, a certified copy of the death certificate, and the hospital record, was incorporated as a part of her petition. (Such record was filed with the petition and was before the superior court.)

The board filed "Points and Authorities" in the superior court in opposition to the issuance of an alternative writ of mandate. On February 1, 1955, the judge, without a hearing, made an order denying the writ. On the same day the judge signed and filed a written order which provided, in part: "The transcript of the hearing before the Board of Medical Examiners, held on June 21, 1954, shows that petitioner had a full and fair hearing on the question as to whether the Board should file an accusation against Dr. Dougall. In addition to the testimony the Board had before it and considered the hospital records relating to Mrs. Crawley. Petitioner had a fair hearing before the Board. The record thereof is incorporated in the petition by reference. (Par. X.) The Board exercised its discretion and decided not to file an accusation. A writ of mandate will be issued only to compel the performance of an act which the law specifically enjoins; neither will a writ issue to control the exercise of official discretion. The petition fails to state a cause of action. The writ is denied."

As above stated, petitioner contends that it was the mandatory duty of the board to file an accusation of unprofessional conduct against the doctor. She argues that the uncontradicted evidence produced by her before the board, and before the superior court by her verified petition for a writ of mandate, showed that the doctor had knowingly executed and filed a false certificate as to the cause of death of Mrs. Crawley in that he had falsely certified that death was caused by cancer; that the filing of such certificate by the doctor constituted unprofessional conduct within the provisions of section 2411 of the Business and Professions Code; that it was therefore the mandatory duty of the board, under the provisions of section 2361 of the Business and Professions Code, to file such an accusation against the doctor.

Section 2411 of the Business and Professions Code, above referred to, provides: "Knowingly making or signing any certificate * * * which falsely represents the existence or nonexistence of a state of facts, constitutes unprofessional conduct * * *." Section 2361 of said code, above referred to, provides: "The board shall take action against any holder of a certificate, who is guilty of unprofessional conduct which has been brought to its attention * * *." Section 11503 of the Government Code provides that a hearing to determine whether a license shall be revoked, suspended, limited or conditioned shall be initiated by filing an accusation.

[1-3] Although there were statements by petitioner before the board to the effect that the doctor had told petitioner, prior to Mrs. Crawley's death, that Mrs. Crawley did not have cancer, it cannot be said accurately that the evidence was uncontradicted that the death certificate was false. The certificate, being a public record, was presumed to be true. The presumption was evidence. The hospital records, which were before the board, were extensive and covered a period of approximately 5 weeks. The members of the board were doctors of medicine and they were entitled, of course, to consider the hospital records in determining whether an accusation should be filed. Those records contained entries made by the attending doctor, an interne, three consulting doctors, and special nurses. Also, the records contained several laboratory reports. One of the entries made by the interne (about a week before the patient died) was that there was an abdominal hard mass with right supra pubic tenderness, and the condition of the patient appeared to be terminal. Also, there were entries therein (one by the interne, and several by the nurses) that there was vaginal bleeding. There was an entry therein by the attending doctor to the effect that the final diagnosis was cancer. That entry was: "Diagnosis final—Meta[s]tatic Carcinoma, Pyloro-Hepatic Carcinoma." A member of the board stated at the hearing that the record regarding the abdominal hard mass, above referred to, would indicate that Mrs. Crawley possibly had cancer and an obstruction of the bowel. Even if it be assumed that the board accepted as true petitioner's statement as to the doctor's diagnosis before the death, the board might have concluded from the hospital records that after the death, and irrespective of any prior inconsistent statements as to diagnosis, the doctor made a true statement as to diagnosis in the death certificate, or at least he did not knowingly make a false statement as to diagnosis in the certificate. The board was not required to file an accusation based solely upon the statements of petitioner that the doctor had told her, prior to the death, that Mrs. Crawley did not have cancer. If the doctor made a mistake as to diagnosis prior to the death, or if he purposely misstated the

diagnosis prior to the death in an effort to relieve anxiety of relatives as to the illness, he was not bound to adhere to and continue the mistake or misstatement when he made the certificate of cause of death. It was his duty not to knowingly make a false certificate of death, regardless of his prior statements. Whether an accusation against the doctor should have been filed was a matter within the discretion of the board upon a consideration of all the evidence presented.

[4–6] Appellant contends further that the board abused its discretion in not filing an accusation. She argues that she proved without contradiction that the doctor executed a false certificate as to the cause of death; and that the board, by acting arbitrarily, capriciously and in abuse of its discretionary power, failed to do its duty. The statements made hereinabove regarding the preceding contention are applicable here. Of course, the board was not required to file an accusation merely because a request was made that an accusation be filed. The board was required to consider the request and to determine, in its discretion, whether an accusation should be filed. It was not required to exercise its discretion in a particular manner. See Lindell Co. v. Board of Permit Appeals, 23 Cal.2d 303, 315, 144 P.2d 4. The court may compel an administrative agency to act, but it may not substitute its discretion for the discretion vested in the agency. (Ibid.) In the present case, the board did act, by considering and ruling upon petitioner's request that an accusation be filed. A hearing, which lasted 47 minutes, was held and petitioner and her counsel made extended statements. As above shown, the hospital records were before the board for its consideration. The above references to statements in the records were sufficient to indicate that there was substantial basis for the board's refusal to file an accusation. A writ of mandate will not lie to control official discretion. Friedland v. Superior Court, 67 Cal.App.2d 619, 623, 155 P.2d 90. In Boyne v. Ryan, 100 Cal. 265, 34 P. 707, a writ of mandate was sought to compel a district attorney to commence an action to recover money. The court therein said, 100 Cal. at page 267, 34 P. at page 708: "[A] court will not do a vain or fruitless thing, or undertake by *mandamus* what cannot be accomplished * * *. Now, it is not contended that the language of section 8 goes any further than to declare it to be the duty of the district attorney 'to institute suit.' But to compel a district attorney, against his will and contrary to his judgment, to merely *commence* an action, would be an idle thing, in the absence of power to compel him to prosecute it to final determination; and such power is not contended for by appellant, and, indeed, there could be no practicable exercise of such power. The court granting the writ of mandate could not follow the district attorney through the case * * *." In the present case no useful purpose would be served, even if the court were empowered to direct the board to file an accusation. The board, after filing an accusation, could in the exercise of its discretion determine that there was no basis for a disciplinary order.

[7] The board did not abuse its discretion in refusing to file an accusation.

[8] Appellant asserts further that she was not given a fair hearing by the board. She argues that the board was prejudiced by reason of statements made by the assistant attorney general, before any evidence was presented, wherein he argued and recommended against any accusation being made against the doctor. Those statements were to the effect that he had examined the file which petitioner had presented to the secretary of the board, and that the file did not indicate any evidence that would warrant an accusation; but the board "may well" desire not to take his recommendation and consider that an accusation should be filed. He also read a letter which he had sent to petitioner, about 10 days previously, which letter was to the effect that the attorney general believed the evidence was insufficient. The attorney general is the legal counsel for the

Board of Medical Examiners. Bus. and Prof.Code, § 2116. The transcript of the hearing shows that members of the board examined the hospital records, and asked petitioner many questions. It appears that the board carefully considered the evidence. It cannot be concluded that the board was prejudiced.

The contention that the board abused its discretion is not sustainable.

[9, 10] Appellant also contends that the court erred in denying the petition without a hearing or argument. The petition was filed January 31, 1955. The board filed Points and Authorities on the same day, January 31. The petition was denied the next day, February 1. The court was not required to have a hearing or to permit argument upon the petition. Code Civ.Proc. § 1094. The court was empowered to deny the petition "out of hand." Wilson v. Los Angeles County Civil Service Comm., 103 Cal.App.2d 426, 431, 229 P.2d 406, 408. The transcript of the hearing, the death certificate, and the hospital records were incorporated as a part of the petition. "[A] petition alleging abuse of discretion which incorporates a transcript by reference will be examined in the light of the evidence contained in the transcript to determine whether a cause of action is stated, and the court may exercise its discretionary power to dismiss the petition on the merits or deny the issuance of the writ upon the theory that the petition plus the transcript shows no cause of action. Thus, the petitioner may lose his day in court by an 'out of hand' ruling of the court * * *." 2 Cal.Jur. 2d 352–353, § 213; see Sipper v. Urban, 22 Cal.2d 138, 140, 137 P.2d 425.

As above shown, the court determined, among other things, that petitioner had a full and fair hearing, the board exercised its discretion, and the petition does not state a cause of action. The record supports the determinations of the court.

Respondent board asserts that the disciplinary proceeding is barred by laches. The death certificate was filed July 11, 1949. The petition herein for a writ of mandate states that "on or about" June 21, 1954, the petitioner requested the board to file an accusation. (The record does not show when an application or petition in the disciplinary proceeding was filed.) In view of the above conclusions, regarding the merits of the proceeding, it is not necessary to determine this contention.

The order denying the petition for a writ of mandate should be affirmed.

Appeal, No. 21365.

[11] As above stated, petitioner filed a notice which states that she appeals from an order denying her motion to correct and augment (1) the clerk's transcript and (2) the record of the proceedings before the board. Such an order is not appealable. In People v. Gross, 44 Cal.2d 859 at pages 860, 861, 285 P.2d 630, it was held that an order denying defendant's motion to correct and amend a clerk's transcript by striking out statements and substituting others was not an appealable order. See also McCord Co. v. Plotnick, 104 Cal.App.2d 495, 496, 231 P.2d 880; Cross v. Tustin, 37 Cal.2d 821, 825–826, 236 P.2d 142. In People v. Gross, supra, it was said, 44 Cal.2d at page 861, 285 P.2d at page 631: "If, however, the record is deficient in any respect, defendant may apply to the District Court of Appeal for augmentation under rule 12 of the Rules on Appeal." In the present case, petitioner made a motion in this court to correct and augment the clerk's transcript and the reporter's transcript of the hearing before the board. The motion before this court was in substance the same as the motion in the trial court. This court denied the motion. The purported appeal from the order of the trial court should be dismissed.

The order denying the petition for a writ of mandate (case No. 21364) is affirmed. The purported appeal from the order denying the motion to correct and augment transcript and record (case No. 21365) is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

146 Cal.App.2d 268

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Edward H. GOLDSTEIN, Defendant and Appellant.

Cr. 3241.

District Court of Appeal, First District, Division 2, California.

Nov. 27, 1956.

Rehearing Denied Dec. 12, 1956.

Hearing Denied Dec. 27, 1956.

Prosecution under an information charging defendant with attempted violation of § 288a committed upon a certain person, and with violation of § 288a committed on same date with another person. The Superior Court, County of Santa Clara, William F. James, J., entered a judgment based on verdict finding defendant guilty on both counts, and the defendant appealed. The District Court of Appeal held that trial court's failure to give instructions vital to consideration of complicity of witness whose testimony was relied upon to corroborate accomplice required reversal of the conviction.

Reversed.

1. Criminal Law ⚷507(7)

One who voluntarily consented to violation of section 288a was an "accomplice" and his testimony required corroboration. West's Ann.Pen.Code, §§ 288a, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Accomplice".

2. Criminal Law ⚷511(2)

Corroborative evidence must be in itself of an inculpatory character without the aid of testimony which is to be corroborated. West's Ann.Pen.Code, § 1111.

3. Criminal Law ⚷511(2)

The corroborating evidence necessary to warrant a conviction on testimony of an accomplice need not establish actual commission of the offense, the corpus delicti, but it is sufficient that it tends to connect defendant with commission of the crime in such a way as may reasonably satisfy jury that the witness, who must be corroborated, is telling the truth. West's Ann.Pen.Code, § 1111.

4. Criminal Law ⚷511(10)

The testimony of one accomplice cannot corroborate that of another. West's Ann.Pen.Code, § 1111.

5. Criminal Law ⚷507(1)

To "aid and abet", within statute defining an accomplice as including all persons concerned in commission of a felony whether they directly commit the act constituting the offense, or aid and abet in its commission, means to instigate, encourage, promote or aid with guilty knowledge of the wrongful purpose of the perpetrator. West's Ann.Pen.Code, §§ 31, 971, 1111.

See publication Words and Phrases, for other judicial constructions and definitions of "Aid and Abet".

6. Criminal Law ⚷59(5)

The aider and abetter is not only guilty of crime the contemplated commission of which was known to him, but also of the natural and reasonable or probable consequences of the acts which he knowingly aided or encouraged. West's Ann.Pen. Code, §§ 31, 971.

7. Indictment and Information ⚷191

Vagrancy under subdivision defining vagrant as a lewd and dissolute person is an included offense of that of violating sections 286 and 288a. West's Ann.Pen.Code, §§ 647, subd. 5, 286, 288a.

8. Criminal Law ⚷769

It is incumbent upon court in criminal case to instruct jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case.

9. Criminal Law ⚷770(2)

Trial court is not relieved of duty to give instructions whose necessity is developed through evidence introduced at the trial.

10. Criminal Law ⚷770(2)

An instruction is necessary if it is vital to a proper consideration of evidence by the jury.

11. Criminal Law 🔑780(1)

Trial court must of its own motion instruct jury in criminal cases with respect to accomplices and their testimony. West's Ann.Pen.Code, § 1111.

12. Criminal Law 🔑780(1), 1173(2)

In prosecution for violation of section 288a, trial court's failure to give instructions vital to consideration of complicity of witness whose testimony was relied on to corroborate testimony of an accomplice required reversal of conviction. West's Ann. Pen.Code, §§ 288a, 1111.

13. Criminal Law 🔑511(1)

In prosecution for violation of section 288a, if both witnesses for prosecution considered accomplices, their admitted visit at night in defendant's living room and knowledge of one of the witnesses of the existence of a bathroom were insufficient corroboration because they were not in themselves inculpatory or unnatural. West's Ann.Pen.Code, §§ 288a, 1111.

14. Sodomy 🔑6

Evidence was insufficient to support conviction of an attempt to commit offense of violating section 288a. West's Ann.Pen. Code, § 288a.

15. Criminal Law 🔑44

In order to establish an "attempt", it must appear that defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end, and preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished.

See publication Words and Phrases, for other judicial constructions and definitions of "Attempt".

16. Criminal Law 🔑1169(1)

In prosecution for violating § 288a, overruling of defendant's objection to question asked whether witness knew a short term for homosexual acts and permitting him to answer was not prejudicial error. West's Ann.Pen.Code, § 288a.

17. Criminal Law 🔑814(13)

Instruction on subject of flight immediately after commission of a crime was improperly given, where there was no evidence that defendant left immediately after commission of the acts of which he was accused or even after they were found out, and only evidence was that he left on a prolonged vacation a year after the acts.

Morris Oppenheim, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

PER CURIAM.

Appellant was found guilty by a jury on both counts of an information, the first of which accused him of attempted violation of Penal Code Section 288a committed on or about November 1, 1953 with Billy Hoss, and the second violation of section 288a committed on the same date with John Ritesman, and was sentenced to San Quentin, the sentences to run concurrently. He appeals from the judgment on both counts asserting mainly with respect to the first count that there was no evidence of facts constituting a punishable attempt to commit the alleged offense, nor that any such act was committed about November 1, 1953, and with respect to the second count, that he was convicted on uncorroborated evidence of one or two accomplices.

The only accusatory evidence was the testimony, to the following effect, of Hoss and Ritesman. In November 1953, Hoss was 20 and in the Navy, Ritesman a cement mason of 22 out of work. Both testified that about November 1, 1953, they together visited defendant after midnight at his home in Los Altos following an appointment made by telephone. Hoss testified that he had been there several times before and that he was friendly with defendant, Ritesman that he had once before seen defendant when somebody showed defendant's home to him, but that he did not know him personally. They were received by defendant in his living room. There was nobody else present. Hoss introduced Ritesman to defendant. They had some conversation and drinks and then defendant said he wanted to talk to Bill (Hoss). Hoss went with him into a bedroom. Hoss testified that defendant asked him about Johnny (Ritesman). In the course of the conversation he asked questions which Hoss understood to mean whether Ritesman would consent to anything. Asked whether he knew a short word for homosexual acts, he said that he had heard it as a "blow job"; that he did not remember that defendant had said it like that, but that the way it was put was if he would consent. Hoss answered that he did not know and that he would have to find out for himself. When asked what defendant did with respect to Hoss himself he said: "Well, one time he kind of got a little funny with me, you know, patting my legs, and, you know, tried to play around and everything. He was going up my leg; in other words like I was a girl and had intentions." Hoss moved away and told him that he didn't like any of that sort of thing. On cross-examination Hoss testified that this patting and the rebuff had not taken place the evening when he visited defendant with Ritesman, but the first time he visited defendant to swim in his pool in the summer of 1952. When Hoss and defendant came back to the living room they had another drink and then defendant said he would like to talk to Ritesman. They went into the bedroom and there and then, according to the testimony of Ritesman, the offense took place. Ritesman first resisted somewhat but when defendant persisted he gave way voluntarily and accepted ten dollars from defendant before they went back to the living room. According to Hoss, defendant and Ritesman stayed away half an hour or more. Hoss testified that when they left defendant gave him also ten or fifteen dollars. It was brought out in the cross and redirect examination of Hoss, that Hoss and Ritesman went there because they were broke and needed some money. Hoss told Ritesman that he would probably get some money and why. When Hoss phoned defendant that he was coming, defendant asked him whether he was going to bring somebody with him. "I said probably, because before I always brought somebody with me. I didn't want to go alone and that was the deal." One of the reasons given why he did not wish to go to defendant alone was that then he would have to fight all day to stay away from him. Defendant paid him to come up there. "I mean he figured if I came there would be some other guys." It was quite a long time ago that a boy had introduced him to defendant. Since that time he had made many a trip to defendant's house with sailors from Moffett Field and such boys, and nearly every time he went he got money. He denied, however, that there was an understanding that he was supposed to receive money for bringing the boys up there. He did not know whether anything wrong or ungentlemanlike went on there, although there were a few remarks made and everything. He didn't speak to Ritesman about a blow job or such. Ritesman also denied that any such thing had been discussed with Hoss. Defendant took the stand, confirmed the visit of the boys in the living room but denied everything else. A sister-in-law of defendant testified that since October 5, 1953 until some time in 1954 she had been living at defendant's house with her three children; that they occupied both bedrooms and during that period were never absent at night. Defendant slept in a trailer.

[1-3] It is undisputed that Ritesman, who voluntarily consented, was an accomplice, People v. Ellis, 137 Cal.App.2d 408, 413, 290 P.2d 266; People v. Battilana, 52 Cal.App.2d 685, 695, 126 P.2d 923, and that under Penal Code Section 1111 his testimony required corroboration. The court so instructed the jury. Appellant contends that the testimony of Hoss was insufficient as corroboration because it required the interpretation and direction of Ritesman's testimony in order to give it value and because Hoss himself was an accomplice having aided and abetted the commission of the act with Ritesman as a procurer. It is true that the corroborative evidence must be in itself of an inculpatory character without the aid of the testimony which is

to be corroborated. People v. MacEwing, 45 Cal.2d 218, 225, 288 P.2d 257; People v. Garrison, 80 Cal.App.2d 458, 461, 181 P.2d 738. However, such is the case with the testimony of Hoss apart from the question whether Hoss himself was an accomplice. The corroborative testimony that after midnight defendant received in his home a young man he concededly did not know, together with a mutual friend, that he asked that friend in veiled terms whether the man would consent to homosexual acts, that he thereafter took the unknown young man to a bedroom and stayed there with him for half an hour or more leaving the friend alone, and that when the friend left he gave him ten or fifteen dollars is clearly inculpatory independent of any further evidence. It does not show exactly what act took place in the bedroom, but the corroborating evidence need not establish the actual commission of the offense, the corpus delicti. People v. Yeager, 194 Cal. 452, 473, 229 P. 40; People v. McNamara, 103 Cal.App.2d 729, 740, 230 P.2d 411. It is sufficient that it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness, who must be corroborated, is telling the truth. People v. MacEwing, supra, 45 Cal.2d at page 224, 288 P.2d at page 260. The distinction from People v. Robbins, 171 Cal. 466, 154 P. 317, on which appellant relies, is illuminatory. There the corroborating evidence was only that the defendant and the boy, his alleged accomplice in the sex violation, after a game of tennis went to a bathroom, locked the door, pulled the frosted glass window down and let the water run. The court held that there was nothing unnatural or suspicious in this testimony which could well relate to just washing up after a game. The same can certainly not be said of the corroborative evidence in the case before us.

[4–7] However, a serious question is presented by appellant's contention that Hoss himself was an accomplice. The testimony of one accomplice cannot corroborate that of another. People v. Clapp, 24 Cal.2d 835, 837, 151 P.2d 237 and cases there cited. An accomplice, defined in Penal Code Section 1111 "as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given", includes "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present." Pen.Code § 971; see also § 31. In this connection to aid and abet means to instigate, encourage, promote or aid with guilty knowledge of the wrongful purpose of the perpetrator. People v. Johnson, 99 Cal.App.2d 717, 732–733, 222 P.2d 335; People v. Best, 43 Cal.App.2d 100, 105, 110 P.2d 504. Accordingly, it has been held that a person who procured opportunity for a sex crime (statutory rape) by providing a room with knowledge of the illegal purpose for which it was to be used, aided and abetted the crime and was punishable as a principal. People v. Wood, 56 Cal.App. 431, 205 P. 698. The aider and abetter is not only guilty of the crime the contemplated commission of which was known to him, but also of the natural and reasonable or probable consequences of the acts which he knowingly aided or encouraged. People v. Beltran, 94 Cal.App.2d 197, 206, 210 P.2d 238; People v. Etie, 119 Cal.App.2d 23, 28, 258 P.2d 1069; People v. King, 30 Cal.App.2d 185, 202, 85 P.2d 928; People v. Simpson, 66 Cal.App.2d 319, 328, 152 P.2d 339. "Whether the act committed was the natural and probable consequence and the extent of the defendant's knowledge are questions of fact for the jury." People v. Beltran, supra [94 Cal.App.2d 197, 210 P.2d 243], People v. Etie, supra. In the present case, considering the conflicts in the evidence, Hoss cannot be held an accomplice as a matter of law. However, a jury could have found on the evidence that Hoss was an accomplice, a principal as an aider and abetter of the offense committed with Ritesman. The jury could infer from the testimony of Hoss that there was a probably tacit "deal" between defendant and Hoss that Hoss would be given money if he brought boys or young men to defendant's home, and that Höss knew that defendant did so to have the opportunity to commit lewd acts with them, which, if they did not rebuff him and fight him continually, would probably extend to violations of section 286 or 288a of the Penal Code, and that Hoss brought Ritesman there with that knowledge. Even if the acts would not go so far they would still be illegal and would stamp defendant a vagrant as a lewd and dissolute person under Penal Code Section 647, subd. 5. It may be noted in this respect that vagracy under said subdivision was held to be an included offense of that of Penal Code Section 286, People v. Babb, 103 Cal.App.2d 326, 229, P.2d 843, and that it then would also be included in the offense of section 288a.

[8–13] If sufficient instructions on the subject had been given it would have been concluded from the verdict that the jury found that Hoss was not an accomplice. People v. Williams, 30 Cal.App.2d 234, 239, 85 P.2d 974; People v. King, supra, 30 Cal. App.2d at page 197, 85 P.2d at page 936. However, the instructions were insufficient to guide the jury with respect to the possible complicity of Hoss. No instruction was given that the evidence of an accomplice cannot corroborate that of another, although it was proposed by defendant; no instruction on the rule that one who aids and abets is punishable as a principal, nor any other instruction on aiding and abetting was given. "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. [Citations.] The court is not relieved of the duty to give instructions whose necessity is 'developed through the evidence introduced at the trial.' [Citation.] An instruction is necessary if it is vital to a proper consideration of the evidence by the jury. [Citations.] Accordingly, it has been held that the court must of its own motion instruct the jury in criminal cases with respect to accomplices and their testimony". People v. Putnam, 20 Cal.2d 885, 890, 129 P.2d 367, 369; People v. Buffum, 40 Cal.2d 709, 724, 256 P.2d 317; People v. Davis, 43 Cal.2d 661, 673–674, 276 P.2d 801; People v. Ellis, 137 Cal.App.2d 408, 414, 290 P.2d 266. The failure of the court to give instructions vital to the consideration of the complicity of Hoss as to the second count must lead to reversal of the judgment on that count. If both witnesses are considered accomplices, their admitted visit at night in defendant's living room and Ritesman's knowledge of the existence of a bathroom on which the People rely as corroboration are clearly insufficient because they are not in themselves inculpatory or unnatural. People v. Robbins, supra.

[14, 15] With respect to the first count the lewd acts testified to by Hoss and stated before are not specific enough to constitute an attempt to commit the offense of Penal Code Section 288a. "In order to establish an attempt, it must appear that the defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end; preparation alone is not enough, and some appreciable fragment of the crime must have been accomplished." People v. Gallardo, 41 Cal.2d 57, 66, 257 P.2d 29, 35. In that case it was held that payment of $250 after arrangement for an abortion and preparation of hospital cards and records were insufficient to support conviction of attempts to commit abortions because no means to procure a miscarriage had yet been employed. In People v. Miller, 2 Cal. 2d 527, 531–532, 42 P.2d 308, 310, 98 A.L.R. 913, a similar rule as the one quoted above is explained because in the majority of cases the conduct of a defendant, consisting merely of acts of preparation has not ceased to be equivocal irrespective even of a declared intent. "It is that quality of being equivocal that must be lacking before the act becomes one which may be said to be a commencement of the commission of the crime, or an overt act, or before any fragment of the crime itself has been committed, and this is so for the reason that, so long as the equivocal quality remains, no one can say with certainty what the intent of the defendant is. As stated in United States v. Ford, D.C., 34 F. 26, 27, 'the intention of the actor can alone

be clearly ascertained by the movements which he has made to complete his design.' " The lewd acts with respect to Hoss, to which Hoss testified were of too preparatory and equivocal a character to constitute an attempt to commit a fellatio under the above rule. In cases in which an attempt to commit a sex crime was found the acts had progressed much further. E. g., People v. Gleason, 99 Cal. 359, 33 P. 1111; People v. Jensen, 76 Cal.App. 558, 562, 244 P. 1086. The judgment of conviction on the first count must also be reversed. As the facts are insufficient to constitute a punishable attempt, we need not decide whether the evidence as to the time of the alleged acts would prevent defendant's conviction on this count.

[16] Appellant also predicates error on the court's overruling of his objection to a question whether the defendant knew a short term used for homosexual acts and its permitting him to testify that he had heard it as a "blow job." We find no error nor possibility of prejudice. The question was clearly introductory and Hoss further testified in that respect only that he did not know that defendant had used the word and that he, Hoss, had not spoken about such things with Ritesman.

[17] The instruction on the subject of flight immediately after the commission of a crime should not have been given as there was no evidence that defendant left immediately after the commission of the acts of which he was accused or even after they were found out. The only evidence was that he left on a prolonged vacation a year after the acts and that the attention of the police was first called to the matter in connection with a theft at his home which took place after he had left. He had been in Mexico for a month when the first accusation was filed on January 3, 1955. It is conceded that the only attitude which could be held against him is that he did not immediately come back when he heard that the authorities wished to interrogate him. Such cannot correctly be described as flight. Whether the error was reversible notwithstanding the express statement of the court that it did not say whether there was flight or not need not be decided as the judgment must be reversed at any rate on the grounds stated before.

Judgment reversed.

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146 Cal.App.2d 261

Myron J. STUART, Plaintiff and Appellant,

v.

HOLLYWOOD TURF CLUB, a California corporation, Harry O. Hoyt, an individual, Harry O. Hoyt, doing business under the fictitious firm name and style of Harry O. Hoyt Productions, Defendants and Respondents.

Civ. 21870.

District Court of Appeal, Second District,
Division 2, California.
Nov. 26, 1956.

Action wherein the Superior Court of Los Angeles County, Bayard Rhone, J., granted defendants' motion to dismiss, and plaintiff appealed. The District Court of Appeal, Fox, J., held that it had not been an abuse of discretion to deny motion for immediate trial, made by plaintiff who had waited more than four years after sustention of demurrer to his original complaint before filing an amended complaint, even though motion had been made just one week before expiration of five-year period in which trial was required to be commenced; and held that neither period following such request nor time consumed in attempted appeal from denial of such request could be excluded in computing five-year period within which action was required to be brought to trial.

Affirmed.

1. Dismissal and Nonsuit ⚿60(1)

Statute requiring dismissal of actions not brought to trial within five years after filing is mandatory where applicable. West's Ann.Code Civ.Proc., § 583.

2. Dismissal and Nonsuit ⚿60(2)
Trial ⚿5

It was not an abuse of discretion to deny motion for immediate trial, made by plaintiff who had waited more than four years after sustention of demurrer to his original complaint before filing an amended complaint, even though motion was made just one week before expiration of five-year period in which trial was required to be commenced; and neither period following such request nor time consumed in attempted appeal from denial of such request could be excluded in computing five-year period within which action was required to be brought to trial. West's Ann.Code Civ. Proc., § 583.

Zeman, Hertzberg & Schekman, Los Angeles, for appellant.

Freston & Files, Ralph E. Lewis, Los Angeles, for respondents.

FOX, Justice.

Plaintiff appeals from an order dismissing his case because he did not bring it to trial within five years.

[1, 2] The complaint was filed April 13, 1950. A demurrer was sustained June 20, 1950, with leave to amend in ten days. First amended complaint was filed November 26, 1954. Demurrer was sustained to this pleading, but with permission to amend, on January 7, 1955. Second amended complaint was filed on January 12th. Demurrer was sustained to counts 2 and 4 with leave to amend on February 9 and overruled as to the other counts. On March 28, 1955, plaintiff elected not to amend counts 2 and 4. Defendants filed an answer to the other counts the next day. On April 5, 1955, plaintiff filed notice of motion to set the case for immediate trial. This motion was denied two days later, which was the fifth court day prior to the expiration of the five-year period. Code of Civil Proc., sec. 583.[1] A notice of appeal from this ruling was filed April 12, 1955. The purported appeal was dismissed by this court in January, 1956, on the ground that the order was nonappealable. In the meantime the case was set for trial on December 8, 1955. However, defendants' motion to dismiss was granted on November 28. This was more than five years and seven months after the complaint was filed. It is therefore apparent that the dismissal was proper unless plaintiff can bring his case within one of the exceptions stated in section 583, or within one of the implied exceptions developed by the decisions[2] for the statute is mandatory where applicable. Anderson v. Superior Court, 187 Cal. 95, 97, 200 P. 963; Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 63, 168 P.2d 665; Plaintiff does not rely on any of the expressly enumerated exceptions in the statute. Rather he relies on the principle that, in computing the five-year period, the time during which, for all practical purposes, going to trial would either be impossible or impracticable and futile, is to be excluded. Christin v. Superior Court, 9 Cal.2d 526, 533, 71 P.2d 205, 112 A.L.R. 1153. He therefore argues that "inasmuch as the

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[1] The pertinent portion of section 583, Code of Civil Procedure, reads: "Any action * * * shall be dismissed by the court in which the same shall have been commenced * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have filed a stipulation in writing that the time may be extended and except where it is shown that the defendant has been absent from the State or concealed therein and his whereabouts unknown to plaintiff and not discoverable * * * upon due diligence, in which event said period of absence or concealment shall not be a part of said five-year period."

[2] For list of implied exceptions see Ellsworth v. United States Metals Corp., 110 Cal.App.2d 727, footnote 3, at pages 728 and 729, 243 P.2d 575.

attention of the Presiding Judge was called to the fact that the five-year period was about to expire, there was an abuse of discretion in failing to set the matter for trial and the period following such request should be excluded from the computation of the statutory period" and that the time the appeal was pending from the order denying plaintiff's motion for an immediate trial should also be excluded from such period. Plaintiff's position is not sound upon either count.

The reasonableness of the court's action in denying plaintiff's motion on April 7th for an immediate trial must be measured by the entire factual picture and not by just the single fact that the five-year period would expire in five court days. The Presiding Judge was entitled to take into account that a demurrer had been sustained to the original complaint on June 20, 1950, with leave to amend within ten days, but that the first amended complaint was not filed until November 26, 1954. Thus for a period of more than four years plaintiff had permitted the case to lie dormant. Also, as plaintiff points out in his brief, "the cause was at issue for the first time on March 29, 1955." This was approximately two weeks before the five-year statutory period would expire. And, as previously noted, the motion for immediate trial was made on the fifth court day before the expiration of such period. The Presiding Judge was also entitled to take into consideration the state of the court's calendar and the large number of cases that were already scheduled for and awaiting trial and the time normally required to get on the trial calendar. Continental Pac. Lines v. Superior Court, 142 Cal.App.2d 744, 299 P.2d 417. In such circumstances it cannot be said that the Presiding Judge abused his discretion in denying plaintiff's motion for an immediate trial. See Legg v. United Benefit Life Ins. Co., 136 Cal.App.2d 894, 289 P.2d 553, 555, where the motion for an early setting was heard "just five days before the expiration of the statutory period." The case was set for trial, however, three months and ten days later. In the meantime, a motion to dismiss was made and granted. This court affirmed the judgment of dismissal.

In this connection plaintiff relies on the observation in Bank of America Nat. Trust & Savings Ass'n v. Superior Court, 84 Cal. App.2d 34, at page 37, 189 P.2d 799, at page 801, that "It may be that if a plaintiff moves to set *well within the five years* and requests that the cause be set for trial before the expiration of that period a failure to so set the cause for trial might be an abuse of discretion and such period might be excluded on the theory" that it was "practically impossible to proceed." (Emphasis added.) It is apparent that the case at bar does not fall within the above dictum since plaintiff did not move for an immediate trial "well within the five years." Any practical impossibility in getting the case to trial within the statutory period was due to plaintiff's own inactivity and lack of diligence. He is not entitled to use the time thus consumed to extend the five year limitation on bringing his case to trial.

California Employment & Stabilization Comm. v. Guernewood Park, etc., 70 Cal. App.2d 245, 160 P.2d 581, relied on by plaintiff, is not here applicable since the motion to dismiss was made on the day of the trial which was one day short of the expiration of the five-year period.

Plaintiff is not entitled to exclude from the five-year period the time consumed in his attempted appeal from the denial of his motion for an immediate trial. Not only was the order nonappealable as this court held in dismissing the purported appeal, but it did not divest the trial court of jurisdiction in any sense or to any extent. Plaintiff was not held up at all by reason of his attempted appeal but was entitled to proceed with his case in the trial court during such period. Hence he is not entitled to deduct that time from the statutory period. His attempted appeal rendered his going to trial neither "impossible" nor "impracticable and futile." Thus plaintiff fails to bring his case within the principles of the Christin case, supra.

The order (including judgment for costs) is affirmed.

MOORE, P. J., and ASHBURN, J., concur.

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146 Cal.App.2d 199

Irene D. SHAROVE, etc., Plaintiff, Respondent and Appellant,

v.

Jack M. MIDDLEMAN, Defendant, Appellant and Respondent.

Civ. 21667, 21780.

District Court of Appeal, Second District, Division 2, California.

Nov. 21, 1956.

Hearing Denied Jan. 16, 1957.

Proceeding by former wife for judgment establishing Florida divorce decree and for accumulated child support payments awarded under such decree. The Superior Court of Los Angeles County, Elmer D. Doyle, J., and Clarence E. Johns, J. pro tem., entered judgment establishing decree and awarding accumulated child support payments. The husband appealed. The wife appealed from order denying motion to restrain husband's prosecution of appeal. The District Court of Appeal, Fox, J., held that where there was not a definite and certain finding that Florida court entering decree had jurisdiction of defendant, in personam judgment for child support could not be upheld, but that it was not error for trial court to refuse to restrain former husband from prosecuting appeal pending his payment of attorney's fees and costs awarded in connection with appeal.

Judgment affirmed in part, reversed in part and order affirmed.

1. Appeal and Error 🔑1071(6)
Trial 🔑391

Findings are required on all material issues raised by the pleadings and evidence unless they are waived, and if the court renders judgment without making findings on all material issues the case must be reversed.

2. Trial 🔑395(2)

Findings of trial court on all material issues raised by the pleadings and evidence should be definite and certain.

3. Divorce 🔑403(9)

Where former wife sought to establish Florida divorce decree and an adjudication of accumulated child support payments awarded under decree, and there was no definite and certain finding of Florida court's jurisdiction of former husband, money portion of trial court's judgment must be reversed.

4. Divorce 🔑403(4)

Without appearance in divorce suit by husband or by someone on his behalf, or personal service on him in the state awarding decree, award for child support was not valid.

5. Judgment 🔑17(1)

An in personam judgment may not be legally rendered upon service of process by publication only.

6. Trial 🔑405(1)

A failure to object to findings is not a waiver of a failure to find on a material issue.

7. Judgment 🔑815

Doctrine of comity does not justify recognition of a judgment that is not valid in the state where rendered.

8. Appeal and Error 🔑436

Where former wife brought suit to establish Florida divorce decree and for a judgment on accumulated child support payments and trial court entered judgment in her favor, trial court properly refused to entertain former wife's motion to restrain husband from further prosecuting appeal pending his payment of attorney's fees and costs which had been awarded her in connection with his appeal, since appropriate place to make such a motion was reviewing court where the appeal was pending.

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Julius A. Leetham, Los Angeles, for appellant Sharove.

Grant B. Cooper and Ned R. Nelsen, Los Angeles, for respondent Middleman.

FOX, Justice.

There are two appeals in this case.

Defendant's Appeal

Defendant appeals from a judgment establishing a Florida divorce decree and awarding plaintiff $7,220 accumulated child support under the Florida decree.

Plaintiff and defendant were married in New York in 1934. A child was born in 1936. The parties separated in 1938. Plaintiff established residence in Florida in 1939 and there filed suit for divorce. She was granted a final decree in December of that year. She was awarded custody of the minor child, and defendant was ordered to pay plaintiff $10 a week for the child's support and maintenance. Both parties have since remarried.

By her amended and supplemental complaint plaintiff sought to have the Florida decree established as a judgment in this state and to recover $7,220 due her from defendant under said judgment for the support of the child. She had also a cause of action for declaratory relief in which she sought a declaration of "the rights, duties and obligations of the parties" under the Florida judgment, "or their rights, duties and obligations otherwise."

In his answer defendant alleged, inter alia, that he did not appear either personally or by counsel in the divorce suit in Florida, nor was personal service made upon him; that service was effected by publication only.

At the trial he testified on this point in support of the allegations of his answer. On appeal he asserts error on the ground that the trial court failed to find on this issue.

[1, 2] It is elementary that findings are required on all material issues raised by the pleadings and evidence, unless they are waived and "if the court renders judgment without making findings on all material issues, the case must be reversed." James v. Haley, 212 Cal. 142, 147, 297 P. 920, 922; Fairchild v. Raines, 24 Cal.2d 818, 830, 151 P.2d 260. A corollary to this rule is that findings should be definite and certain. Andrews v. Cunningham, 105 Cal.App.2d 525, 528, 233 P.2d 563; Williams v. Wren, 88 Cal.App. 607, 608, 263 P. 1038.

[3] The nearest approach to a finding on this issue is finding VI, where it is stated "That pursuant to a domestic relations proceeding commenced in the state of Florida, *of which defendant had notice and concerning which he negotiated and participated with his attorneys,* a decree of divorce was granted to plaintiff dissolving the bonds of matrimony, and in line with the previous agreement of the parties, decreeing the payment of $10 a week for the care and support of Paul M. Middleman, the minor child of the parties." (Italics added.) A mere reading of the quoted finding discloses that it is not a finding "definite and certain" or otherwise, on the affirmative defense that the Florida court never acquired personal jurisdiction over defendant in the divorce case by his appearance therein or by service of process upon him within the jurisdiction.

[4, 5] A finding on this issue is, of course, material insofar as the order of the Florida court requiring defendant to pay plaintiff $10 a week for the support and care of the minor child is concerned. Without an appearance in that suit by him or on his behalf, or personal service on him in that state, the award for support is not valid for it is an *in personam* judgment and such a judgment may not legally be rendered upon service of process by publication only. Peacock v. Peacock, 160 Fla. 630, 36 So.2d 206; Newton v. Bryan,

142 Fla. 14, 194 So. 282; Perry v. Perry, 119 Cal.App.2d 461, 259 P.2d 953; Comfort v. Comfort, 17 Cal.2d 736, 112 P.2d 259; Glaston v. Glaston, 69 Cal.App.2d 787, 160 P.2d 45; Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565. The Perry case is particularly apposite here. In that case a New Jersey court made an order directing defendant to pay $25.00 per week for the support and maintenance of the minor child of the parties. The only notice of this hearing was served on defendant in New York. Suit was later brought here, as in the instant case, to collect on the New Jersey award. The court pointed out, 119 Cal.App.2d at page 464, 259 P.2d at page 954, that the New Jersey order was *in personam* and that "the defendant is entitled to insist that such a judgment be predicated upon personal service within the state which seeks to impose such obligation. To hold otherwise would be to violate the fundamental requirement of due process * * *." Since there is no finding on the issue of the Florida court's jurisdiction over the person of the defendant, the money portion of the judgment must be reversed.

[6] Plaintiff states that defendant "made no objection whatsoever to the formulation of the Findings or of the Conclusions of the Court." She then suggests that "If error exists, appellant's [defendant's] non-objection doubtless waived it." This does not represent the law. The rule is that failure to object to the findings is not a waiver of a failure to find on a material issue. San Jose Abstract & Title Ins. Co. v. Elliott, 108 Cal.App.2d 793, 803, 240 P.2d 41; Palpar, Inc., v. Thayer, 82 Cal.App.2d 578, 584, 186 P.2d 748; Wilcox v. Sway, 69 Cal.App.2d 560, 564, 160 P.2d 154.

[7] Plaintiff argues also that "Enforcement of the Florida judgment on the grounds of comity alone would be sufficient, and make immaterial whatever form of service was employed." This proposition is not sound. In Comfort v. Comfort, supra, 17 Cal.2d at page 741, 112 P.2d at page 262, citing Pennoyer v. Neff, supra, our Supreme Court pointed out: "It is a fundamental rule of jurisdiction that constructive service on a nonresident is not effective so as to permit a court to render a valid judgment *in personam* which will be within the protection of the full faith and credit clause, or, in fact, that will be valid in the state where rendered." It naturally follows that comity does not justify the recognition of a judgment that is not "valid in the state where rendered." It is therefore essential that the character of service that was had on defendant in the Florida case be determined insofar as the money judgment is concerned.

Although defendant has appealed "from the whole and each and every part" of the judgment, he fails to suggest any reason why the portion of the judgment which establishes the Florida divorce decree in this state should be reversed. Our examination of the record fails to disclose any basis for upsetting that portion of the judgment.

Plaintiff's Appeal

[8] Plaintiff appeals from an order dismissing her motion to restrain defendant from further prosecuting his appeal from the judgment, pending his payment of attorney's fees and costs which had been awarded her in connection with his appeal. The court refused to entertain plaintiff's motion on the ground of lack of jurisdiction. The court was correct for obviously it has no jurisdiction to interfere with or stay proceedings on appeal. The appropriate place to make such a motion is in the reviewing court where the appeal is pending. Krog v. Krog, 32 Cal.2d 812, 198 P.2d 510; Kopasz v. Kopasz, 34 Cal.2d 423, 210 P.2d 846.

The portion of the judgment establishing in rem the Florida divorce decree is affirmed; the portion of the judgment awarding plaintiff $7,220 is reversed. (Appeal No. 21667.)

The order dismissing plaintiff's motion to restrain further prosecution of defendant's appeal is affirmed. (Appeal No. 21780.)

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

146 Cal.App.2d Supp. 889

PEOPLE of the State of California, Plaintiff and Appellant,
v.
John L. BINZLEY, Defendant and Respondent.
No. Cr. A. 3505.

Appellate Department, Superior Court, Los Angeles County, California.
Nov. 19, 1956.

Prosecution for maintenance of bus storage facility contrary to zoning ordinance. The Municipal Court, Glendale Judicial District, Kenneth A. White, J., sustained defendant's demurrer and, upon the people's statement that they did not intend to amend, discharged defendant, and the people appealed. The Superior Court, Appellate Department, Bishop, P. J., held that zoning ordinance provision that "other similar businesses, trades or uses which in the opinion of the council are not more obnoxious or detrimental to the welfare of the particular community than the businesses, trades or uses herein in this section enumerated" could be maintained in commercial zone was too vague and uncertain to constitute valid legislation, but a use, not one of those expressly permitted for such zone, would not, because of such invalid provision, thereby be authorized, and, until listed as a permissible use, bus storage facility use would be prohibited in such commercial zone.

Judgment reversed with directions.

1. Municipal Corporations ⚿601(26)

Where "M2" zone was, under city zoning ordinance, a zone in which any use not prohibited in the city was expressly permitted, and nowhere in the zoning ordinance was a bus storage facility expressly permitted nor expressly prohibited, such facility could be maintained within zone "M2".

2. Municipal Corporations ⚿111(1, 4), 601(21)

Zoning ordinance provision that "other similar businesses, trades or uses which in the opinion of the council are not more obnoxious or detrimental to the welfare of the particular community than the businesses, trades or uses herein in this section enumerated" could be maintained in commercial zone was too vague and uncertain to constitute valid legislation, but a use, not one of those expressly permitted for such zone, would not, because of such invalid provision, thereby be authorized, and, until listed as a permissible use, bus storage facility use would be prohibited in such commercial zone.

Henry McClernan, City Atty., Glendale, for appellant.

Hasbrouck & Melby, Glendale, for respondent.

BISHOP, Presiding Judge.

The trial court sustained defendant's demurrer to the complaint filed against him and then, upon the People's statement that they did not intend to amend, discharged the defendant. The demurrer should not have been sustained on any of the grounds specified in it, and we are reversing the judgment upon the appeal taken by the People.

The charging words of the complaint are these: "* * * in the City of Glendale * * * [the defendant] * * * did willfully and unlawfully have and maintain a bus storage facility contrary to the provisions of * * * Section 307 of the Glendale Municipal Code." In his demurrer the defendant set forth three grounds: first, "that the facts stated in the complaint do not constitute a public offense"; second, that a "bus storage facility" is a business similar to a "Public Garage" and so permitted by Section 307 of the Glendale Code; and, finally, that Section 307 is invalid because its standards of misconduct are too vague to satisfy due process.

The Glendale zoning ordinance constitutes a part of the City's Municipal Code. It divides the city into a number of zones; two, designated as C3 and M2 are involved in our problem. Section 307 opens with these words: "The following regulations shall apply in the C3 commercial zone: No building, structure or land shall be used and no building or structure shall be hereafter erected, structurally altered, enlarged or maintained except for the following uses:" Then follows a list of permitted uses, beginning with "Any use permitted in the C1 restricted commercial zone," and continuing with "(2) any store or shop for the conduct of a wholesale or retail business * * * (6) Dancing academy * * * (8) Furniture store * * * (16) Public garage. (17) Shoe Repair shop"—and others, totalling twenty-two in all. A twenty-third is added in these words: "(23) Other similar businesses, trades or uses which in the opinion of the council are not more obnoxious or detrimental to the welfare of the particular community than the businesses, trades or uses herein in this section enumerated."

[1] It is sufficient for us to know, respecting the M2 zone, that it is a zone where any use, "not prohibited in the city," is expressly permitted. Nowhere in the zoning ordinance is "a bus storage facility" expressly permitted, with the result that it is not expressly allowed in any of the zones other than zone M2, but neither is it expressly prohibited in the city, and so may be maintained in that part of the city falling within zone M2.

[2] We find ourselves in agreement with the premise reached by the trial court, and supported there and on appeal by the defendant, but differ from them as to the conclusion that should follow. We agree that the twenty-third item in section 307, of the Glendale Code, is too vague and uncertain to be valid legislation. No person can know what use is or is not permitted under the terms of the item, and no procedure is prescribed whereby it may be ascertained. But it does not follow that a use, not one of the twenty-two expressly permitted, is, because of this uncertainty of item 23, thereby authorized. We have no hesitancy in saying that section 307 would be adopted had item 23 been omitted. The various uses that came to the mind of the city council were expressly named: item 23 is an attempt to take care of other uses either not yet known or not thought of. They can quickly and easily be added by amendment. Their omission should not affect the constitutionality of the section as it stands with item 23 held not to add an unidentified use. Until listed, it remains prohibited in zone C3. Notwithstanding what we have just said, and in order to avoid any misunderstanding, we merely observe that defendant, upon the trial, is not precluded from proving, if he can, that the City Council has, under the assumption that item 23 gave it authority to admit uses not mentioned, so applied the same as to render Section 307 of the ordinance unconstitutional as applied to the defendant and his property.

To be immune to criticism, the complaint should have alleged that the defendant maintained his bus storage facility in a C3 zone, but this defect was no particularized in the demurrer, and in view of the terms of section 307, no misunderstanding is possible as to the charge made.

The judgment of dismissal is reversed, with directions to overrule defendant's demurrer and to arraign him for a plea.

PATROSSO and SWAIN, JJ., concur.

47 Cal.2d 416

In re Pleas SCAGGS, on Habeas Corpus.

Cr. 5968.

Supreme Court of California.
In Bank.
Nov. 30, 1956.

Proceeding in habeas corpus to admit petitioner to bail pending an appeal from a conviction of receiving stolen property. The Supreme Court, Gibson, C. J., held that the refusal to admit to bail was not shown to be an abuse of discretion

Writ denied.

Carter and Schauer, JJ., dissented.

1. Bail 🔑42

Before conviction, a defendant charged with felony not punishable with death is entitled to be admitted to bail as a matter of right, but after conviction his admission is a matter of discretion unless only a fine is imposed. West's Ann.Pen.Code, §§ 1270–1272.

2. Bail 🔑44

Where defendant was convicted of receiving stolen property and sentenced to imprisonment he was not entitled to be admitted to bail on appeal as a matter of right but was compelled to adjust himself to the discretion of the courts. West's Ann. Pen.Code, §§ 496, 1270–1272.

3. Bail 🔑44

The primary purpose of bail is to assure the presence of defendant in court when required, but other matters may be considered in determining whether a convicted defendant should be retained in custody pending his appeal, such as whether the convicted defendant, if released, would continue to commit crime. West's Ann. Pen.Code, §§ 1270–1272.

4. Habeas Corpus 🔑85(1)

Where defendant was convicted of receiving stolen property and sentenced to imprisonment, evidence did not establish that the refusal to admit the defendant to bail, pending appeal constituted an abuse of discretion. West's Ann.Pen.Code, §§ 496, 1270–1272.

◆

Franklin H. Williams, John W. Bussey, W. Lawrence Oliver and Lawrence Speiser, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and Clarence A. Linn, Asst. Atty. Gen., for respondent.

GIBSON, Chief Justice.

This is a proceeding in habeas corpus to admit Scaggs to bail pending his appeal from a conviction of receiving stolen property in violation of section 496 of the Penal Code. The questions presented are whether the trial court exercised its discretion in refusing to admit him to bail and, if so, whether the refusal constituted an abuse of discretion.

After the verdict was returned against Scaggs, he remained at large on bail for about six weeks while his motion for probation was pending. On May 15, 1956, the court denied probation in accordance with the recommendation of the probation officer's report and sentenced Scaggs to be confined in state prison for the term prescribed by law. His motion for bail pending appeal was also denied. Execution of the sentence was stayed through May 31.

On May 29, a second motion for bail was made. It was argued that Scaggs owned a hotel which was being converted into apartments and that it was mortgaged in the amount of $72,000 and would be lost by foreclosure unless he were admitted to bail. The motion was denied.

On July 13, Scaggs made a third motion for bail, and, by way of indicating additional circumstances which had arisen after the court's ruling on May 29, he pointed to the illness of his wife, who was in the hospital for surgery, and to our decision in Application of Friedman (In re Brumback), 46 Cal.2d 810, 299 P.2d 217. In again denying the motion, the court stated, "Well, as I read the Brumback case, they hold what we felt was the law at the time of the original ruling on this application for bail. The trial court had it within its discretion to admit or deny admission to bail on appeal. * * * The Court exercised its discretion at that time and, in consideration of all the circumstances, decided that no order fixing bail would be made. * * * I don't think the situation has changed, at all. Nothing substantial has been brought to the attention of the Court that would warrant granting of bail to this Defendant." In response to a remark by counsel that the court had stated that granting bail "in these cases" was contrary to its policy, the court said, "In this type of case. * * * Where the facts were as they appeared in this case, I would not grant bail."

[1] Before conviction, a defendant charged with a felony not punishable with death is entitled to be admitted to bail "as a matter of right," but, after conviction, his admission to bail is a "matter of discretion," unless only a fine is imposed. Pen. Code, §§ 1270, 1271, 1272.[1] This important difference in the status of a defendant before and after conviction is one of long standing in both the statutes and judicial decisions of California and arises from the fact that, upon conviction, the defendant loses the benefit of the presumption of innocence and is presumed to be guilty. Crim.Prac.Act (1851), §§ 509, 510, 512; Ex parte Voll, 1871, 41 Cal. 29, 32 (holding that, so far as cases *after conviction* were concerned, the provision of the 1849 Constitution, art. 1, § 7, that "All persons shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident or the presumption great" was not intended to alter the common-law rule that applications for bail were addressed to the discretion of the court); Ex parte Brown, 1885, 68 Cal. 176, 177, 8 P. 829 (reaching the same result with respect to that provision as incorporated, without change in language, in section 6 of article I of the 1879 Constitution).

[2] It is thus clear that Scaggs, having been convicted of a felony and sentenced to imprisonment, was not entitled to be admitted to bail as a matter of right but was compelled to address himself to the discretion of the court. In Application of Friedman (In re Brumback), 46 Cal.2d 810, 299 P.2d 217, after recognizing that the discretion in such a case belongs primarily to the trial court and is to be exercised in the light of all of the attending circumstances, we held that the trial court may not decline to exercise that discretion. Although the court in the present case used language on May 29 which might be construed as indicating that it was declining to exercise its discretion, it undertook to dispel any doubt in that regard by stating on July 13 that, in previously denying the motion for bail, it had applied the law as set forth in the Brumback case. In any event, it is immaterial whether the court failed to exercise its discretion on May 29, since the record shows that it did so on July 13 in making its final ruling on the motion for bail.

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[1] Section 1270 of the Penal Code provides: "A defendant charged with an offense punishable with death cannot be admitted to bail, when the proof of his guilt is evident or the presumption thereof great. The finding of an indictment does not add to the strength of the proof or the presumptions to be drawn therefrom."

Section 1271 of the Penal Code provides: "If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right."

Section 1272 of the Penal Code provides: "After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail:

"1. As a matter of right, when the appeal is from a judgment imposing a fine only.

"2. As a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor.

"3. As a matter of discretion in all other cases."

[3, 4] There remains the question of whether the refusal to admit Scaggs to bail constituted an abuse of discretion. Although, as we have said, the primary purpose of bail is to assure the presence of the defendant in court when required, see Application of Friedman (In re Brumback), 46 Cal.2d 810, 813, 299 P.2d 217, it does not, of course, follow that other matters may not be considered in determining whether a convicted defendant should be retained in custody pending his appeal. Obviously, one important consideration is whether there is any danger that, if released, he would continue to commit crime. In an affidavit filed in this proceeding, Judge Caulfield, who presided at the trial and denied the motions for bail, states that there were "strong indications that he [Scaggs] had engaged in other criminal activities before, during and even after the trial." As additional factors upon which his denial of the motions was based, Judge Caulfield includes the unfavorable recommendation of the probation officer, the fact that, after his conviction, Scaggs was at liberty for several weeks during which he had an opportunity to put his affairs in order, the judge's view that there was no convincing evidence to support the claim of economic hardship, and his belief that no substantial errors in the trial of the case would be shown on appeal. We are satisfied that there was no abuse of discretion in refusing to admit Scaggs to bail.

The order to show cause is discharged, and the writ is denied.

SHENK, TRAYNOR and SPENCE, JJ., concur.

McCOMB, J., concurs in the order denying the writ.

CARTER, Justice.

I dissent.

It appears from the record before us that Pleas Scaggs was found guilty of violating the provisions of section 496 of the Penal Code (receiving and withholding certain stolen property) in the Superior Court of the City and County of San Francisco on March 27, 1956. A motion for new trial was made and denied on April 4, 1956 and Scaggs was sentenced to prison for the term prescribed by law on May 15, 1956. He was granted a stay of execution until May 31, 1956. Notice of appeal from the judgment of conviction was filed on May 21, 1956 and the appeal is being diligently prosecuted. Application for probation was made and denied. On the day sentence was pronounced, a motion was made in the trial court for an order admitting Scaggs to bail pending appeal. This motion was summarily denied. On May 29, 1956, a second motion for the admission of Scaggs to bail pending appeal was made in the trial court and the record discloses the following:

"Mr. Duane: Well, first of all, your Honor please, the matter of health is not involved in this, at all, but that is not the law. As the Court has said that where a condition is so serious that bail should be granted, then it should be granted.

"The Court: Well, health isn't involved here.

"Mr. Duane: No part of this. This is a matter purely within your Honor's discretion, that is all.

"The Court: *Within the limits set down by the decisions.*

"Mr. Duane: What is that, your Honor?

"The Court: *Within the limit set down by the decisions. One is newly discovered evidence and the other is health.*

"Mr. Duane: Yes, that is right, and also, any others.

"The Court: I will state right now that I don't consider health a very controlling cause, because they can secure just as good if not better medical care in custody, as they can out.

"Mr. Duane: That is right, but aside from that, Counsel is incorrect when he says that this work has been going on for four years; that is not true. I have gone up there, seen the place. I know what goes on and I know Scaggs himself has been working there and he has workmen there, but since this thing happened he hasn't been able to pay any help and he has got this tremendous deed of trust staring him in the face, right now.

"The Court: Economic hardship is not one of the reasons for exercising discretion.

"Mr. Duane: No, except this, if the Court please, the courts have held that where there are extraordinary circumstances—it doesn't go into detail as to what the circumstances may be—but there are a couple of cases referred to, propositions where a man was supposed to have been murdered and after the conviction he showed up and a couple of cases of that kind, but in this case, as I say, there is no one to take care of these affairs for him, to work out these obligations, and he will just lose $72,000 and he will lose the property.

"The Court: The matter is submitted?

"Mr. Berman: Submitted.

"The Court: Mr. Duane, you appeal to the Court's fairness. There is a rule of moral law, I understand, that we have to be just before we are generous and there is a rule of law that controls the Court that we have to conform to the law before we consider any other element.

"Mr. Duane: That is right, and the law presumes fairness in laying down its principles.

["The Court:] The case we have before us is a case of a convicted felon. All the presumptions of innocence are gone. I was fair to him. I didn't order him into custody immediately upon conviction. I could have done that. I had this other situation in mind. I also had in mind the fact that his accomplice in crime, Mr. Randolph, was at liberty and I didn't see fit to take his liberty away from him at that time. And I assume that the six or seven weeks he had from the time he became a convicted felon until sentence was formally passed upon, that he would act as a prudent man and get his business affairs in order, if his business affairs are of such shape that he is going to be prejudiced by going to San Quentin. That situation is of his making; not of yours or of mine.

"Mr. Duane: Well, it is only a question of permitting him to remain at liberty.

"The Court: I know that, but justice delayed is justice denied and I am not going to be a party to this man's—a convicted felon—roaming the streets for a month or two months until this case is decided on appeal.

"The motion for bail is denied." (Emphasis added.)

On July 13, 1956, counsel for Scaggs again moved the trial court that Scaggs be admitted to bail pending appeal, and the record discloses the following:

"Mr. Duane: There are only two new features in it. One is that Mrs. Scaggs, the wife of the Defendant, is in the hospital for an operation and in view of the Supreme Court decisions on the Brumback case we feel that we have a good meritorious argument in support of our application.

"The Court: Well, as I read the Brumback case, they hold what we felt was the law at the time of the original ruling on this application for bail. The trial court had it within its discretion to admit or deny admission to bail on appeal.

"Mr. Duane: Yes.

"The Court: The Court exercised its discretion at that time and, in consideration of all the circumstances, decided that no order fixing bail would be made.

"Now, the only additional features you bring to the Court's attention this morning are, first, the illness of Mrs. Scaggs, and second, the Brumback decision.

"Mr. Duane: Well, the other matters have been gone into.

"The Court: Yes.

"Mr. Duane: I have set up there the financial condition, the loss of this hotel business, loss of the property, the whole thing. There is some $64,000 involved in it and he will lose the whole thing. Now, it is not going to do anyone any harm to permit him to remain on bail pending the appeal, at which time he can get his affairs all cleared up.

"The Court: I don't think the situation has changed, at all. Nothing substantial has been brought to the attention of the Court that would warrant granting of bail to this Defendant.

"Mr. Duane: Well, your Honor made the statement that it was contrary to your policy to grant bail in these cases.

"The Court: In this type of case.

"Mr. Duane: Yes.

"The Court: Where the facts were as they appeared in this case, I would not grant bail.

"Mr. Duane: And I don't believe that is a proper use of discretion, frankly.

"The Court: Well, you can ask the Appellate Court to review the Court's discretion. That is perfectly proper. That would be a proper exercise of discretion on your part."

Thereafter application for a writ of habeas corpus for and on behalf of Scaggs for bail on appeal was submitted to the District Court of Appeal and denied without an opinion.

On September 7, 1956, petition for a writ of habeas corpus for bail on appeal on behalf of Scaggs was presented to this court and an order to show cause why he should not be admitted to bail was issued and the matter came on for hearing before this court on October 10, 1956.

The record before us discloses that Scaggs has been for many years a resident of the City and County of San Francisco and is the owner of real property of the estimated value of $100,000; that he is married and lives with his wife in an apartment owned by him; and that he has no prior criminal record.

At the hearing before this court the attorney general presented the affidavit of Honorable C. Harold Caulfield, the judge who presided at the trial of Scaggs and ruled on the various motions for the admission of Scaggs to bail. In said affidavit the judge states as follows:

"At the time of sentence a motion for defendant Scaggs' release on bail pending appeal was presented and urged on the ground that he was engaged in converting a hotel into an apartment house, that this work was incomplete, and that economic hardship and financial loss would result unless he were allowed to remain on bail. I gave careful consideration to the representations thus made and the evidence in support thereof. The record shows that the work referred to had been in slow process for several years and nothing about it appeared to be so unique as to prevent adequate arrangements for its conservation and supervision from being made. The defendant's wife and others made personal representations to the court in connection with this claim of economic hardship, but neither the claim nor the representations thus made were supported by substantial, convincing evidence. On the other hand I considered the probation report, the apparent unreliability and dishonesty of the defendant, and certain strong indications that he had engaged in other criminal activities before, during and even after the trial, as factors weighing against his release. Lastly, in my judgment there were no such substantial errors of law involved in this trial as to present a substantial issue on appeal.

"Considering all these factors, it was determined that the interests of society would best be served by ordering the defendant into custody and such order was made on May 15, 1956.

"It was thereafter represented that the defendant required still further time in which to take care of his personal affairs, and although in my judgment he had had ample time to make such arrangements, he was granted a stay of execution for a period of 14 days to and including May 29, 1956.

"Subsequently there was presented an additional motion for an order fixing bail on appeal. This motion was based on the same representations which had previously been considered. Nothing new was presented. Under the circumstances of this case I did not find such alleged hardship a sufficient reason, considering the other factors involved, for permitting this defendant to be on bail pending appeal. In the exercise of my discretion I therefore denied the motion."

We have recently had before us a similar application in a very similar case, Application of Friedman (In re Brumback), 46 Cal.2d 810, 299 P.2d 217, 219, decided June 29, 1956, in which this court unanimously declared: "It is settled that the primary discretion belongs to the trial judge and that it is a sound legal discretion to be exercised in the light of all attending circumstances. [Citations.] *He should recognize that the primary purpose of bail, before or after conviction, is practical assurance that defendant will attend upon the court when his presence is required.* Where the trial judge has passed upon the merits of the application his ruling will not be disturbed unless a manifest abuse of discretion appears [citations] or 'circumstances of an extraordinary character have intervened since conviction, which make such action obviously proper.' * *

"There appears to be no case in which it has been held that this test limits the discretion of the trial judge. Were that rule applied as the trial judge did in this instance it would virtually nullify § 1272, subdivision 3, for it would preclude a successful early application for bail and necessitate defendant's serving part of his term in the penitentiary or sojourning in jail until some new and untoward and unexpected circumstance, like illness or discovery of new and convincing evidence, should eventuate. Absence of intervening extraordinary circumstances cannot prevent the trial judge from acting or excuse his failure to act although their presence properly may influence his discretion. It follows that the judge in the present instance mistakenly declined to exercise his discretion.

"It is true that the primary discretion in the matter of bail on appeal resides in the trial court but it is not correct to say that '[i]t always has been the law in this state that the discretion referred to in section 1272 of the Penal Code * * * is not a discretion conferred upon the appellate courts,' as stated in People v. Davis, 67 Cal.App.2d 837, 839, 155 P.2d 675, 676; and the cases cited on page 839 of 67 Cal.App.2d on page 676 of 155 P.2d do not support that proposition. There is no question of power here presented. The Constitution, art. VI, §§ 4 and 4b confers upon the Supreme Court and the District Courts of Appeal and each individual justice the right to issue the writ of habeas corpus, and Penal Code, § 1490, makes it a proper avenue for obtaining bail. The requirement of intervening extraordinary circumstances is a self-imposed criterion for the guidance of appellate courts and individual appellate justices in the exercise of a sound judicial discretion. The cardinal rule is that manifest abuse of discretion must appear as a basis for the exercise of a sound discretion by an appellate court or justice; the intervening circumstance test is a supplementary one designed to enable the court of review to do justice even though it has become too late for the trial judge to do so. It operates by way of enlargement of the concept of permissible discretion and not as a restriction upon the power of trial or appellate court. In any event that test is not exclusive. The trial judge may grant bail in his discretion though no intervening circumstance has occurred and the appellate court may act where an abuse of discretion appears regardless of the existence of intervening extraordinary circumstances. But if they have occurred affirmative action by the upper court may be appropriate though no abuse of discretion in the trial court appears. In the present instance no discretion was exercised below and no intervening circumstances now appear. Appellant is entitled to have his application considered on the merits but not in this court at this time." (Emphasis added.)

Applying the foregoing rules to the case at bar, I am of the opinion that the trial judge abused his discretion in refusing to admit Scaggs to bail pending appeal. The offense of which Scaggs was convicted is clearly a bailable offense (see Cal.Const. art. I, § 6; Pen.Code, § 1272). There is nothing in the record from which a reasonable mind could conclude that Scaggs, if admitted to bail in a reasonable sum, would not attend upon the court when his presence is required. In fact, the record discloses that Scaggs remained at large for a period of over two months after conviction upon the bail which he had posted prior to conviction. In my opinion it was a manifest abuse of discretion on the part of the trial judge to refuse to fix bail in any sum whatsoever in a case of this character. It is apparent from the remarks of the trial judge at the time he passed upon the various motions for the admission of Scaggs to bail, that he did not give consideration to the primary purpose of bail, but had in mind subjecting Scaggs to punishment forthwith regardless of the outcome of the appeal which he had taken from the judgment of conviction. At no time did the trial judge intimate that his reason for refusing Scaggs bail pending appeal was that he entertained the belief that Scaggs would fail to attend upon the court when his presence was required. It is obvious that the judge did not entertain such a belief because he permitted Scaggs to remain at large after conviction for over two months and over two weeks after pronouncing sentence on the bail which Scaggs had posted prior to trial. In fact the record discloses that the only reasons given by the trial judge for refusing Skaggs bail pending appeal were that he wanted him to go to prison pending appeal because "Justice delayed is justice denied and I am not going to be a party to this man's—a convicted felon—roaming the streets for a month or two months until his case is decided on appeal" and that it was against his policy to grant bail in cases of this character. He also stated in his affidavit that: "I considered the probation report, the apparent unreliability and dishonesty of the defendant, and certain strong indications that he had engaged in other criminal activities before, during and even after the trial, as factors weighing against his release. Lastly, in my judgment there were no such substantial errors of law involved in this trial as to present a substantial issue on appeal." I submit that the foregoing reasons are inadequate to justify the refusal to grant bail in a case of this character.

In my long years of experience in law enforcement it was my observation that it was not at all unusual for convicted persons to be admitted to bail pending appeal in cases of this character, and I have no recollection of any of such persons ever failing to attend upon the court when his presence was required. In my opinion the only realm for the exercise of discretion in a case such as this is the amount which the trial judge believes to be commensurate with the risk assumed by the admission of the prisoner to bail, and not whether bail should be granted or refused.

We may take judicial notice that many criminal cases are reversed on appeal; that some of the defendants in such cases are never retried and others are acquitted upon retrial. While it is true that every judgment of a court of record carries a presumption of validity, that presumption does not become conclusive until the judgment becomes final. A person convicted of a felony is not a felon as a matter of law until the judgment of conviction becomes final. Appellate courts were established to review judgments of trial courts and set aside those which were not obtained pursuant to the rules of law declared in the Constitution and statutes of this state, and every person convicted of a crime has the right of appeal, and when an appeal is validly perfected and prosecuted, his conviction is not final until it is affirmed on appeal. It is a salutary principle of American justice which the framers of both the federal and our state Constitutions wisely engrafted upon our fundamental law that all persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great, and that excessive bail shall not be required, Cal.Const., art. I, § 6. This principle has been embraced in the Declaration of Rights of our Constitution since its adoption and was intended as a fundamental safeguard to the liberty of the citizens of this state. It should be invoked and applied in all proper cases to the end that a person who is so unfortunate as to be unjustly convicted of crime may not be required to endure penal servitude until his conviction has become final.

For the foregoing reasons I would grant the writ of habeas corpus in the case at bar and order that Scaggs be released on bail in the sum of $10,000 pending his appeal from the judgment of conviction to which he is now subjected.

SCHAUER, Justice (dissenting).

In my view, upon the record presented to us, the defendant is prima facie entitled to be admitted to reasonable bail upon appeal. I find no factual basis for the implied finding that no conceivable amount of bail would secure the presence of defendant and his amenability to the process of the court when required. Neither does the record support any other tenable ground for denying bail. Certainly the indicated objective of punishing the defendant is not a valid ground for jailing him pending his appeal. Consequently, the absolute denial of an order fixing bail is an abuse of discretion (Cal.Const. art. I, § 6; Application of Friedman (In re Brumback) (1956), 46 Cal.2d 810, 299 P.2d 217).

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47 Cal.2d 396

ESTATE of Ralph LUCKSINGER, a/k/a Ralph L. Lucksinger, a/k/a R. Lucksinger, Deceased.

BANK OF AMERICA, as Executor, etc., Respondent,

v.

TAYLOR, TAYLOR & TAYLOR, Appellants.

Supreme Court of California.
In Bank.
Nov. 30, 1956.

Proceeding for settling the final account and report of executor, fixing payment of ordinary fees of executor and attorneys and ordering final distribution under will. The Superior Court, Stanislaus County, David F. Bush, J., entered order and attorneys for executor appealed. The Supreme Court, McComb, J., held that in fixing ordinary fees of attorney for executor, they should be based upon the statute in effect in time of settlement of account and making of order for compensation rather than statute in effect at date of testator's death.

Reversed in part and remanded and affirmed in part.

Executors and Administrators ⚷216(2)

In fixing the ordinary fees of attorneys for executor, they should be predicated upon the statute in effect at the time of settlement of account and making of order for compensation rather than on the basis of statute in effect at date of testator's death. West's Ann.Prob.Code, §§ 901, 910.

◆

Taylor, Taylor & Taylor, Modesto, in pro. per.

No appearance for respondent.

McCOMB, Justice.

This is an appeal from an order settling the first and final account and report of the executor and fixing payment of the ordinary fees of the executor and attorneys for the executor and ordering final distribution under the will of Ralph Lucksinger.

Chronology

i. Testator died December 28, 1953.

ii. At the time of his death section 901 of the Probate Code read in part as follows:

"The executor, when no compensation is provided by the will or he renounces all claim thereto, or the administrator, shall receive commissions upon the amount of estate accounted for by him, as follows: For the first thousand dollars, at the rate of seven per cent; for the next nine thousand dollars, at the rate of four per cent; for the next ten thousand dollars, at the rate of three per cent; for the next thirty thousand dollars, at the rate of two per cent; and for all above fifty thousand dollars, at the rate of one per cent."

iii. By an amendment to section 901 of the Probate Code, effective September 7, 1955, the fee schedule was increased as follows:

Size of Estate	Former Rates	New Rates
First $ 1,000	7%	7%
Next 9,000	4	4
Next 10,000	3	3
Next 30,000	2	3
Next 100,000	1	2
Next 350,000	1	1½
Over 500,000	1	1

iv. Section 910 of the Probate Code reads as follows:

"Attorneys for executors and administrators shall be allowed out of the estate, as fees for conducting the ordinary probate proceedings, the same amounts as are allowed by the previous article as commissions to executors and administrators; and such further amount as the court may deem just and reasonable for extraordinary services."

v. On September 14, 1955, the executor filed its first and final account and petition for ordinary fees of the attorneys for the executor.

vi. On October 11, 1955, the probate court settled the first and final account and ordered payment of ordinary fees for the attorneys for the executor calculated in accordance with the provisions of section 901 of the Probate Code in effect at the time of decedent's death. (See ii., supra.)

Question

In fixing the ordinary (statutory) fees of attorneys for the executor, should they be predicated upon the statute in effect at the time of settlement of the account and making of the order allowing compensation, or on the basis of the statute in effect at the date of the testator's death?

Fees for attorneys for the executor should be the amount of the statutory commissions in effect at the time of settlement of the account and making of the order allowing compensation, to wit, in the instant case, in accordance with the provisions of section 901 of the Probate Code as amended and effective September 7, 1955. (See iii., supra.) (In re Estate of Johnston, 47 Cal.2d 265, 303 P.2d 1.)

Since the probate court allowed attorneys' fees in accordance with the statute in effect at the date of decedent's death, this portion of the order was erroneous.

The order is reversed insofar as it fixes compensation of the attorneys for the executor upon the basis provided by law prior to September 7, 1955, and the cause is remanded with directions to the probate court to enter an order in accordance with the views expressed herein. In all other respects the order is affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

47 Cal.2d 406

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

William BRIDGEHOUSE, Defendant and Appellant.

Cr. 5913.

Supreme Court of California.

In Bank.

Nov. 30, 1956.

Defendant was convicted of second degree murder. The Superior Court, Los Angeles County, Joe Raycraft, J., entered judgment, and defendant appealed. The Supreme Court, Carter, J., held that evidence was insufficient to support conviction for second degree murder but was sufficient to support conviction for manslaughter.

Judgment modified and cause remanded with directions.

Spence, Shenk, and McComb, JJ., dissented.

Opinion, 296 P.2d 103, vacated.

1. Homicide ⇐39

Where defendant's wife was having an affair which had extended over a considerable period of time with deceased and wife would not approve of defendant commencing a divorce action and would not forego seeing deceased, and defendant, a man of excellent character, was mentally and emotionally exhausted when he unexpectedly saw deceased in home of defendant's mother-in-law, defendant shot deceased in such heat of passion as to be guilty, at most, of voluntary manslaughter and not second degree murder. West's Ann.Pen.Code, § 192, subd. 1.

2. Homicide ⇐33

"Voluntary manslaughter" is a willful act, characterized by the presence of an intent to kill engendered by sufficient provocation and by the absence of premeditation, deliberation and malice aforethought. West's Ann.Pen.Code, § 192, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Voluntary Manslaughter".

3. Homicide ⇐39

To be sufficient to reduce a homicide to manslaughter, "heat of passion" must be such as would naturally be aroused in the mind of an ordinary, reasonable person, under the given facts and circumstances, or in the mind of a person of ordinary self-control. West's Ann.Pen.Code, § 192, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Heat of Passion".

4. Homicide ⇐345

Where the evidence was legally insufficient to support judgment of conviction for second degree murder and was legally sufficient to support judgment of conviction for manslaughter, Supreme Court would not reverse judgment of conviction for second degree murder for prejudicial error in refusing instruction on defense of legal effect of unconsciousness, but would reduce the crime to that of manslaughter. West's Ann.Pen.Code, §§ 26, subd. 5, 192, subd. 1, 1181.

Eugene V. McPherson and Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and Elizabeth Miller, Deputy Atty. Gen., for respondent.

CARTER, Justice.

Defendant, William Bridgehouse, was convicted, after trial by jury, of second degree murder of William Bahr. His plea of not guilty by reason of insanity was tried, by stipulation, by the court and he was adjudged sane both presently and at the time of the commission of the crime. The appeal is from the judgment of conviction and the denial of his motion for a new trial.

Defendant who was thirty-one years of age, married Marylou Bridgehouse in 1951.

At the time of the crime, they had a son, Danny, who was two-and-a-half years old. Mrs. Bridgehouse had a son by a prior marriage who, at the time of the crime, was six-and-a-half years of age. At some time early in 1954, defendant met the deceased who was a part time bartender as well as a commercial fisherman and an engineer on construction work. Mrs. Bridgehouse had known Bahr for more than six years. After defendant met Bahr, he and his wife had discussed her relations with him over a period of "well over a year." Mrs. Bridgehouse told defendant she was having a love affair with Bahr and that she had stayed all night with him. For some six or seven months prior to the crime, defendant had worked at two jobs—from 3:30 p. m. until 11:30 p. m. he worked at the Los Angeles County Sheriff's Department as a deputy sheriff; and from midnight until seven in the morning, he worked at Air Research Manufacturing Company where he had been employed for some six or seven years. During the time he was working nights, Mrs. Bridgehouse told him that she was seeing Bahr at the family home, and other places. When defendant took the night position he had moved into a room in Los Angeles, returning to his home in San Pedro on his days off. The record shows that Mrs. Bridgehouse left the children at home alone, or that she took them with her to the bar where Bahr worked. There is testimony by defendant's neighbors that Bahr's car was often seen standing all night, or the major portion thereof, in front of the Bridgehouse home.

The defendant filed a suit for divorce from his wife in October, 1954. On January 4, 1955, he filed an application for a restraining order prohibiting Mrs. Bridgehouse from associating with, or cohabiting with Bahr in the presence of the parties' minor child. This was served on Mrs. Bridgehouse on January 7th. About January 7th, defendant resigned from the sheriff's department. On the same day he got his gun, which he had bought as a service weapon while with the sheriff's department, out of hock and loaded it in the pawn shop with the intention of selling it. On January 7th, after having been served with the restraining order, Mrs. Bridgehouse telephoned defendant asking him to see her in San Pedro. Defendant went to San Pedro, arriving there at approximately 10 o'clock on the morning of the 8th. When he reached the family home, he slept for a couple of hours. When he awoke, Mrs. Bridgehouse told him that she would fight his divorce action and would not hesitate to lie or use any other methods in so doing; that she would kill him if he tried to take the children away from her. During this discussion, defendant apparently gave his wife, at her request, two or three months to think things over and decide whether or not she wanted him or Bahr. After this discussion, defendant left the house and went to Manhattan Beach returning to his wife's home between 7 and 8 o'clock in the evening. Mrs. Bridgehouse was not there at the time but returned with the children sometime after 9:00 p. m. Defendant spent the night there, and the next morning Mrs. Bridgehouse at defendant's request finally consented to arrange a meeting between defendant and Bahr but would not agree to a time and place, and in answer to defendant's questions as to Bahr's whereabouts, told defendant she did not know where Bahr was.

The defendant and the parties' small son left the house. He intended to go to his room in Los Angeles and clean up and, after finding some socks for the boy, take a trip to the zoo. The defendant, prior to leaving the home in San Pedro, took his gun, which was on a shelf there, and put it in his belt. He went to his wife's mother's home in San Pedro where his wife had told him he could find some socks for the child. When the door was opened to him by his wife's grandmother, he went to his mother-in-law's bedroom where he was told by her that the socks were either in the pantry or hanging on the line. As he returned from the clothesline with the socks, he passed the den where he saw Bahr sitting on the davenport reading. Bahr was living there at the time. At this point, Mrs. Jennings, the grandmother, said that the child was getting out of the car, so defendant went through the front door of the house and put him back into the car. Upon defendant's return to the house, he was informed that the child was again getting out of the car. Defendant then went after the child and brought him in the house. His mother-in-law told him when he came in the bedroom, "Bill, you look white and shaking. I have something that I think will calm you down. Something the doctor gave me and I * * *." After this statement, Mrs. Huff went into the kitchen to get the defendant a glass of water and as she returned she heard the shots; that she thought there were five or six of them; that the defendant was firing them; that he was standing in front of Bahr who was standing in front of the sofa; that he started falling before the "end of the shots"; that she saw Bahr fall over the coffee table; that she ran and got the child and went to her bedroom where she sat, holding him. She testified that prior to going to the kitchen for the water she heard either defendant, or Bahr, say "Hi, Bill."

Defendant testified that he had purchased the gun as his "service weapon" for his work in the sheriff's department where it was required; that after getting it out of the pawn shop he had placed it on a top shelf in the San Pedro home; that when he left his wife's home he stuck it in his belt where it remained while he went into the Huff house; that he did not want to leave it in the car because of the child; that it would not fit in the glove compartment. He testified that when he went into the Huff house he was "Tired. Physically tired. Perhaps to the point of exhaustion." He said his mother-in-law said he looked as if he had been working too hard and that he was shaking and she would get him something. He said that he then walked over to where Bahr was sitting and that "It is very hazy, but I believe I spoke to him, and it is my recollection that at that time that I wanted to discuss my legal—the legal action that I was taking against him, and that I wanted to get it over with and get it out of my system and talk it out with him"; that he had no idea where Bahr was or that he was there until he saw him; that he seemed "to have a very vague memory of him springing from the couch"; that "As near as I can possibly reconstruct in my mind, the next thing I remember was pulling the trigger on the empty cartridges"; that "The whole action was of such an explosive nature, you might say, and so distorted by a haze of mental void, you might say, that a detailed remembrance of the whole action are very * * *"; that he believed he next walked into the kitchen, but didn't know how much later it was; that while being questioned by the officers "It is very difficult to recall. All I knew was that I was in considerable pain at the time. I had a great deal of difficulty in replying to the questions * * * as I remember, it [the pain] was in the region of the solar plexus or in the thoracic or chest region"; that he had never had any pains like that before; that many times in the past he had been so fatigued he had not been able to speak rationally. The officer who questioned him after the crime was committed, said he found defendant sitting at the kitchen table with his head in his hands; that he seemed to be in pain and upset; that he had difficulty in speaking and that his voice seemed to come in sort of a "gasp." Shortly after the crime, the defendant made the following statement to a police officer: "About this time I thought that I would tell Mr. Bahr what I wanted to tell him for a long time, that I didn't want him around my children, and I was really going to tell him off. I went out of the bedroom [belonging to Mrs. Huff] and across the living room to where Mr. Bahr was sitting on the divan. He looked up or started to stand up. I really don't remember what. As I stood in front of him, there was a table between us. I don't remember if I said anything or not before taking the gun out of my belt and shooting. I don't actually recall pulling the trigger. All I remember is that I realized my gun was clicking on empties."

The defendant's testimony showed that his mother had been committed to Camarillo State Hospital; that he still loved his wife and wanted her to give up Bahr and live with him and the children and that he thought the complaint for divorce and the order to show cause might force her to choose him and leave Bahr. The record also showed that defendant's wife and Bahr had a joint bank account which was known to defendant; that one of defendant's charge accounts had been used to buy a gift for Bahr; that defendant had found Bahr's clothing hanging in the closets of his home; that he had paid the entire support of his wife's son by her former marriage; that he thought of the child as his own son and treated him in the same way as he did his own son; that the child thought he was his father and called him "Daddy." He testified that he resigned his job in the sheriff's department because he felt the position was "detrimental to my family, and secondarily very detrimental to my health" since he was worn out physically; that he had tried many times to get Mrs. Bridgehouse to go to a marriage counselor in order to work out their difficulties. He testified that his wife had had a very unhappy childhood and unfortunate first marriage and that her emotional disturbances were caused thereby; that she didn't seem to want to lose him, nor did she want to give up Bahr. When defendant was asked what his feeling was concerning Bahr, he answered: "I tried very much to make a non-entity out of him in my own mind, in my mind's eye. I knew from various sources that he was not the kind of person whom I could consider an upright, solid citizen. I knew that you can't force an adult to do something or not to do something against their will. I had to leave the decision up to Mary, and, yet, as I say, I also had my duty and my sacred oath [his marriage vows] and my regard for my children to consider."

During the trial defendant was asked what his emotions were when he saw Bahr in his mother-in-law's home. He said: "It is a very difficult thing to describe. I recall trying to discuss it. I believe it was with Officer Butts during one of our interrogations. It was a feeling of great shock. He was living in my mother's house, or in my mother-in-law's house or that she was virtually acting as a panderer you might say, and that the dreadful situation had gone as far as it had." He also said that his pallor and shakiness might have come from the shock he sustained at finding Bahr living in Mrs. Huff's home. He testified that he really didn't believe he resented Bahr or felt angry toward him. He also testified that on the morning of the Sunday in question, he had asked his wife to go skiing with him, but that she had refused, saying she was going fishing with her mother and that probably Bahr would be along later.

There is very little discrepancy between defendant's three statements to police officers and his testimony while on the stand. In all statements, as well as in his testimony, he stated that he did not remember what he had done with the gun after the shooting. Perhaps the only real difference is in a statement signed by him and prepared from a series of questions and answers in which he said that he had not taken time to aim but had just kept on shooting, while in another statement, and in his testimony, he said he remembered only the trigger clicking on empty cartridges. He also testified that he did not actually remember pulling the gun from his belt; that he was not conscious at any time of any bullets exploding. During defendant's testimony he repeatedly stated that he was not sure what he actually remembered as having taken place in Mrs. Huff's home on the day of the crime and what he had decided must have taken place from questions asked of him and statements made to him. He stated at the trial that he had no actual recollection of reading the statements attributed to him before signing the paper.

There is no evidence in the record that defendant ever made any threatening remarks to, or about Bahr, or even any remarks showing resentment toward Bahr because of his love affair with Marylou Bridgehouse. All the evidence in the record shows that defendant's reputation for peace and quiet both at work and in the neighborhoods in which the parties had lived was "very good" and "extremely good"; that he was a good father and loved his children, took care of them, and played with them whenever he had an opportunity.

Defendant's contentions are that the evidence is insufficient to sustain the judgment and that it was prejudicial error for the trial court to refuse to give his requested instruction on the legal effect of unconsciousness. Pen.Code, § 26, subd. Five.[1]

[1–3] We are of the opinion that defendant's contention that the evidence is insufficient to sustain the judgment of second degree murder is meritorious and that the evidence, as a matter of law, shows that the defendant was guilty, at most, of voluntary manslaughter. Voluntary manslaughter is a wilful act, characterized by the presence of an intent to kill engendered by sufficient provocation and by the absence of premeditation, deliberation and (by presumption of law) malice aforethought. Penal Code, section 192, subdivision 1, defines voluntary manslaughter as the unlawful killing of a human being, without malice "upon a sudden quarrel or heat of passion." To be sufficient to reduce a homicide to manslaughter, the heat of passion must be such as would naturally be aroused in the mind of an ordinary, reasonable person, under the given facts and circumstances, or in the mind of a person of ordinary self-control. People v. Valentine, 28 Cal.2d 121, 169 P.2d 1; People v. Danielly, 33 Cal.2d 362, 202 P.2d 18. The evidence here shows, without conflict, that defendant's wife was having an affair which had extended over a considerable period of time with the deceased; that she would neither approve of the defendant commencing an action for divorce nor would she forego seeing the victim of the crime; that the sight of the victim in his mother-in-law's home was a great shock to the defendant who had not expected to see him there or anywhere else. This court said in People v. Kelley, 208 Cal. 387, 393, 281 P. 609, 611, in reducing the degree from first degree murder to manslaughter, "That a crime was committed, and that the appellant committed it, are firmly established by this record. We have therefore concerned ourselves with the degree or the extent of the crime which was committed. The injuries inflicted on Mrs. Mellus, and from the effects of which she died, were disgusting, bestial and shocking. But there is nothing in the record from which it may with reason be argued that they were inflicted with that intent or that malice aforethought which is a necessary ingredient of the crime of murder. Nor can we bring ourselves to believe that there was a willful, deliberate and premeditated killing. The prosecution, the defense, and all others connected with the cause are so familiar with the crime that an analysis of the evidence seems unnecessary. No express malice was shown, for there was not manifested a deliberate, or any, intention to unlawfully take the life of a fellow creature, and the circumstances attending the killing in this case, as proved, do not show an abandoned and malignant heart." In the case at bar, there was no malice shown, either express or implied; there was no showing of any premeditation, either express or implied; there was no evidence of an "abandoned and malignant heart." There was ample, uncontradicted, evidence that defendant was a man of excellent character; that he was mentally and emotionally exhausted and was white and shaking. It appears to us, as a matter of law, that under the circumstances here presented there was adequate provocation to provoke in the reasonable man such a heat of passion as would render an ordinary man of average disposition likely to act rashly or without due deliberation and reflection. People v. Logan, 175 Cal. 45, 49, 164 P. 1121.

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[1] § 26. [Who are capable of committing crimes.] "All persons are capable of committing crimes except those belonging to the following classes: * *

"Five—Persons who committed the act charged without being conscious thereof. * * *"

[4] We are not unaware of defendant's second contention that although he offered four instructions on the legal effect of unconsciousness[2] which he relied upon as a defense no such instruction was given. An instruction on that subject should have been given. As this court said in People v. Kelley, supra, "Were we compelled, as formerly, to either affirm the judgment or reverse the case, we would be driven to the latter course" because of this prejudicial error. However, we have concluded that we must exercise the power conferred upon us by section 1181 of the Penal Code and reduce the degree of the crime from second degree murder to that of manslaughter. People v. Kelley, supra; People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385; People v. La Fleur, 42 Cal. App.2d 50, 108 P.2d 99; People v. Castro, 37 Cal.App.2d 311, 99 P.2d 374; People v. Slater, 60 Cal.App.2d 358, 140 P.2d 846; People v. Daniel, 65 Cal.App.2d 622, 151 P.2d 275; People v. Ross, 34 Cal.App.2d 574, 93 P.2d 1019; People v. Moreno, 6 Cal.2d 480, 58 P.2d 629; People v. Holt, 25 Cal.2d 59, 153 P.2d 21; People v. Tubby, 34 Cal.2d 72, 207 P.2d 51.

We conclude, therefore, that the evidence is legally insufficient to support a judgment of second degree murder but that it is legally sufficient to support a judgment of manslaughter.

The judgment of the trial court of second degree murder is modified and the cause remanded to the trial court with directions to enter judgment against defendant finding him guilty of manslaughter and thereupon to pronounce judgment upon him as prescribed by law.

GIBSON, C. J., and TRAYNOR and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

The majority concludes that the offense should be reduced from second degree murder to manslaughter upon the authority of People v. Kelley, 208 Cal. 387, 281 P. 609. The cited case is clearly distinguishable. From the summary of the testimony in the majority opinion, it appears that there was ample evidence here from which the jury could infer that defendant had a definite motive for killing his victim, that he had deliberately made preparation for such killing, and that the killing was thereafter accomplished with "malice aforethought" and at the first opportunity. Pen.Code, § 187. There was no comparable evidence in the Kelley case to support any one of the above-mentioned inferences. I am therefore of the view that the Kelley case is not controlling, and that the evidence in this case is sufficient to sustain the conviction of second degree murder. Pen.Code, §§ 187, 189. In fact, said evidence appears to be sufficient to sustain an inference that defendant's act constituted a "wilful, deliberate, and premeditated killing," but these elements are only required in sustaining a conviction of first degree as distinguished from second degree murder. Pen.Code, § 189.

With respect to the alleged error in the failure of the trial court to give an instruction, I find no evidence to support the theory that defendant was unconscious at the time of the killing. Defendant was asked: "You believe that in your condition, as you were that Sunday morning, that you were capable of thinking correctly and rationally?" He testified in reply: "I thought so at the time. I rather doubt it now." While defendant professed at the trial to be somewhat hazy in his recollection concerning the events of the morning of the killing, he did not testify at any time that he was unconscious at the time of the killing. If, however, there could be found any basis for the majority's conclusion that the evidence was such as to require an instruction on the subject of unconsciousness, then the majority should reverse rather than reduce the crime to manslaughter, as a person who does an act "without being conscious thereof" does not commit voluntary manslaughter or any other crime by the doing of such act. Pen. Code, § 26, subd. 5.

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[2] Penal Code, § 26, subdivision 5.

I would affirm the judgment and the order denying a new trial.

SHENK and McCOMB, JJ., concur.

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47 Cal.2d 438

The PEOPLE of the State of California, Respondent,
v.
Clifford JEFFERSON, Appellant.
Cr. 5931.

Supreme Court of California.
In Bank.
Dec. 4, 1956.

Rehearing Denied Jan. 3, 1957.

Defendant was convicted in the Superior Court of Sacramento County, Grover W. Bedeau, J., of assault with deadly weapon by life prisoner, and he appealed. The Supreme Court, McComb, J., held that defendant, sentenced for second degree murder which carried punishment of from five years to life, was undergoing a life sentence when he committed assault, though Adult Authority could fix sentence at a lesser term, when Authority had not so acted at time of the assault.

Affirmed.

1. Indictment and Information 🔑137(3)

Grand jury foreman's alleged noncompliance with statute requiring request for prejudiced grand jurors to retire, is not ground for setting aside indictment. West's Ann.Pen.Code, §§ 907, 995, subds. 1, 2.

2. Indictment and Information 🔑10.2(9)

Showing before grand jury that defendant was one of men who had a knife, and inflicted knife wounds upon another prisoner, constituted reasonable or probable cause for indictment for assault with deadly weapon by life prisoner. West's Ann.Pen.Code, § 4500.

3. Constitutional Law 🔑250, 270
Criminal Law 🔑1206(1)

The statute fixing death penalty for assault by life prisoner with deadly weapon does not deny due process of law or equal protection of laws. West's Ann.Pen. Code, § 4500; West's Ann.Const. art. 1, § 11; U.S.C.A.Const. Amend. 14.

4. Convicts 🔑5

One who had been sentenced for second degree murder, which carries punishment of from five years to life, was undergoing "life sentence" when he committed assault with deadly weapon so as to be subject to death penalty, though Adult Authority could fix sentence as lesser term, where Authority had not so acted at time of the assault. West's Ann.Pen.Code, §§ 190, 4500.

See publication Words and Phrases, for other judicial constructions and definitions of "Life Sentence".

5. Convicts 🔑5

Certified copy of judgment and commitment for second degree murder, together with testimony of Secretary for Adult Authority that records disclosed that Authority had not fixed any terms for defendant, and defendant's admission that his term had not been fixed by Authority on date of his assault on fellow prisoner, was sufficient evidence to sustain finding that defendant was undergoing life sentence at time of assault. West's Ann.Pen.Code, §§ 190, 4500.

6. Convicts 🔑5
Criminal Law 🔑755

In prosecution for assault with deadly weapon by life prisoner, instruction that prisoner confined for a term with maximum of life is serving a life sentence until term is legally reduced, that second degree murder is punishable by term with maximum of life imprisonment, and that jury should find that defendant was serving a life sentence if it found that he was legally serving a sentence for second degree murder and that his term had not been reduced, was correct and did not invade province of jury. West's Ann.Pen.Code, §§ 190, 4500.

7. Criminal Law 🔑795(1)

In prosecution for assault with deadly weapon by life prisoner, refusal of requested instructions relating to lesser included offenses and defining assault was not error. West's Ann.Pen.Code, §§ 190, 4500.

8. Statutes 🔑212.1

When Legislature re-enacted section of Penal Code relating to assault with deadly weapon by life prisoner, in the same wording as that in former section, it presumably knew of prior decisions construing the section, including decisions against giving instruction on included offenses in prosecutions thereunder, and used the same language intending that it be given the same meaning. West's Ann.Pen.Code, § 4500.

9. Criminal Law 🔑1167(1)

There was no prejudicial variance between indictment charging in statutory language an assault by life prisoner with "a" deadly weapon or instrument, and proof that defendant and another assaulted fellow-prisoner with two knives, where there was substantial evidence that one of blood-stained knives subsequently found was used by defendant. West's Ann.Pen.Code, § 4500.

10. Criminal Law 🔑429(3)

Offer in evidence of copies of sections of Penal Code was properly refused, since statutes were not evidentiary matters but presented questions of law upon which trial judge could instruct jury. West's Ann.Pen.Code, §§ 190, 1168, 1823, 1875, subd. 2, 3020, 3023, 5077.

11. Criminal Law 🔑304(9)

Courts take judicial notice of the laws of the state. West's Ann.Pen.Code, §§ 190, 1168, 1823, 1875, subd. 2, 3020, 3023, 5077.

12. Criminal Law 🔑939(3)

In prosecution for assault with deadly weapon by life prisoner, denial of new trial sought on ground of newly discovered evidence, consisting in exculpatory affidavits of other participants in the affray, was not an abuse of discretion where defendant's counsel must have known of affiants' part in the offense and could have elicited testimony from them at trial, and it was clear that trial judge disbelieved affidavits.

13. Criminal Law 🔑938(1), 1156(3)

Applications for new trial based upon newly discovered evidence are addressed to trial court's sound discretion, and in absence of clear showing of abuse thereof, trial court's ruling will not be disturbed on appeal.

Douglas R. Greer and Richard A. Case, Sacramento, under appointment by the Supreme Court, for appellant.

Edmund G. Brown, Atty. Gen., and Doris H. Maier, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

This is an automatic appeal from a judgment of guilty of violating section 4500 of the Penal Code (assault with a deadly weapon by a prisoner undergoing a life sentence in a state prison)[1] after trial by a jury. There is also an appeal from the order denying defendant's motion for a new trial.

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[1] Section 4500 of the Penal Code reads: "Every person undergoing a life sentence in a State prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, is punishable with death."

On September 13, 1955, defendant, an inmate of Folsom State Prison undergoing a life sentence, assaulted with a deadly weapon another prisoner, Leonard Thompson.

Questions

First: Did the trial court err in denying defendant's motion to set aside the indictment?

[1] *No.* Section 995 of the Penal Code provides two grounds for setting aside an indictment: "1. Where it is not found, endorsed, and presented as prescribed in this code. 2. That the defendant has been indicted without reasonable or probable cause."

Defendant contends that the trial court erred in failing to grant his motion to set aside the indictment because the foreman of the grand jury did not comply with the provisions of section 907 of the Penal Code.[2]

Section 995, subdivision 1, of the Penal Code has been interpreted as applying only to those sections in part 2, title 5, chapter 1, of the Penal Code beginning with section 940. (People v. Colby, 54 Cal. 37; People v. Kempley, 205 Cal. 441, 447, 271 P. 478.)

In People v. Kempley, supra, this court held an indictment was not subject to attack under the provisions of section 995 of the Penal Code because of noncompliance with the requirements of section 907 of the Penal Code. It said, 205 Cal. at page 447, 271 P. at page 481: "The provisions of the foregoing section were not complied with; but the neglect or failure of the foreman to comply therewith is not made a ground for setting aside the indictment by section 995 of the Penal Code, and section 907 contains within itself the penalty for the violation of its provisions."

This rule is applicable to the facts of the present case.

[2] The record before the grand jury disclosed that Thompson was waylaid by three men, two of whom had knives. Defendant was one of the men who had a knife, and he inflicted knife wounds upon Thompson. From this evidence it appears that the requirements of section 995, subdivision 2, of the Penal Code were satisfied since there was reasonable ground for the grand jury's conclusion that defendant had violated section 4500 of the Penal Code. It is evident that the ruling of the trial court was correct.

Second: Is section 4500 of the Penal Code unconstitutional in that it results in a denial of due process of law and equal protection of the laws?

[3] *No.* This court has upheld the constitutionality of the statute in People v. Berry, 44 Cal.2d 426, 430 [1], 282 P.2d 861, and People v. Wells, 33 Cal.2d 330, 335 et seq. [2a]–[3], 202 P.2d 53.

Third: At the time of the assault was defendant undergoing a life sentence for murder in the second degree?

[4] *Yes.* At the time of the assault defendant was serving a sentence for murder in the second degree, which carries a punishment of from five years to life. (Pen.Code, § 190.) The Adult Authority may fix this sentence at a lesser term than life. However, at the time of the assault here involved it had not so acted. Therefore, under the settled law of this state defendant was undergoing a "life sentence" when he committed the assault. (People v. Smith, 36 Cal.2d 444, 445 [1], 222 P.2d 719; People v. McNabb, 3 Cal.2d 441, 444 [1], 45 P.2d 334; People v. Wells, 33 Cal.2d

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[2] Section 907 of the Penal Code reads: "Before considering a charge against any person, the foreman of the grand jury shall state to those present the matter to be considered and the person to be charged with an offense in connection therewith, and direct any member of the grand jury who has a state of mind in reference to the case or to either party which will prevent him from acting impartially and without prejudice to the substantial rights of the party to retire. Any violation of this section by the foreman or any member of the grand jury is punishable by the court as a contempt."

330, 334 [1], 202 P.2d 53; People v. Finley, 153 Cal. 59, 62, 94 P. 248.)

Fourth. Was the evidence sufficient to justify a finding that defendant was "undergoing a life sentence"?

[5] *Yes.* The custodian of records at Folsom State Prison produced a certified copy of the judgment and commitment under which defendant was held. This judgment of the Superior Court of Kern County, entered on the 20th day of May, 1949, showed that defendant was guilty of murder in the second degree and was sentenced to the state prison for the term prescribed by law.

The custodian testified that he acted as secretary for the Adult Authority at Folsom State Prison. He said the records disclosed the Adult Authority had not fixed any term for defendant.

In addition, defendant admitted he knew his term had not been fixed by the Adult Authority on the date of the assault.

This constituted substantial evidence to sustain the jury's finding that defendant was at the time of the assault " 'undergoing a life sentence.' " (See People v. Wells, 33 Cal.2d 330, 337–338 [4a]–[4b], 202 P.2d 53, 58.)

Fifth: Did the trial court commit prejudicial error in instructing the jury as follows:

"Section 5077 of the Penal Code of California provides, so far as pertinent in this case, that the fixing of sentences shall be determined by the Adult Authority.

"Every prisoner confined in a state prison of the State of California for a term, the maximum of which is life, is in legal effect, serving a life sentence in such state prison until and unless his term is legally reduced to a term less than life.

"A violation of Penal Code Section 187, to wit, Murder of the Second Degree, is punishable by a term the maximum of which is life imprisonment.

"If, therefore, you find from the evidence, to a moral certainty and beyond a reasonable doubt that the defendant, Clifford Jefferson, was, on the 13th day of September, 1955, legally serving a sentence in the state prison of the State of California at Folsom, for a violation of Penal Code Section 187, murder of the second degree, and that his term had not, prior to said date, been reduced to a term of less than life, it is your duty to find that the said defendant, Clifford Jefferson, was then and there serving a life sentence and you should so find."

[6] *No.* The instructions did not take from the jury the question: Did it believe from the evidence that at the time of the assault defendant was serving a sentence for murder in the second degree, the term for which had not been fixed by the Adult Authority? This was the extent of the factual determination to be made by the jury. The length of the punishment imposed by statute for second degree murder was one to be given to the jury by the court as a matter of law. The instruction was correctly stated and finds full support in People v. McNabb, supra; People v. Wells, supra; and People v. Berry, 44 Cal.2d 426, 430 [2], 282 P.2d 861.

People v. Oppenheimer, 156 Cal. 733, 106 P. 74, and People v. Carson, 155 Cal. 164, 99 P. 970, decided before the enactment of the indeterminate sentence law, are not applicable in this case.

Sixth: Did the trial court err in refusing to give instructions requested by defendant relating to lesser included offenses?

[7] *No.* Defendant contends that the trial court committed prejudicial error when it refused to give his proposed instructions (a) relating to lesser offenses, (b) relating to included offenses or attempts, and (c) defining "assault."

In People v. Finley, 153 Cal. 59, 63, 94 P. 248; People v. Carson, 155 Cal. 164, 175, 99 P. 970; and People v. Oppenheimer, 156 Cal. 733, 737, 106 P. 74, decided under Penal Code section 246 (the predecessor of section 4500 of the Penal Code), a contention similar to that made by defendant here was held untenable.

In People v. Carson, supra, 155 Cal. at page 169, 99 P. at page 971, this court held that section 246 of the Penal Code, which read: " 'Every person undergoing a life sentence in the state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death,' " was not unconstitutional.

It held the section neither denied to a defendant the equal protection of the law guaranteed by the fourteenth amendment to the Constitution of the United States, nor contravened the provisions of section 11 of article I of the state Constitution declaring that all laws of a general nature shall have a uniform operation. (See also People v. Finley, 153 Cal. 59, 62, 94 P. 248; People v. Quijada, 154 Cal. 243, 246, 97 P. 689.)

[8] When the Legislature enacted section 4500 of the Penal Code in the same wording as that in the former section 246 of the Penal Code, it presumably knew of the prior decisions construing the section and thus used the same language intending that it be given the same meaning. (People v. Berry, 44 Cal.2d 426, 430 [1], 282 P.2d 861; People v. Superior Court, 118 Cal. App.2d 700, 703 [2], 258 P.2d 1087.)

Seventh: Was there a prejudicial variance between the charge in the indictment and the proof adduced?

[9] *No.* The indictment was framed in the words of section 4500 of the Penal Code. The evidence disclosed that two persons, Carter and defendant, assaulted Thompson with knives, inflicting 14 or 15 wounds. Defendant was seen stabbing Thompson with *a knife* and running from the vicinity of the fracas to the Education Building. Two knives with fresh bloodstains were found in the Education Building, one under a water cooler and the other in the drafting room. Thus, regardless of which knife defendant used, there was substantial evidence to justify the jury's finding that one of them was used by him. From the evidence the jury could have concluded which particular knife was used by defendant in making the assault. There is, therefore, no variance between the indictment and the proof.

Eighth: Did the trial court err in refusing to admit in evidence sections 190, 1168, 3020, 3023 and 5077 of the Penal Code?

[10] *No.* Section 1823 of the Code of Civil Procedure defines "judicial evidence" as the means sanctioned by law of ascertaining in a judicial proceeding the truth respecting a question of fact.

[11] Section 1875, subdivision 2, of the Code of Civil Procedure provides that courts will take judicial notice of "whatever is established by law." Thus under the code provisions and under the general rules of law, courts take judicial notice of the laws of the state. (Peck v. Noee, 154 Cal. 351, 353, 97 P. 865.)

Defendant's offer in evidence of copies of the above sections of the Penal Code was properly refused. These were not evidentiary matters to be submitted to the jury, but presented questions of law upon which the trial judge could instruct the jury if such instructions were proper under the evidence. The record disclosed that the jury was fully and properly instructed as to the law upon all issues presented to it.

Ninth: Did the trial court err in denying defendant's motion for a new trial on the ground of newly discovered evidence?

[12] *No.* Affidavits of William Carter and Frank Williams in support of the motion purporting to exculpate defendant were filed. A counteraffidavit of Kenneth Wells was also introduced stating that William Carter had subsequently retracted his statement contained in the affidavit he had executed and which was offered by defendant.

The record discloses that counsel for defendant had full opportunity to present this matter at the time of the trial. Carter had already been convicted of being a participant in the same affray, and the evidence of Thompson on the stand disclosed that Williams was also a participant. Thus counsel for defendant was fully aware of the part these affiants played in the commission of the offense and could have elicited testimony from them at the time of the trial.

[13] Applications for a new trial based upon newly discovered evidence are addressed to the sound discretion of the trial court. In the absence of a clear showing of an abuse of discretion the trial court's ruling will not be disturbed on appeal. (People v. Smith, 36 Cal.2d 444, 449, 224 P.2d 719; People v. Ross, 120 Cal.App.2d 882, 889 [13], 262 P.2d 343; People v. Parkinson, 138 Cal.App. 599, 612 [4], 33 P.2d 18.)

It is clear that the trial judge disbelieved both the affidavits of Williams and Carter in support of the motion for a new trial. Since the question of weight and credibility to be attached to the affidavits was for the trial judge, defendant has failed to demonstrate any error or abuse of discretion.

The judgment and order are affirmed.

GIBSON, C. J., and SHENK, CARTER, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

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47 Cal.2d 398

Hazel L. CROGAN, Plaintiff and Respondent,
v.
Bert METZ, Vivian Metz, and Dewey Letsinger, Defendants and Appellants.
S. F. 19096.

Supreme Court of California.
In Bank.
Nov. 30, 1956.

Rehearing Denied Dec. 24, 1956.

Action by client against brokers to recover secret profits. The Superior Court of the City and County of San Francisco, Frank T. Deasy, J., rendered judgment for plaintiff and defendants appealed. The Supreme Court, Shenk, J., held that evidence authorized finding of existence of brokerage relation as to two defendants, but not as to the third, and that plaintiff was entitled to compensatory but not punitive damages.

Reversed in part, and in part modified and affirmed.

Opinion, 290 P.2d 930, vacated.

1. Pleading ⇨53(1)

A complaint may plead different theories on which relief is sought.

2. Pleading ⇨369(6)

Where several counts are each based on same allegations of fact, without contradictory or antagonistic facts, election as to which cause of action is sustained is, after taking all evidence, a matter for judge or jury if plaintiff makes no election or is not otherwise estopped.

3. Appeal and Error ⇨852

On appeal from judgment which could have been based on one of several theories raised by pleading, reviewing court has power to disregard particular theories and findings and to affirm on a theory which is supported by findings and evidence.

4. Appeal and Error ⇨931(1)

All intendments are in favor of judgment appealed from and reviewing court must accept as true the evidence which tends to establish correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by trial court.

5. Appeal and Error ⇨1010(1)

The test on appeal is not whether there is a substantial conflict in evidence but whether there is substantial evidence in favor of respondent.

6. Principal and Agent ⇨78(2)

Principal has right to waive agent's tort and recover secret profits made out of agency, in common count for money had and received. West's Ann.Civ. Code, § 3343.

7. Brokers ⇨37

Where three brokers arranged transaction among their respective clients in which one client's property was disposed of at valuation of $115,000, though all brokers knew that such client was willing to sell for $100,000, other client could recover from her broker and his associate the resulting $15,000 of secret profits.

8. Brokers ⚷8(3)

Evidence authorized finding of existence of broker relationship between plaintiff and two defendants, as basis for recovery of secret profits, but did not authorize such finding with respect to defendant who was merely the named promisee in plaintiff's note for commissions and named beneficiary in deed of trust securing such note.

9. Brokers ⚷37

In client's action against brokers to recover secret profits, client was entitled to compensatory but not punitive damages. West's Ann.Civ.Code, § 3294.

10. Damages ⚷89(2)

Punitive damages may not be granted in action based on breach of contract, even though breach was wilful or fraudulent. West's Ann.Civ.Code, § 3294.

11. Appeal and Error ⚷1151(2)

Where trial court erroneously awards both compensatory and exemplary damages for breach of contract, reviewing court may, instead of reversing the entire judgment, strike the portion relating to punitive damages and affirm the judgment as so modified.

Byron Arnold, George I. Hoffman, Lansburgh, Hoffman, Arnold & Schiller and Theodore M. Monell, San Francisco, for appellants.

Ralph Wertheimer, San Francisco, for respondent.

Chandler P. Ward, Los Angeles, as amicus curiae on behalf of respondent.

SHENK, Justice.

Separate appeals have been taken by the defendants from a judgment for the plaintiff in an action to recover secret profits in a real estate transaction.

The defendants Bert Metz and Dewey Letsinger and another real estate broker, William W. Mogan, shared office space in San Francisco but each carried on an independent real estate business. There is substantial evidence that, beginning in the early part of 1951, they engaged in the following activities.

The defendant Letsinger represented one Desiano who owned income property on Scott Street in San Francisco which he wished to sell for $165,000 net to himself, less a $5,000 bonus to Letsinger if he could arrange for the sale within a specified time. Letsinger's associate Mogan represented one Rinas who owned property on Bay Street which he wished to exchange for more valuable income property. Rinas had been unsuccessful in attempts to sell the property for $110,000 and even $100,000, and for purposes of exchange valued the property at $100,000. Accordingly Letsinger and Mogan attempted to arrange for an exchange of the Scott Street for the Bay Street property and $60,000 in cash but Desiano was not interested in acquiring additional property.

It became obvious that in order for Letsinger and Mogan to consummate negotiations on the terms required by their principals and to provide commissions for themselves it would be necessary for them to sell the Bay Street property at a price in excess of the $100,000 valuation placed on it by its owner, Rinas. Acting together they advertised it for $115,000. Desiano knew nothing of these activities. Rinas knew of the advertised price for his property but believed that no one would accept at that figure and that if a buyer was found that he, Rinas, would share in the increase over his named price.

Meanwhile the defendant Bert Metz learned of the pending transactions from his associates. He advised the plaintiff, a widow whom he had represented for a number of years, that he had an advantageous deal for her whereby she could acquire a valuable property in excellent condition for $115,000; that she could use property she owned on Fulton Street valued at $50,000 in partial payment on a trade, and that she probably could secure a loan upon the execution of a deed of trust on the Bay Street property for the difference. He assured the plaintiff that the owners were asking $115,000 and that they "wouldn't budge" from that price. She entered into an agreement with Metz wherein he was authorized to arrange for the exchange of her property according to the terms he suggested to her. No explanation was made to her by Metz that a multiparty transaction was involved, nor that a price of $15,000 over and above Rinas' demands had been set by the brokers so that they could recover their commissions from the fund which would be realized upon the consummation of all the transactions involved. The plaintiff agreed to execute a second deed of trust in favor of Metz in payment of his commission for services rendered to her.

The exchange of properties suggested by the plaintiff's offer of exchange would not, of course, supply the necessary funds to consummate the transaction contemplated. Accordingly, each of the three brokers participated in obtaining bids for the plaintiff's property and a purchaser, Mrs. Lukes, was found who was willing to pay $49,500 for it. On June 28, 1951, the transactions were closed by means of five grant deeds: The Scott Street property from Desiano to Rinas, the Bay Street property from Rinas to Desiano and from Desiano to the plaintiff, and the Fulton Street property from the plaintiff to Desiano and from Desiano to Lukes. In addition the following transfers of funds were made: Mrs. Lukes paid into escrow $49,500, the plaintiff paid $65,000, Rinas paid $60,000, and Desiano received $160,000 less minor costs and fees. Commissions paid through the title company to the three brokers totaled $11,984.50, including Letsinger's bonus. In addition to other commissions received by Metz the plaintiff executed her note to him, secured by a second deed of trust on the Bay Street property, in the sum of $3,000, $2,500 of which represented commissions. Certain other costs and fees absorbed the balance of the fund placed in the brokers' hands.

Letsinger and Metz testified that the three brokers had acted "in concert" and "as a team" in negotiating the "three cornered deal", and that they had cooperated in showing and obtaining buyers for the property of Rinas and of the plaintiff. Each knew that the price the plaintiff paid for the Bay Street property had not been set by the owner, Rinas. The record shows that each of the brokers was fully aware of the nature of all transactions.

Shortly after the sale was consummated the plaintiff learned that Rinas had been asking only $100,000 for his property. She thereupon commenced this action for $15,000 and punitive damages against Metz, joining Letsinger, Mogan and Mrs. Vivian Metz as co-defendants. The amended complaint alleges facts based on three different legal theories. Count I alleges fraud and the making of false representations to the plaintiff by the defendant Metz in his personal capacity and as agent of each of the other defendants, for the purpose of fraudulently inducing the plaintiff to purchase certain property at a price of $15,000 in excess of the owner's willingness to accept. Count II incorporates allegations of Count I as to the status of the parties and ownership of the properties involved, including an allegation that the defendant Metz acted for himself, as agent for the plaintiff, and as agent for each of the other defendants. It then alleges that Metz, in effecting the exchange of the properties involved "retained, and does now retain, monies, property and secret profits received by him for the use of and belonging to plaintiff herein in the sum of Fifteen Thousand ($15,000.00) Dollars, no part of which has been paid to plaintiff, and the same is now due, owing and unpaid." Count III incorporating all of the allegations of Count I, alleges that the three brokers conspired to defraud the plaintiff in the sum of $15,000. Punitive damages were prayed for as to Counts I and III. The action was tried by a court sitting without a jury. The defendant Mogan died prior to the trial and no further proceedings were taken as to his alleged part in the transaction.

The court made only two findings, namely: "I. The allegations set forth in plaintiff's amended complaint on file herein are True. II. The defendants and each of them conspired to obtain from plaintiff, and did assist each other in obtaining, by means of the fraudulent conduct more fully set forth in the findings of fact herein and in violation of the fiduciary duty owed by defendant Bert Metz to plaintiff, the sum of $15,000." Judgment was entered against the defendants Bert Metz, Vivian Metz and Dewey Letsinger in the sum of $15,000, together with interest at the rate of 7% from June 28, 1951, and in the sum of $2,500 as punitive damages in favor of the plaintiff against the defendants Letsinger and Bert Metz.

[1–3] From its general finding that the allegations of the amended complaint are true, it is not readily ascertainable upon which of the theories pleaded the court based its judgment. It is well established that a complaint may plead different theories on which relief is sought with legal propriety. Faulkner v. California Toll Bridge Authority, 40 Cal.2d 317, 328, 253 P.2d 659; Tanforan v. Tanforan, 173 Cal. 270, 273, 159 P. 709. It is noted that here each of the counts is based upon the same allegations of fact and that there are no contradictory or antagonistic facts. Cf. Faulkner v. Cal. Toll Bridge Authority, supra, 40 Cal.2d 317, 328, 253 P.2d 659; Beatty v. Pacific States S. & L. Co., 4 Cal.App.2d 692, 696, 41 P.2d 378. If the plaintiff makes no election or is not otherwise estopped, Steiner v. Rowley, 35 Cal.2d 713, 720, 221 P.2d 9, the election as to which cause of action is sustained is, after the taking of all the evidence, a matter for the judge or the jury. Tanforan v. Tanforan, supra, 173 Cal. 270, 274, 159 P. 709. Where an appeal is taken from such a judgment the reviewing court has the power to disregard particular theories and findings and to affirm the judgment on a theory which is supported by the findings and evidence in order that causes may be disposed of by a single appeal and without further proceedings in the trial court. Wallace Ranch W. Co. v. Foothill Ditch Co., 5 Cal.2d 103, 118, 53 P.2d 929; Baird v. Ocequeda, 8 Cal.2d 700, 703, 67 P.2d 1055; cf. Block v. D. W. Nicholson Corp., 77 Cal.App.2d 739, 747, 176 P.2d 739. The main issue on this appeal, therefore, is whether the findings and the judgment may be sustained by the pleadings and proof as to any of the causes of action stated.

[4, 5] It is plain that by its general finding that the allegations of the complaint were true the intent of the court was to find the material facts against the defendants and in favor of the plaintiff. As usual in actions of this sort the evidence is conflicting. However, as so often stated, all intendments are in favor of the judgment and this court must accept as true the evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court. The test, of course, is not whether there is a substantial conflict in the evidence but whether there is substantial evidence in favor of the respondent. In re Estate of Teel, 25 Cal.2d 520, 527, 154 P.2d 384; Estate of Teed, 112 Cal.App.2d 638, 644, 247 P.2d 54; Witkin, Procedure, p. 2250.

It is claimed that the judgment must be reversed for the reason that there is no evidence as to the actual damages sustained by the plaintiff. Section 3343 of the Civil Code provides that one "defrauded in the purchase, sale or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which he received * * *."

The trial court refused to permit either party to introduce evidence on questions of value and this refusal is claimed to constitute prejudicial error. See Bagdasarian v. Gragnon, 31 Cal.2d 744, 763, 192 P.2d 935. While it may be argued with some reason that an application of the Bagdasarian case would require a reversal of the judgment on the theory of recovery stated in Counts I and III, it is not necessary to decide that question as the judgment may be affirmed on the theory pleaded in Count II.

[6] Count II is in the nature of a common count for money had and received. By such a pleading the principal waives the tort of the agent and asserts a right to recover any secret profits made by him out of his agency. Her right to do this is well recognized. Philpott v. Superior Court, 1 Cal.2d 512, 518 et seq., 36 P.2d 635, 95 A.L.R. 990; McCall v. Superior Court, 1 Cal.2d 527, 530–531, 36 P.2d 642, 95 A.L.R. 1019.

In Savage v. Mayer, 33 Cal.2d 548, at page 551, 203 P.2d 9, at page 10, it was stated that an agent "is not permitted to make any secret profit out of the subject of his agency. [Citations.] All benefits and advantages acquired by the agent as an outgrowth of the agency, exclusive of the agent's agreed compensation, are deemed to have been acquired for the benefit of the principal, and the principal is entitled to recover such benefits in an appropriate action." As to the applicability of section 3343 of the Civil Code it was there stated: "It follows that the principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal. Thus section 3343 of the Civil Code, which provides the measure of damages in a suit based upon fraud in the sale or exchange of property, does not operate to limit a principal's recovery to those damages even though the profits may have been acquired through fraudulent representations to him. * * * see also recent cases which allowed full recovery of secret profits without discussing section 3343: Kinert v. Wright, 81 Cal.App.2d 919, 185 P.2d 364; Thompson v. Stoakes, 46 Cal.App.2d 285, 115 P.2d 830; Schwarting v. Artel, 40 Cal.App.2d 433, 105 P.2d 380."

[7, 8] Here the whole transaction was tainted by a breach of duty and the entire $15,000 may be recovered as secret profits from those who jointly received it while acting in concert in a fiduciary relationship. A clear showing of agency on the part of Metz and the defendant Letsinger is reflected by the record. It is not necessary to restate all the evidence in support of the finding on this material allegation. However, no evidence of agency is shown insofar as the defendant Vivian Metz is concerned. Her sole connection with the transaction appears to be that she is a named promisee in the note and the named beneficiary in the deed of trust securing the note given by the plaintiff in payment of commissions to Metz on the sale of the Fulton Street property.

[9–11] The cause of action stated in Count II is supported by the general finding and the judgment for compensatory damages, but does not entitle the plaintiff to punitive damages. Such an award may not be granted in an action based on a breach of contract even though the defendant's breach was wilful or fraudulent. § 3294, Civ.Code; Brewer v. Second Baptist Church, 32 Cal.2d 791, 801, 197 P.2d 713; Chelini v. Nieri, 32 Cal.2d 480, 486–487, 196 P.2d 915; Mother Cobb's Chicken T., Inc., v. Fox, 10 Cal.2d 203, 205, 73 P.2d 1185. Where a trial court erroneously awards both compensatory and exemplary damages for a breach of contract a reviewing court may, instead of reversing the entire judgment, make an order of modification striking that portion relating to punitive damages and affirm the judgment as so modified. Chelini v. Nieri, supra, 32 Cal.2d 480, 488, 196 P.2d 915; Wolfsen v. Hathaway, 32 Cal.2d 632, 651, 198 P.2d 1; 14 Cal.Jur.2d p. 828.

It is therefore ordered that the judgment against the defendant Vivian Metz be and and the same is hereby reversed; that as to the defendants Dewey Letsinger and Bert Metz the judgment is modified by striking therefrom that portion in which the plaintiff is awarded $2,500 as punitive damages, and as so modified the judgment as to them is affirmed, no party to recover costs on appeal.

GIBSON, C. J., and CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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47 Cal.2d 384

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION, et al., Defendants and Appellants.

NORTHWEST CASUALTY COMPANY, a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION, et al., Defendants and Appellants.

NATIONAL AUTOMOBILE & CASUALTY INSURANCE CO., a corporation, Plaintiff and Respondent,

v.

STATE BOARD OF EQUALIZATION, et al., Defendants and Appellants.

L. A. 23712–23714.

Supreme Court of California.
In Bank.
Nov. 30, 1956.

Rehearing Denied Dec. 24, 1956.

Actions by insurance companies against the State Board of Equalization and others to recover taxes which companies paid under protest on bail bond premiums received. The Superior Court, Los Angeles County, Allen T. Lynch, J., entered judgments adverse to the State Board of Equalization and others, and they appealed. The Supreme Court, Carter, J., held that failure of insurance commissioner to collect a tax from insurance companies on the total charges made to a customer for issuance of a bail bond, and failure to object to sufficiency of reports of gross premiums made by companies, and approval by commissioner of a receipt for a bond applicant wherein amount retained by agent of companies as compensation for their services in securing release of applicants on bail was separated from amount received by companies for becoming sureties on the bail bonds did not estop the State Board of Equalization from asserting liability on part of companies for gross premiums taxes for full amount charged and retained by bondsmen as compensation for their services.

Judgments reversed.

Opinion, 296 P.2d 607, vacated.

1. Estoppel ⚷62(1)

An equitable estoppel in fact will run against government where justice and right require it.

2. Estoppel ⚷62(1)

The government may be estopped in tax matters; however, it is the unusual case in which estoppel will be applied; the case must be clear and the injustice great. West's Ann.Const.Cal. art. 13, § 6.

3. Estoppel ⚷62(2)

Generally, failure to enforce state statutes will not estop a state agency from subsequent enforcement of such statutes.

4. Estoppel ⚷62(1)

Failure to collect taxes which are payable under statute, even though an official thinks they should be collected, is not sufficient for an estoppel.

5. Estoppel ⚷62(1)

An estoppel will not arise against the government in tax matters where the taxpayer relies on an erroneous construction of a statute by an official.

6. Estoppel ⚷62(2)

Failure of insurance commissioner to collect tax from insurance companies on total charges made to customer for issuance of bail bond, and failure to object to sufficiency of reports of gross premiums made by companies and approval by commissioner of receipt for bond applicant wherein amount retained by agent of companies as compensation for their services in securing release of business on bail was separated from amount received by companies for becoming sureties on the bail bonds, did not estop the State Board of Equalization from asserting liability on part of companies for gross premiums taxes on full amount charged and retained by bondsmen as compensation for their services. West's Ann.Insurance Code, §§ 1800 et seq., 1812; West's Ann.Rev. & Tax.Code, §§ 12276, 12403, 12431 et seq.; West's Ann. Const. art. 13, § 14⅘.

7. Estoppel ⚷62(2)

Mere fact that insurance companies asserted they would have charged more for bail bonds if they had known at time of issuance of such bonds that a claim would be made that entire amount received by their bail agents was taxable as gross premiums rather than the part of such premiums actually received by the companies for becoming sureties, was not sufficient to establish a reliance on insurance commission's failure to object to companies' reporting of only portion of gross premiums actually received by them, and therefore State was not estopped from collecting additional taxes due under applicable statutes. West's Ann.Rev. & Tax.Code, § 12431 et seq.; West's Ann.Const. art. 13, § 14⅘.

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Edmund G. Brown, Atty. Gen., James E. Sabine, Asst. Atty. Gen., and Harold B. Haas, Deputy Atty. Gen., for appellants.

Latham & Watkins, Dana Latham and Charles E. Horning, Jr., Los Angeles, for respondents.

CARTER, Justice.

Defendants, the State Board of Equalization and others, appeal from judgments for plaintiffs, insurance companies, in their actions to recover taxes on their gross premiums paid under protest, together with interest on the sums.

It was stipulated that the method of conducting the bail bond business (it is a tax on premiums for such bonds which are here involved) by plaintiff companies and their agents was substantially as follows: "P, a prisoner, contacts B, a bail agent, to secure his release from jail. If B holds a bail permittee license he first decides whether to post cash bail or a bail bond. Assuming that he decides to post a bond he has P make out an application for a bond in the penal sum of P's bail. B undertakes, for a fee, to secure the release of P on bail. Assuming that P's bail is set at $1,000, the total amount charged by B will ordinarily (but not necessarily) be $100. P pays B $100 and is given a Receipt and Statement of Charges (see Exhibit 'I') carrying a breakdown as follows:

"Bail Bond Premium	$———
"Fee for Arranging Bond	$———
"Total Charges	$———

Upon instructions of G, the general agent, B will insert the sum of $20 opposite the item 'Bail Bond Premium,' and $100 opposite the item 'Total Charges.' It is stipulated that these were G's instructions to B, but it is not clearly established that more than 75% of the receipts were so broken down. B, having satisfied himself that the security offered by P is in all respects sufficient, posts a surety bail bond in the penal sum of $1,000 and secures the release of P from jail. At the end of the week during which this transaction was carried out, B reports to G, the general agent or supervising agent, of the surety company. B pays to G a consideration for the bond determined by the contractual arrangement between B and G. At the same time B deposits with G an additional sum as a 'reserve' to cover possible losses on the bond. G then reports to S, the surety company, the total face amount of all bonds written during the period covered by the report and pays to S an agreed amount.

G may also deposit an additional sum as a 'reserve' to cover possible losses on this and other bonds. S reports the sum of $20 or a portion thereof (there being no uniformity) as gross premiums received on account of this bond in its annual statement and in its premium tax return to the Insurance Commissioner." The taxes which were paid under protest and awarded by the judgments were on the amounts paid to and retained by the insurance companies' agents who solicited and obtained takers of bail bonds. There is no question about the amount actually received by the companies from the agents as that was included in the gross premiums reported by the companies and on which taxes were paid. This method of operation is substantially the same as that set forth in Groves v. City of Los Angeles, 40 Cal.2d 751, 754, 256 P.2d 309, where we held that the entire amount that was paid by the applicant to the bail agent for a bail bond was the premium, hence was gross premium received by the companies which was taxed by the Constitution, Cal.Const., art. XIII, § 14⅘; this was held to be true even though the companies' bail agent retained a large percentage of the amount for his profit and operation expenses. It is not questioned that the Constitution levies taxes on the entire amount but heretofore the state has been collecting taxes on only the amount actually received by the companies.

Plaintiff companies contend that, as held by the trial court, the state is estopped to collect taxes on those premiums for the past years, 1947 in the instant cases. Defendants contend there can be no estoppel against the state in tax matters; that assuming estoppel is available, none was established here; and that in any event interest on the taxes paid under protest should not be allowed.

There is no dispute as to the facts. At the close of 1947, plaintiffs submitted reports to the state insurance commissioner of their gross premiums,[1] but did not include therein the portion of the premiums received by their bail agents as discussed above and in the Groves case. The commissioner made his report to the State Board of Equalization on the basis of the reports by plaintiffs to him (see Rev. & Tax.Code, § 12403) and the board assessed taxes on that basis against plaintiffs (see Rev. & Tax.Code, § 12431 et seq.) and plaintiffs paid those taxes in 1948. In 1951, the state's attorney general advised the commissioner that all the amounts received by the bail agents were taxable premiums and the commissioner advised plaintiffs that an additional assessment was being included in the 1951 assessments to include those amounts for 1947. The additional assessments were paid under protest and recovery thereof allowed by the trial court.

The gross premium tax law has been in effect since 1911, but until 1951 no surety company has reported the entire amount received by its bail agents. In 1937, licenses were required for bail agents and section 1800 was added to the Insurance Code providing that no insurer shall execute an undertaking on bail except "by and through" a licensed bail agent, which this court considered in Groves v. City of Los Angeles, supra, 40 Cal.2d 751, 256 P.2d 309, as a factor showing that the bail agents were the agents of the insurer and hence amounts received by them for bail bonds were gross premiums received by the insurers and taxed by the Constitution. Plaintiffs as well as all other companies, prior to 1951, considered and reported to the commissioner as gross premiums for bail bonds only the amount actually received by them from the agents. The commissioner and attorney general knew of the practice because of a letter in 1941 from the commissioner to the attorney general asking an opinion on the subject; that request was withdrawn by the commissioner before the attorney general gave an opinion. No objection was ever made by the commissioner to any company for the failure to report the whole bail bond premiums, and, of course, no taxes were collected. Also in 1941 the commissioner held hearings in regard to proposed regulations by him for the bail bond business which were attended by plaintiffs. At the hearing one of the things considered was a form for the receipt given by the bail agent to the applicant for a bond, which was approved. In that receipt, as appears from the method of doing business, the amount charged for the bond was broken down into two categories: one, the amount listed as "premium" for the bond which included only the amount actually received by the company and the other, "fees for arranging bond" which included all of the rest of the charge for the bond, most of which the bail agent retained. In other branches of the surety business there is no such breakdown. Nothing was said about taxes on gross premiums and the commissioner at the hearings said "he wanted the paying public to know where their dollar was going that they spent and that we could either give them a certified copy of the bond with the various charges thereon or, in lieu thereof, break those charges down on a receipt form and that he would approve the receipt form that they would receive."

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[1] Those reports are required by law. Revenue & Taxation Code, § 12276.

[1] "[T]here are many instances in which an equitable estoppel in fact will run against the government where justice and right require it. City of Los Angeles v. Cohn, 101 Cal. 373, 35 P. 1002; Fresno v. Fresno C. & I. Co., 98 Cal. 179, 32 P. 943; City of Sacramento v. Clunie, 120 Cal. 29, 52 P. 44; Brown v. Town of Sebastopol, 153 Cal. 704, 96 P. 363, 19 L.R.A., N.S., 178; Times-Mirror Co. v. Superior Court, 3 Cal.2d 309, 44 P.2d 547; Sutro v. Pettit, 74 Cal. 332, 16 P. 7, 5 Am.St.Rep. 442; City of Los Angeles v. County of Los Angeles, 9 Cal.2d 624, 72 P.2d 138, 113 A.L.R. 370; Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 P. 189; County of Los Angeles v. Cline, 185 Cal. 299, 197 P. 67; La Societe Francaise v. California Emp. Comm., 56 Cal.App.2d 534, 133 P.2d 47; McGee v. City of Los Angeles, 6 Cal.2d 390, 57 P.2d 925; Ernst v. Tiel, 51 Cal.App. 747, 197 P. 809; People v. Gustafson, 53 Cal.App.2d 230, 127 P.2d 627; Hewel v. Hogin, 3 Cal.App. 248, 84 P. 1002." Farrell v. Placer County, 23 Cal.2d 624, 627, 145 P.2d 570, 571, 153 A.L.R. 323. (See, also, Lorenson v. City of Los Angeles, 41 Cal.2d 334, 260 P.2d 49; San Diego County v. California Water etc. Co., 30 Cal.2d 817, 186 P.2d 124, 175 A.L.R. 747; Tyra v. Board of Police etc. Com'rs, 32 Cal.2d 666, 197 P.2d 710; Cooke v. Ramponi, 38 Cal.2d 282, 239 P.2d 638; Adams v. California Mutual B. & L. Ass'n, 18 Cal.2d 487, 116 P.2d 75.

[2] The government may be estopped in tax matters. See, Garrison v. State of California, 64 Cal.App.2d 820, 149 P.2d 711; Outer Harbor Dock & Wharf Co. v. City of Los Angeles, 49 Cal.App. 120, 193 P. 137; Goodwill Industries v. Los Angeles County, 117 Cal.App.2d 19, 254 P.2d 877; La Societe Francaise v. California Emp. Comm., 56 Cal.App.2d 534, 133 P.2d 47; Market St. Ry. Co. v. California State Board of Equalization, 137 Cal.App.2d 87, 290 P.2d 20; Joseph Eichelberger & Co. v. Commissioner of Int. Rev., 5 Cir., 88 F.2d 874; United States v. Brown, 6 Cir., 86 F.2d 798; see discussion and cases, 33 Cornell L.Q. 607; 3 Tax L.Rev. 71; 21 Univ. of Chic.L.Rev. 680; 40 Va.L.Rev. 313.) However, it is the unusual case in which estoppel will be applied in tax cases; the case must be clear and the injustice great (see authorities last cited). This is indicated by the general rules in the field. "The power of taxation shall never be surrendered or suspended by any grant or contract to which the State shall be a party." Cal.Const., art. XIII, § 6. It is said in Market St. Ry. Co. v. California State Board of Equalization, supra, 137 Cal.App.2d 87, 100, 290 P.2d 20, 28; "None of these cases involved reliance on an erroneous administrative tax ruling. The State Board cites many cases from this and other jurisdictions to the effect that an estoppel based on reliance upon an erroneous construction of the statute by an administrative ruling will not lie against the government, particularly in tax matters. As a general proposition this is sound law. Obviously, a tax administrator should not be

permitted by an erroneous ruling to exempt a taxpayer from the obligation to pay taxes. But that is as far as the rule goes. The proper limitations on that rule were pointed out by this court in La Societe Francaise v. California Emp. Comm., 56 Cal.App.2d 534, 133 P.2d 47, in which a petition for hearing was unanimously denied. * * *

"As to that portion of the tax imposed directly on the Societe the court had the following to say, 56 Cal.App.2d at page 553, 133 P.2d at page 57: 'It is the general rule that the government does not lose its revenues because of an erroneous ruling of an administrative official as to the meaning of a tax law. [Numerous citations.] An administrative regulation which is in conflict with the statute is invalid and the government is not bound thereby. [Citations.] The duty of the tax officials is to collect taxes imposed by law. * * * it is generally no defense that taxes were not paid when due in reliance on an official ruling of non-liability. The taxpayer is deemed to act with knowledge that administrative officials cannot bind the government by their erroneous interpretation of tax statutes.'"

[3–5] The facts here do not establish a clear case of estoppel and injustice necessary in tax cases. The failure to collect the tax or object to the sufficiency of the reports of gross premiums made by plaintiffs, although the commissioner thought possibly there were insufficient as shown by his request (later withdrawn) for an opinion from the attorney general is not enough. The request to the attorney general for an opinion was not known by plaintiffs; all they knew was that no objection was made to their reports and taxes were not collected on the entire premiums received by them. Generally "* * * failure to enforce statutes of this state will not estop a state agency from their subsequent enforcement, Caminetti v. State Mut. Life Ins. Co., 52 Cal.App.2d 321, 326, 126 P.2d 165 * * *." Richfield Oil Corp. v. Crawford, 39 Cal.2d 729, 736, 249 P.2d 600, 605. The failure to collect taxes which are payable under a statute, even though the official thinks they should be, is not sufficient for an estoppel. (See, Goodwill Industries v. Los Angeles County supra, 117 Cal.App.2d 19, 254 P.2d 877; La Societe Francaise v. California Emp. Comm., supra, 56 Cal.App.2d 534, 133 P.2d 47; El Dorado Oil Works v. McColgan, 34 Cal.2d 731, 739, 215 P.2d 4; Gaylord v. Commissioner of Internal Revenue, 9 Cir., 153 F.2d 408; 40 Va.L.Rev. 313; Hotel Kingkade v. Commissioner of Internal Rev., 10 Cir., 180 F.2d 310; Mt. Vernon Trust Co. v. Commissioner of Internal Revenue, 2 Cir., 75 F.2d 938. And it has been held that an estoppel will not arise against the government in tax matters where the taxpayer relies on an erroneous construction of a statute by an official. Fletcher Trust Co. v. Commissioner of Int. Revenue, 7 Cir., 141 F.2d 36; certiorari denied 323 U.S. 711, 65 S.Ct. 36, 89 L.Ed. 572; Blumberg v. Smith, 7 Cir., 138 F.2d 956; Schafer v. Helvering, 65 App.D.C. 292, 83 F.2d 317; Utah Hotel Co. v. Industrial Commission, 107 Utah 24, 151 P.2d 467, 153 A.L.R. 1176; Crane Co. v. Arizona State Tax Commission, 63 Ariz. 426, 163 P.2d 656, 163 A.L.R. 261.

[6] With reference to the hearing by the insurance commissioner in 1941, in which the form for the receipt to be given by the bail agent to the applicant for a bail bond, which listed premium and fees for expenses separately, the stipulation of facts states: "Subsequent to September 6, 1941, hearings were held by the Insurance Commissioner in Los Angeles, California, with regard to proposed regulations governing the transaction of bail bonds and the conduct of bail agents and regarding the approval by the Insurance Commissioner of certain forms of documents to be used in the transaction of bail bonds." This hearing apparently was an investigation of the bail bond business and the matters considered were in the nature of police regulations for that business. Nothing was said about taxes and the commissioner was interested in having the receipt given to

bail bond applicants advise them as to where the money he paid for the bond was going. While the receipt was approved and listed "premium" as the item which plaintiffs actually received, it could be referring only to net premiums rather than gross premiums upon which the tax is levied. There is no necessary relation between the receipt so given and taxes. Taxes were not mentioned. The commissioner had authority to adopt rules and regulations for the conduct of bail bond business," Ins. Code, § 1812; see Smith v. Downey, 109 Cal.App.2d 745, 241 P.2d 618, which have to do with the conduct of the business rather than taxes. (See, Ins. Code, § 1800 et seq.) In regard to taxes the insurance companies must make a report of their gross premiums to the commissioner, Rev. & Tax.Code, § 12276, and the commissioner makes a report to the State Board of Equalization of the premiums received by each insurer, id., § 12403. The board assesses and levies the tax, id., § 12431, and gives notice thereof to the insurer, id., § 12435, and they are to be paid to the state controller, id., § 12624. Probably the commissioner has authority to question the reports of the insurers to him but the tax is assessed by the board. Nothing was said about those reports at the hearings held by the commissioner and as far as appears they were not involved. It does not appear therefore that there was a clear representation by the commissioner as to what constitutes taxable premiums such as would satisfy an estoppel in connection with taxes.

Garrison v. California Employment Stabilization Comm., 64 Cal.App.2d 820, 149 P.2d 711, involved an express administrative ruling on the taxability for certain employees and is thus distinguishable. Moreover, it holds that an erroneous administrative rule by a tax official necessarily estops the collection of taxes imposed on a person even though there was no showing of reliance and change of position. We need not decide whether an erroneous ruling alone establishes estoppel here, see Market St. Ry. Co. v. California State Board of Equalization, supra, 137 Cal.App.2d 87, 290 P.2d 20; La Societe Francaise v. California Emp. Comm., supra, 56 Cal.App.2d 534, 133 P.2d 47, because we do not have such a ruling known to plaintiffs.

There is no question here of penalties. The commissioner in his report to the state board in 1951 followed the procedure outlined in the Revenue & Taxation Code which provides for taxes not assessed and not collected, although assessable, because of error or omission on the part of the insurer or computation in a manner contrary to law. The commissioner may include such premiums for past years in his report to the board and the board may assess the additional tax. But the levy and assessment of additional taxes may be for only a specified time. Rev. & Tax.Code, §§ 12996–12999.

[7] In regard to reliance by plaintiffs and change of position the only direct evidence on the subject is that by their officers that if they had known in 1947 that a claim would be made that the entire amount received by the bail agent was taxable gross premium they would have charged more for the bond in order to pass on the tax to the taker of the bond. While this may be sufficient it is doubtful that it shows a reliance.

The judgments are reversed.

GIBSON, C. J., and TRAYNOR, SPENCE and McCOMB, JJ., concur.

SCHAUER, Justice.

I concur in the judgment, reluctantly, on the ground that it does not appear that on the facts shown in this record an estoppel arose. But this is because of a failure to show a representation by a responsible agent of government upon which a taxpayer could reasonably rely. I do not concur in any implication that as a matter of law an estoppel cannot be invoked by a taxpayer as against the government's claim for a deficiency, if in fact the taxpayer relied upon an administrative representation and as a result lost the opportunity to pass the tax on to others.

Preliminarily, a distinction must be recognized between the case wherein the taxpayer acts as a mere collection agent, and that in which a tax is imposed directly on the taxpayer. The unemployment insurance tax illustrates this distinction: the employer withholds a certain sum from the salary of his employes, as to which he acts as a collection agency only; he also remits a sum based on the total salaries paid, as to which he is the principal taxpayer. In such a case, if the taxpayer is informed by the proper authority that certain employes are not subject to the tax, and therefore no remittances are made with respect to the salaries paid to such employes, and if the authority later changes its position and declares a tax due, the government may be able to collect the amounts the employer should have paid on his own account, but it will not be allowed to recover from the employer the amounts which should have been withheld from the employes' salaries. (Garrison v. California Employment Stabilization Comm., (1944), 64 Cal.App.2d 820, 149 P.2d 711; La Societe Francaise v. California Emp. Comm. (1943), 56 Cal.App. 2d 534, 133 P.2d 47.)

Where a taxpayer has refrained from paying a tax for which he is primarily liable because of reliance upon an erroneous administrative interpretation, it has been held in a number of cases that he must pay an asserted deficiency, even though he would have been able to pass on the tax had he not relied on the administrative position that no tax was due. (Market St. Ry. Co. v. California State Board of Equalization (1955), 137 Cal.App.2d 87, 290 P.2d 20; Duhame v. State Tax Commission (1947) 65 Ariz. 268, 179 P.2d 252, 171 A.L.R. 684; Crane Co. v. Arizona State Tax Comm. (1945) 63 Ariz. 426, 163 P.2d 656, 163 A.L.R. 261; Bennetts, Inc. v. Carpenter (1943) 111 Colo. 63, 137 P.2d 780.) Inspection discloses, however, that the Duhame and Bennetts cases are of little weight in California. In Duhame the court disposed of the estoppel question by saying that "there can be no estoppel against a government or governmental agency with reference to the enforcement of taxes" (page 260 of 179 P.2d); similarly, in Bennetts the court merely stated that "It is a general principle of law that the doctrine of estoppel cannot be invoked against any governmental agency, acting in its public capacity" (page 782 of 137 P.2d). But the rule is established in California that estoppel may be invoked against a government entity where "justice and right require it." (Farrell v. County of Placer (1944), 23 Cal. 2d 624, 627, 145 P.2d 570, 153 A.L.R. 323.)

The Market Street Railway case relied strongly on the Crane case, and the Crane case was based on the distinction made in La Societe Francaise v. California Emp. Comm. (1943), supra, 56 Cal.App.2d 534, 133 P.2d 47, between a tax imposed directly on the taxpayer and a tax as to which he acted merely as a collection agent. The Societe Francaise case, as noted above, involved an unemployment insurance tax, and in that case the employer was held liable for the amounts he would have paid had the employes been properly included on its tax return, although not for the amounts which should have been withheld from the salaries of the particular employes. The Market Street Railway case (involving the sales tax) represents a square California holding by the District Court of Appeal that no estoppel will be raised merely because the taxpayer had a right to pass on the taxes to the purchaser, where he was under no statutory duty to do so, even though the only reason he failed to pass on the tax was because of reliance on the erroneous administrative ruling. But the principal basis of the Market Street Railway case is in ultimate analysis (through the Crane case) the Societe Francaise case.

The true theory of the Societe Francaise case seems to appear at page 555 of 56 Cal. App.2d at page 57 of 133 P.2d, where the court stated: "* * * in the present case a proper regard for the protection of the interests of the government in its revenues, with recognition also of a degree of responsibility on the part of the government to a taxpayer who has relied to his prejudice on an official ruling, is achieved by requiring the taxpayer to discharge that part of the tax burden which it was contemplated it should bear by the statute imposing the tax, while relieving it from liability for the employees' contributions and interest on delayed payments. *The taxpayer will pay from its own funds as much as it would have paid originally but for the erroneous administrative ruling, but it will not pay more.*" (Italics added.) But La Societe Francaise is essentially a non-profit organization and there was no showing that it could have passed on its costs to its customers. In a similiar case, where the employer was an insurance company, the court relieved the taxpayer of liability both for the employes' share and for the employer's share of the tax. (Garrison v. State of California (1944), supra, 64 Cal.App.2d 820, 149 P.2d 711.) The court there reasoned, 64 Cal.App.2d at page 829, 149 P.2d at page 715 (after the rule for the erroneous exemption of the particular employes had been rescinded), "collection of the employees' percentage [which had become due] during the time the rule was in effect was for all practical purposes difficult and expensive if not impossible. With the lapse of time involved and *periodical allocation of costs to policyholders*, it would be unfair now to require the insurance company to pay its contributions for these employees." (Italics added.) (See also Waterbury Savings Bank v. Danaher (1940) 128 Conn. 78, 20 A.2d 455, 462, where the court, following the same principle as that followed by the District Court of Appeal in the Garrison case, declared that "Where it appears that it is against public policy that an administrative officer should change a decision with retroactive effect, it is the court's right and duty to curb his powers so as to serve that policy.") If the taxpayer is to be assessed only for the amount which it would have paid from its own funds in the absence of reliance upon the erroneous administrative action, then it is inconsistent to charge it for an amount which would have been passed on to, and borne by, the ultimate consumer had the tax been properly levied. This is especially true with respect to insurance companies, whose annual premium rates are a reflection of their prior and anticipated operating costs.

Thus it appears that a governmental agency may be estopped to assert a tax deficiency, where the reason for the original nonpayment was reliance on an administrative representation which proved to be erroneous, if the taxpayer can show that he could and would have passed on the tax to his customers had he not relied on the ruling that it was not due, and that he can no longer so pass it on. Here, if the representations which were made by the state insurance commissioner had instead been made by the state board of equalization, a different result would be indicated.

For the reasons and subject to the limitations above stated I concur in the judgment.

SHENK, J., concurs.

47 Cal.2d 457

Thurman TUCKER, Jr., a minor, by his guardian ad litem, Thurman Tucker; and Thurman Tucker, Plaintiffs and Appellants,

v.

Philip LOMBARDO, Defendant and Respondent.

L. A. 24263.

Supreme Court of California.
In Bank.
Dec. 7, 1956.

Action for injuries sustained by boy who, while working at a skeet shooting range, was struck by shot from gun handled by defendant. The Superior Court, Los Angeles County, William P. Haughton, J., entered judgment upon verdict in favor of defendant and boy and his father appealed. The Supreme Court, Spence, J., held that upon consideration of all the instructions together with the one complained of, there was no prejudicial error committed by giving of instruction to effect that defendant had a duty toward boy to exercise ordinary care and quantum of care may be greater than that which would be necessary if defendant was not handling a loaded gun, on ground that use of word "may" was misleading.

Affirmed.

Carter, J., dissented.

Opinion, 298 P.2d 562, vacated.

1. Weapons ⚷18(1)

Standard of care required of person shooting on a skeet range in direction of person operating machine ejecting "clay birds" is that of ordinary care under the circumstances.

2. Negligence ⚷138(2)

Where plaintiff in negligence action proposed instructions attempting to place the burden of proof upon defendant to show that he was not negligent, such instructions were properly refused.

3. Trial ⚷295(6)

In action for injury sustained by boy who, while working at skeet shooting range, was struck by shot from gun handled by defendant who was shooting at clay birds being ejected from machine operated by boy, upon consideration of all the instructions together with the one complained of, no prejudicial error resulted from giving of instruction to effect that defendant owed duty to boy to exercise ordinary care and that quantum of care may be greater than would be necessary if defendant was not handling a loaded weapon, on ground that use of word "may" was misleading.

4. Weapons ⚷18(2)

In action for injury sustained by boy who, while operating machine at skeet shooting range that threw targets into air, was struck by shot from a gun handled by defendant, evidence of the rules, practices, and customs of skeet shooting were properly admissible as having a direct bearing on the question of negligence even though they did not of themselves establish standard of prudent conduct.

5. Negligence ⚷10

Negligence is gauged by the ability to anticipate danger.

6. Weapons ⚷18(2)

In action for injury sustained by boy who, while operating target throwing machine at skeet shooting range, was struck by shot from gun handled by defendant, where it was at least arguable that injuries to boy, resulted from his own negligence or failure of owners of skeet range to provide reasonably safe working area for him, doctrine of res ipsa loquitur was not applicable.

7. Negligence ⚷121(2)

Applicability of doctrine of res ipsa loquitur depends on whether it can be said in the light of common experience that the accident was more likely than not the result of the defendant's negligence, and where there is no such balance of probabilities in favor of negligence, res ipsa loquitur does not apply.

8. Weapons ⚷18(2)

In action for injury sustained by boy who, while working at a skeet shooting range, was struck by a gun handled by defendant, question of boy's contributory negligence presented a jury issue.

9. Weapons ⚷18(2)

In action for injuries sustained by boy who, while working at skeet shooting range, was struck by a shot from gun handled by defendant, where evidence showed that boy was familiar with skeet shooting range practice, there was no error in instructing jury on question of assumption of risk.

10. Negligence ⚷105

Doctrine of assumption of risk is not limited to an action by an employee against his employer because of injuries suffered in the course of employment, but may also be applicable to ordinary negligence actions.

11. Weapons ⚷18(2)

In action for injury sustained by boy who, while working at a skeet shooting range, was struck by shot from gun handled by defendant, there was no error in giving defendant's requested instructions that it was the duty of the employer to furnish his employees a safe place for them to work and that if defendant was exercising ordinary care he was entitled to assume that employer had furnished boy a safe place within which to work and that the boy would reasonably use protection afforded. West's Ann.Labor Code, §§ 6401, 6402.

12. Negligence ⟹68

Every person who is exercising ordinary care has the right to presume that every other person will perform his duty and obey the law.

Madden & McCarry, Long Beach, for appellants.

Moss, Lyon & Dunn, Gerold C. Dunn and Henry F. Walker, Los Angeles, for respondent.

SPENCE, Justice.

Plaintiffs appeal from a judgment based on a verdict in favor of defendant in an action for damages for personal injuries. There is no substantial conflict as to any material fact, and no claim is made that the verdict is not supported by the evidence. The parties' opposing contentions center on the propriety of the giving and refusal of certain instructions. A review of the record, however, leads us to the conclusion that there was no prejudicial error.

Plaintiff Thurman Tucker, Jr. (hereinafter called Tommy), a 12-year-old boy, had been employed on Saturdays and Sundays for about three months at the Dominguez Skeet Range. On Sunday morning, May 3, 1953, the day of the accident, Tommy was ordered to work at the "high house," a tower-like building. His job there was to load a spring apparatus, known as a Remington Trap Machine, with "clay birds" or targets. He had done this work on about six previous occasions. The high house had an opening, shielded by metal plates, through which the bird was ejected when another employee, operating in the control house, pressed a button effecting the bird's release. In skeet shooting, the gunner takes a "ready position" at the firing line and calls "pull." Upon this command the operator in the control house presses the button which releases the bird in the trap machine. Tommy, while working in the high house, was struck by shot discharged from a gun held by defendant, who was shooting from station number 8 on the skeet range. Tommy thereby lost the sight of one eye.

The range where the accident occurred was laid out in a half circle. Station number 1 was at the high house, number 7 was at the low house, and the intervening numbered stations formed a semi-circle arching to the south. Station number 8 was located at the midway point of an east-west line running from station number 1 to station number 7, and was about sixty feet to the east of the high house. When the bird was released from the high house for a gunner at station number 8, its path of flight would be toward the "breaking point," which was eighteen feet north of station number 8 and the point beyond which the bird, if hit, would not count as a score. It appears that for scoring from station number 8, the travel distance for the bird, after emergence from the high house and before reaching the breaking point, would be about sixty-seven feet. The bird, when ejected from the machine, traveled at sixty miles an hour or ninety feet a second, so that the shooter had only about two-thirds of a second in which to make a score by hitting the bird. An expert on skeet shooting testified regarding the difficulty of shooting at station number 8 in that it "gives you about half as much time to shoot as the rest of them. You have to shoot much faster there."

The high house from which the bird was released was built of two by four framing lumber, which was covered by corrugated metal. It was nine and one-half feet high, sixty inches wide and sixty inches deep. The opening through which the bird was ejected, and behind which

Tommy was employed in loading the trap machine, was in the east wall and was seven inches long and seven inches wide. The opening was shielded by two metal plates attached to the outer wall. The trap machine was mounted on a wooden shelf which extended twenty-five and one-half inches back from the east wall of the high house. From the edge of this shelf to the rear or west wall of the house was thirty-four and one-half inches. Tommy testified that in operating the trap machine, he would place a bird in the machine and cock it by pulling down a throwing lever; then he would step back to the wall behind him so as to be clear of the upward swing of the throwing lever. After the operator in the control house released the bird, Tommy would step forward toward the machine and reload it. There was no communication between the high house and the control house, and Tommy would step forward to reload without knowing whether a gun was fired at the released bird. While he could hear the discharge of a gun if there was not too much noise from the lever operating, he could not tell from which range or at what bird it was fired.

Defendant Lombardo was using a 12-gauge over-and-under shotgun, with which he was familiar. He had shot skeet once or twice previously. Standing in a "ready position" at station number 8, he looked toward the high house, called "pull" as the signal for the operator, and waited for the bird to emerge. He testified that he raised his gun and fired as the bird was approximately two feet from the high house. A second or two later defendant heard Tommy "holler" and saw him come out of the high house.

Tommy testified that after the bird had been released, he stepped forward to load the machine; that he was reaching for one of the birds stacked on the shelf alongside the machine when he was struck by some pellets from the shotgun; that he was thrown against the wall and his face was bleeding. One of the pellets caused a double perforation of his right eye, which was subsequently removed.

Defendant introduced photographs of the high house showing perforations resembling shot punctures in the corrugated metal around the opening. The operator of the control house testified that when the boys first started to work in the high house, they were told to stand back after putting the target in the trap machine; that he knew that shot had come before into the high house through the opening and that he had talked to the boys, including Tommy, about it but he did not remember whether he had so warned Tommy that particular morning. Tommy testified that he had never noticed the shot marks and indentations on the metal around the opening in the high house, and that while he was working there no shot had ever before come through the opening. Mrs. Ruth, co-owner of the range with her husband, testified that she had not been aware that shooters had hit the high house though she admitted that she had seen the puncture holes on the metal around the opening and that they were "painted over." Defendant testified that he had never been inside the high house; that he knew that when shot was discharged from a shotgun, it spread out into a pattern but he did not know what the area of spread might be; and that he assumed that the shot would not go into the high house. He further testified that in talking to Mrs. Ruth immediately after the accident, she said "we know it is not your fault" and the "boys are often looking out the windows and they have been warned about that."

At defendant's request, the court gave the following instruction: "You are instructed that the duty owed by the defendant to the plaintiff in this case was to exercise ordinary care, that is the care that would be exercised by a reasonably prudent person in the same or similar circumstances. In this particular instance, however, the defendant was possessed of and using a firearm and a firearm is capable of causing severe injury. For that reason the defendant was required to foresee the possibility of injury and, to avoid it, to exercise a degree of care commensurate with and in proportion to the danger involved, and, in the exercise of ordinary care, the quantum or amount of care exercised *may be greater* than would be necessary if he was not handling a loaded weapon. This is but another way of saying that the amount of care to be exercised by a reasonably prudent person will vary with the circumstances, and where the danger of injury is greater the amount of care to be used *may be great*." (Emphasis added.)

[1, 2] This instruction correctly informed the jury that the standard of care required of defendant was that of ordinary care under the circumstances. Jensen v. Minard, 44 Cal.2d 325, 282 P.2d 7; Warner v. Santa Catalina Island Co., 44 Cal.2d 310, 282 P.2d 12. But plaintiffs attack the use of the permissive word "may" as diluting the established quantum of caution required of a person handling a loaded firearm. They claim that the instruction thereby injected a quantitatively false element into the jury's deliberations and left the jury without a proper appreciation of the controlling rules for judging defendant's conduct; and that they did not waive the error because of a "failure to request an instruction" which correctly recited the high degree of caution required to meet the test of ordinary care in the use of firearms. Sexton v. Brooks, 39 Cal.2d 153, 158, 245 P.2d 496, 499. With reference to this latter point, it should be said that the instructions which plaintiffs did propose upon the subject were incorrect and were properly refused because they attempted to place the burden of proof upon defendant to show that he was not negligent. Jensen v. Minard, supra, 44 Cal.2d 325, 328–329, 282 P.2d 7.

[3] While the challenged instruction is not a model, it must be read with the other instructions and in the light of the circumstances, in determining whether there was any prejudicial error. It was only one of a series of instructions given on this phase of the case. Thus, the trial court first defined "negligence" (BAJI 101), and then stated that it was "not an absolute term, but a relative one," so that "in deciding whether there was negligence in a given case, the conduct in question must be considered in the light of all the surrounding circumstances" (BAJI 101–A). Next, the court defined "ordinary care" (BAJI 102) and amplified that standard as follows: "Inasmuch as the amount of caution used by the ordinarily prudent person varies in direct proportion to the danger known to be involved in his undertaking, it follows that in the exercise of ordinary care, the amount of caution will vary in accordance with the nature of the act and the surrounding circumstances. To put the matter in another way, the amount of caution involved in the exercise of ordinary care increases or decreases as does the danger that reasonably should be apprehended." Then followed the challenged instruction concerning the application to the use of firearms. In the challenged instruction it was stated as a matter of law that "a firearm is capable of causing severe injury" and for that reason "defendant was *required* to foresee the possibility of injury and, to avoid it, to *exercise a degree of care commensurate with and in proportion to the danger involved*"; and that "this is but another way of saying that the amount of care to be exercised by a reasonably prudent person will vary with the circumstances." (Emphasis added.) Thus, the jury was clearly informed that defendant was required to exercise a degree of care commensurate with and in proportion to the danger involved, and we do not believe that the use of the word "may" in the context of the instruction could have misled the jury in determining the quantum of caution which was required here.

[4] The factual situation also has significant bearing on this point. Apparently defendant did exactly what he was supposed to do according to the generally accepted skeet rules and the particular practice on this range. In fact, the photographs of the high house showing how it had been peppered with shot indicate that

defendant's shooting in that direction from station number 8 was precisely what was expected of him. The skeet shooting expert testified, without contradiction, that because the difficulty of a shot from station number 8 steadily increased as the bird approached the breaking point, it was customary and in accordance with nationally recognized rules for the shooter to point his gun at the high house and fire immediately upon the bird's emergence therefrom. There was no error in receiving evidence of the rules, practices and customs of skeet shooting. They have a direct bearing on the question of negligence even though they do not of themselves establish the standard of prudent conduct. Fowler v. Key System Transit Lines, 37 Cal.2d 65, 68, 230 P.2d 339; Hargrave v. Acme Tool & Tester Co., 125 Cal.App.2d 34, 39, 269 P.2d 913. Defendant did not know, and so far as the evidence shows, had no reason to suspect that there was any likelihood of injuring anyone by firing in the direction of the high house.

[5] It is an elementary principle that negligence is gauged by the ability to anticipate danger. "[R]easonable foresight of harm is essential to the concept of negligence, and supplies the criterion for determining whether it exists in a particular case, and reasonable foreseeability of harm is the fundamental basis of the law of negligence. * * * On the other hand, one is not bound to foresee every possible injury which might occur, or every possible eventuality, but only those which were reasonably foreseeable; and one is not required to anticipate against dangers which it is not his duty to avoid." 65 C.J.S., Negligence, § 5c(2) (a), pp. 354–359. This principle of foreseeable danger as the basis for liability underlies the doctrine of the leading case of Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, at page 100, 59 A.L.R. 1253, where Justice Cardozo recognized actionable negligence as involved in proceeding at reckless speed through a crowded city street, but stated: "If the same act were to be committed on a speedway or race course, it would lose its wrongful quality. The risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Here the unfortunate accident occurred on a skeet range. The person injured was not a member of the general public but an employee of the range who was performing his work in a place where he was presumably protected from injury from shots fired from the designated stations. Under these circumstances, the instructions appear to have been fully as favorable to plaintiffs' case as they were entitled to have them.

[6, 7] Nor may plaintiffs prevail in their contention that the trial court erred in refusing to instruct the jury on the doctrine of res ipsa loquitur. They rely on Jensen v. Minard, supra, 44 Cal.2d 325, 282 P.2d 7. There defendant fired a rifle at a sparrow in a strawberry patch and the bullet struck a child walking on the public road. No res ipsa loquitur instructions were requested in that case, but other instructions were given which erroneously foreclosed the jury from considering the mere happening of the accident itself as evidence of possible negligence. Unlike that case where ordinarily such injuries to the general public on a public road "do not occur if those using firearms use due care", Jensen v. Minard, supra, 44 Cal.2d at page 329, 282 P.2d at page 9, here it is at least arguable that the injury to Tommy resulted from his own negligent action or from the failure of the owners of the skeet range to provide a reasonably safe working area for him. The applicability of the doctrine of res ipsa loquitur depends on whether it can be said, in the light of common experience, that the accident was more likely than not the result of defendant's negligence. "' "Where no such balance of probabilities in favor of negligence can be found, res ipsa loquitur does not apply." ' " Zentz v. Coca Cola

Bottling Co., 39 Cal.2d 436, 442, 247 P.2d 344, 347; La Porte v. Houston, 33 Cal.2d 167, 169, 199 P.2d 665. Accordingly, plaintiffs' proposed instructions, which stated unqualifiedly that the doctrine of res ipsa loquitur was applicable, were properly refused. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 692, 268 P.2d 1041.

[8] Likewise the court did not err in refusing to give plaintiffs' instruction on contributory negligence. It read: "You are instructed that plaintiff Tommy Tucker was not contributorily negligent and you must find against the defendant upon that issue." Plaintiffs insist that under any view of the evidence Tommy could not have been negligent; but according to his own testimony, he moved forward to reload the trap machine as soon as the bird had been released.

The subject of contributory negligence was properly covered in the instructions. The court defined contributory negligence (BAJI 103), set forth the various issues to be determined in relation to whether there was contributory negligence chargeable against Tommy (BAJI 113), and declared that a child is not held to the same standard of conduct as an adult (BAJI 147). It appears that there was evidence from which the jury could have found that Tommy was guilty of contributory negligence: He had worked some three months on the skeet range and several times in the high house; he reasonably should have seen the peppered indentation marks on the high house and the metal plates around the opening from which the bird emerged; he had been warned of the danger that shot might come through the opening; he knew that he was not wearing any protective clothing or a face mask; and he was aware of the difficulty of shooting from station number 8. The jury could have inferred that Tommy had not stepped back on loading the machine but remained in direct line of the opening and so was hit, or that he had stepped back and thereafter stepped forward prematurely. Accordingly, whether Tommy was contributorily negligent was a question for submission to the jury rather than an issue for determination as a matter of law through the giving of plaintiffs' requested instruction.

[9, 10] Nor did the court err in giving, at defendant's request, instructions on the question of assumption of risk. These were BAJI 207 to 207–E. They included the distinction between contributory negligence and assumption of risk (BAJI 207–C), the declaration that the person's "age, experience and capacity along with all the other surrounding circumstances as shown by the evidence" should be considered (BAJI 207–D), and the statement that the "plaintiff did not assume the risk of any injury that could have come to him only through the negligence of the defendant" (BAJI 207–E). Here there was evidence from the circumstances of Tommy's work in the high house and his knowledge of skeet range practice which would support a finding that he had voluntarily assumed the risk of his employment. Contrary to plaintiffs' position, the doctrine of assumption of risk is not limited to an action by an employee against his employer because of injuries suffered in the course of employment. Prescott v. Ralph's Grocery Co., 42 Cal.2d 158, 161–162, 265 P.2d 904; see also Warnke v. Griffith Co., 133 Cal.App. 481, 494, 24 P.2d 583.

[11, 12] Finally, there was no error in giving, at defendant's request, the following instruction: "You are instructed that it is the duty of an employer to furnish to his employees a safe place for them to work. You are further instructed that defendant, Philip Lombardo, if exercising ordinary care himself, was entitled to assume that plaintiff's employer had furnished to plaintiff a safe place within which to work and he could further assume that the plaintiff would reasonably use the protection afforded to him by the employer." Plaintiffs argue that this instruction was improper in that it relates only to a duty owed by an employer to an employee as to safety regulations,

Labor Code, §§ 6401–6402; Douglas v. Maloney, 105 Cal.App.2d 284, 286, 233 P.2d 59; Neuber v. Royal Realty Co., 86 Cal.App.2d 596, 619, 195 P.2d 501, and can have no pertinence to the issues between the parties here. But every person who is exercising ordinary care "has a right to presume that every other person will perform his duty and obey the law." Hosking v. Danforth, 1 Cal.App.2d 178, 181, 36 P.2d 427, 429; see also Giovannoni v. Union Ice Co., 108 Cal.App. 190, 195, 291 P. 461. Accordingly here, defendant was entitled to rely upon the assumption that the owners of the skeet range had obeyed the law and had exercised reasonable care toward him and toward persons working on the range through having the range in reasonably safe condition. Apparently the jury accepted defendant's testimony that he did not know, and had no reason to assume, that any shot fired from the designated stations would enter the high house. The jury therefore probably concluded that defendant had done exactly what he was supposed to do in firing from station number 8 and had violated no duty of care in so doing. The issues involved were fairly presented in the instructions to the jury, and no prejudicial error has been shown.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

The trial court gave the following instruction at the request of defendant: "You are instructed that the duty owed by the defendant to the plaintiff in this case was to exercise ordinary care, that is the care that would be exercised by a reasonably prudent person in the same or similar circumstances. In this particular instance, however, the defendant was possessed of and using a firearm and a firearm is capable of causing severe injury. For that reason the defendant was required to foresee the possibility of injury and, to avoid it, to exercise a degree of care commensurate with and in proportion to the danger involved, and, in the exercise of ordinary care, the quantum or amount of care exercised may be greater than would be necessary if he was not handling a loaded weapon. This is but another way of saying that the amount of care to be exercised by a reasonably prudent person will vary with the circumstances, and where the danger of injury is greater the amount of care to be used may be great."

The court refused to give the following instruction requested by plaintiff: "You are instructed that if a person is injured by the discharge of a gun in the hands of another who has entire control of it, the burden is cast upon the latter to prove that the gun was not fired at the party injured either intentionally or negligently, but the result was inevitable and without the least fault upon the part of the one handling the gun."

In my opinion the giving of the first instruction above quoted and the refusal to give the second instruction above quoted was prejudicial error which justifies a reversal of the judgment.

My views with respect to the legal problems involved in this case are expressed in my concurring opinion in Jensen v. Minard, 44 Cal.2d 325, at page 330 et seq., 282 P.2d 7, at page 9, and for the reasons expressed therein I would reverse the judgment in the case at bar and grant plaintiff a new trial.

146 Cal.App.2d 399

HOLLYWOOD WHOLESALE ELECTRIC CO., a Corporation, Plaintiff and Respondent,

v.

JACK BASKIN, Inc., a Corporation, and Seaboard Surety Company, a Corporation, Defendants and Appellants.

Civ. 21623.

District Court of Appeal, Second District, Division 3, California.

Nov. 29, 1956.

Hearing Denied Jan. 23, 1957.

Materialman brought action on a labor and material bond against contractor, as principal, and against surety for reasonable value of electrical materials allegedly furnished by materialman to subcontractor for use in school building. The Superior Court of Los Angeles County, John J. Ford, J., entered judgment in favor of the materialman, and the contractor and the surety appealed. The District Court of Appeal, Shinn, P. J., held that where materialman was unsuccessful in prior action because of error of trial court, award of attorney's fee to materialman in the subsequent action properly included an award for services performed by materialman's counsel in the prior action.

Judgment affirmed.

1. Payment ⊂⇒39(1)

In absence of anything appearing as to source of fund from which subcontractor makes payment to materialman, to whom subcontractor is indebted on account of several obligations and in absence of any direction as to application, such payment may be applied by materialman to any of the obligations.

2. Payment ⊂⇒39(1), 43

Where there is a running account, creditor may apply debtor's payment to any item, and general credits on such accounts stand as payment on oldest items of such counts unless some other application is clearly indicated.

3. Schools and School Districts ⊂⇒86(2)

Where each of subcontractor's orders concerning school project constituted, when filled, distinct obligations owed to materialman, to whom subcontractor owed balance on open account, which included older indebtedness arising from other projects, and not all of subcontractor's payments were designated as applicable to any particular account, and materialman applied undesignated payments to the older items in the account, subcontractor's undesignated payments did not reduce debt owed by him to materialman on school project. West's Ann.Gov.Code, §§ 4200, 4207.

4. Schools and School Districts ⊂⇒81(2)

In action on a labor and material bond by materialman against contractor, as principal, and against surety for reasonable value of electrical materials allegedly furnished to subcontractor for use in school building, evidence sustained finding that, with certain minor exceptions, all materials charged to the school job were actually used in school building. West's Ann.Gov. Code, §§ 4200, 4207.

5. Schools and School Districts ⊂⇒81(2)

Where, because of error of trial court, materialman did not prevail in first action on a labor and material bond against contractor, as principal, and against surety for reasonable value of electrical materials allegedly furnished to subcontractor for use in school building, and a second trial became necessary, and materialman prevailed at second trial, award of attorney's fee to materialman properly included an award for services rendered during the first trial. West's Ann.Gov.Code, §§ 4200, 4207.

6. Appeal and Error ⊂⇒1039(13)

Where variance between pleading and proof of plaintiff did not result in any prejudice to defendants, it would be disregarded on appeal. West's Ann.Code Civ.Proc., § 469.

7. Sales ⊂⇒75, 183

Where goods are billed at a stated price and are received and retained by the buyer without objection to the quantity, the quality, or the price, the buyer must pay the amount of the seller's charges and cannot be heard to say that the agreed price was in excess of the reasonable value, and the seller cannot increase his charge by claiming that he did not ask enough.

8. Schools and School Districts ⇐81(2)

In action on a labor and material bond by materialman against contractor, as principal, and against surety for reasonable value of electrical materials allegedly furnished to subcontractor for use in school building, wherein it was established that materials were sold by materialman to subcontractor under express contracts whereby subcontractor was obligated to pay amount stated on each invoice together with 8% interest on each amount unpaid 30 days after the end of the month each order was shipped, trial court properly awarded materialman interest on principal amount which had accrued prior to the judgment. West's Ann.Gov.Code, §§ 4200, 4207.

9. Schools and School Districts ⇐81(2)

Where purpose of labor and material bond furnished by contractor, as principal, and surety in connection with construction of school buildings, was to indemnify school district with respect to materials which were furnished to subcontractor for use in school building, and for which subcontractor might not pay the supplier, principal and surety were liable for interest on amount owed by subcontractor to materialman, though there was no specific agreement in the bond respecting interest. West's Ann.Gov.Code, §§ 4200, 4207.

◆

Wallace & Wallace, W. W. Wallace, Los Angeles, for appellants.

Forster & Gemmill, Los Angeles, for respondent.

SHINN, Presiding Justice.

This is the second appeal in an action upon a labor and material bond executed and filed pursuant to Sections 4200 and 4207 of the Government Code, for the payment of the reasonable value of electrical materials allegedly furnished for and used in the construction of school buildings at the Colfax Avenue School site in Los Angeles. The action is against Jack Baskin, Inc., as principal, and Seaboard Surety Company, as surety.

Defendants had judgment at the first trial. That judgment was reversed by this court. See Hollywood Wholesale Elec. Co. v. John Baskin, Inc., 121 Cal.App.2d 415, 263 P.2d 665. At the second trial, plaintiff recovered judgment for $8,000.23. The court likewise awarded plaintiff accrued interest totalling $3,016.78 and $4,000 as an attorney's fee. Defendants appeal from the judgment. They contend the evidence was insufficient to support the findings, that the court erred in awarding plaintiff an attorney's fee which took into account services rendered at the first trial, and that plaintiff is not entitled to recover interest which had accrued prior to the judgment.

This opinion must be read with our opinion on the prior appeal. We will summarize the detailed statement of facts therein. On June 19, 1950, Baskin agreed with the Los Angeles City School District to construct certain school buildings at the site of the Colfax School. Pursuant to Section 4200 of the Government Code, Baskin, as principal, and Seaboard, as surety, executed and filed a labor and material bond. On the same date, Baskin contracted with W. C. Scruggs for the furnishing and installation of the electrical equipment.

Plaintiff is a supplier of electrical materials. Scruggs had done business with plaintiff for many years. Between June 28, 1950 and May 2, 1951, plaintiff sold and delivered to Scruggs various electrical materials for the Colfax School job and other jobs. Scruggs maintained a running account with plaintiff, in which charges and credits in connection with the various jobs were recorded on a single continuous series of general ledger sheets. On June 28, 1950, Scruggs owed plaintiff $14,833.49 for equipment previously furnished him on other jobs. As of December 29, 1950, plaintiff broke down the total obligations then owing by Scruggs (including the then balance on the Colfax job) and segregated each obligation to the job to which it was applicable. Scruggs' running balance was then $35,129.19.

During the period of performance of the Colfax job, Scruggs made a number of payments to plaintiff. Only one of these, a check for $1,500, was specifically given and received on account of the Colfax job. It was held on the prior appeal that since Scruggs did not direct plaintiff to apply the other payments to the Colfax indebtedness, plaintiff was justified in applying them to extinguish Scruggs' indebtedness with respect to the oldest items of account, and that defendants, as parties secondarily liable for the materials furnished to Scruggs, could not control the application of payments by plaintiff. Hollywood Wholesale Elec. Co. v. John Baskin, Inc., supra, 121 Cal.App.2d 415, 429–430, 263 P.2d 665.

The court below found that plaintiff's charges were $9,953.43. Scruggs was given credit for the $1,500 payment, for $136.45 for materials not actually used on the Colfax job and for $116.73 for materials which were returned to plaintiff. The court also allowed $200.02 for other credits, and found that the balance due was $8,000.23.

[1–3] The first assignment of error to be considered is that the evidence was insufficient to support the findings. In this connection, defendants seek to re-litigate the same issues which they urged unsuccessfully on the prior appeal. They argue that plaintiff was not entitled to allocate Scruggs' payments to the oldest items of the running account. But as said in our prior opinion (Hollywood Wholesale Elec. Co. v. John Baskin, Inc., supra, 121 Cal. App.2d 415, 429–430, 263 P.2d 674): "In the absence of anything appearing as to the source of the fund from which a subcontractor makes a payment to a materialman, to whom he is indebted on account of several obligations, without any direction as to application, the payment may be applied by the materialman to any obligation. [Citations.] Where there is a running account, the creditor may apply a payment to any item. General credits on open accounts stand as payments on the oldest items of such accounts unless some other application be clearly indicated. [Citations.]" The statement is applicable to the evidence in the second trial.

[4] Defendants also contend there was no evidence that all the equipment charged to the Colfax job was actually used in the construction of the school buildings. Plaintiff introduced into evidence the delivery receipts, signed by Scruggs or his employees. These were not disputed. Two of Scruggs' former employees testified at considerable length as to the receipt and use of items charged to the Colfax job. The court gave Scruggs credit for several minor unused items. It found that with those exceptions, all the materials charged to the Colfax job were actually used in the buildings. The finding has support in the evidence.

[5] The next assignment of error is that the court erred in awarding plaintiff a $4,000 attorney's fee. The award was based upon Section 4207 of the Government Code. That section provides that in an action brought upon a contractor's bond which is required by Section 4200, the prevailing party shall be entitled to a reasonable attorney's fee to be taxed by the court as costs. The bond contains a similar provision. At the conclusion of the trial, the court requested testimony as to the value of the services rendered by plaintiff's counsel, and after a hearing, it found that $4,000 was a reasonable fee for services performed in filing and prosecuting the action, including the two trials, but exclusive of the prior appeal.

Defendants argue that since plaintiff was not the prevailing party at the first trial, it cannot properly be awarded a fee for attorney's services rendered during that trial and that the $4,000 should be reduced by half. The argument is without merit. It is not questioned that the services were competently performed or that they were necessary to plaintiff in establishing its rights under the bond. Plaintiff should have prevailed in the first trial. Neither party can be said to have prevailed in the action until judgment was entered for plaintiff at the conclusion of the second trial. We see no reason why the burden of a portion of plaintiff's attorney's fees should be shifted from defendants to plaintiff when, through no fault of plaintiff, and due to error of the court, induced by defendants, a second trial became necessary.

The final assignment of error is that the court erred in awarding plaintiff interest on the principal amount which had accrued prior to the judgment. Defendants argue that this is an action for the reasonable value of the electrical materials sold to Scruggs and used in the Colfax job, hence plaintiff is not entitled to recover interest for the period preceding the date of judgment, at which time the reasonable value of the material was determined. Citing Associated Wholesale Elec. Co. v. S. H. Kress & Co., 11 Cal.App.2d 592, 54 P.2d 38; Culjak v. Better Built Homes, Inc., 58 Cal.App.2d 720, 137 P.2d 492; Lineman v. Schmid, 32 Cal.2d 204, 195 P.2d 408, 4 A.L.R.2d 1380.

The complaint alleged that Scruggs agreed to pay plaintiff the reasonable value of the materials furnished him on or about the 10th day of each month following the month of delivery, plus interest thereon at the rate of 8 per cent per annum on amounts due and unpaid more than 30 days. Plaintiff introduced into evidence copies of 78 invoices representing separate deliveries of electrical materials to Scruggs between June 28, 1950 and May 2, 1951 on account of the Colfax job. The original invoices, which were sent to Scruggs, contained the terms with respect to the payment of interest.

The court made detailed findings. It found that the materials were sold under express contracts whereby Scruggs was obligated to pay the amount stated on each invoice together with 8 per cent interest on each amount unpaid 30 days after the end of the month each order was shipped. Interest was computed on each separately invoiced item as of June 30, 1951, which was 30 days after the end of the month during which plaintiff made its last delivery to Scruggs. The court found this amount, less adjustment for credits, to be $398.13 and the interest from July 1, 1951 to the date of the judgment to be $2,560.07.

[6] The rule relied upon by defendants is inapplicable to the present case. It is true that the complaint alleged that Scruggs agreed to pay the reasonable value of the materials but that theory of the case was in error. The materials were sold under express contracts as to quantities and prices. The court so found and the findings are not questioned. There was a variance between the pleading and the proof, but it did not result in any prejudice to the defendants and should be disregarded. Code Civ.Proc. § 469.

[7, 8] The court found that the materials were reasonably worth the prices charged therefor but made no finding that they were sold under an agreement to pay the reasonable value. Defendants were obligated to pay whatever Scruggs owed. They seek to avoid their liability for interest prior to judgment by claiming there was uncertainty as to the amount of Scruggs' indebtedness. But there was no uncertainty. Where goods are billed at a stated price and are received and retained by the buyer without objection to the quantity, the quality, or the price, he must pay the amount of the seller's charges. He cannot be heard to say that the agreed price was in excess of the reasonable value nor can the seller increase his charge by claiming he did not ask enough. Scruggs had at hand complete data from which the amount of his indebtedness could be ascertained by simple mathematics. The amount of defendants' liability was not uncertain. Interest was allowable in accordance with the agreement, to be computed upon all amounts that were 30 days overdue.

[9] Defendants make the further claim that they did not agree to pay interest. Although there was no specific agreement

respecting interest, the purpose of the bond was to indemnify the school district with respect to materials furnished to Scruggs for use in the school building for which he might not pay the supplier. The cost of the materials included the interest charges which Scruggs agreed to pay as the price of the retention of sums due plaintiff for more than 30 days.

The judgment is affirmed.

VALLÉE, J., concurs.

PARKER WOOD, J., did not participate.

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146 Cal.App.2d 450

S. A. ANDERSON, Plaintiff and Appellant,

v.

Harry JOSEPH and George Joseph, doing business as Joseph Brothers, Defendants and Respondents.

Harry JOSEPH and George Joseph, individually and as copartners doing business as Joseph Brothers, Plaintiffs and Respondents,

v.

S. A. ANDERSON, Defendant and Appellant.

Civ. 9091, 9092.

District Court of Appeal, Third District, California.

Nov. 30, 1956.

Action for personal injuries. Judgment was entered in favor of plaintiff by the Superior Court, Merced County, R. R. Sischo, J. The clerk entered satisfaction of judgment and plaintiff appealed. Action by judgment debtors on settlement agreement for satisfaction of the judgment. The debtors moved for temporary injunction against issuance of execution. The Superior Court, Merced County, R. R. Sischo, J., made pronouncement that was reflected in minute book as order denying injunction on condition that debtors deliver draft in accordance with agreement to clerk for remittance to creditor who was to either satisfy judgment or have it satisfied for him, and creditor appealed. The District Court of Appeal, Van Dyke, P. J., held that no appeal lay from act of clerk in satisfying judgment, and since the order of court in second action did not grant or deny injunction but was void attempt to determine merits, it too was not appealable.

Motions to dismiss appeals granted in both cases.

1. Appeal and Error 🔑85

No appeal could be taken from the act of the clerk in satisfying a judgment of record.

2. Judgment 🔑898(4)

Where a satisfaction of judgment has been erroneously entered, remedy is for the judgment holder either to move in the case in which the judgment was rendered for an order cancelling entry of satisfaction or to commence an independent action in equity.

3. Appeal and Error 🔑112

Where judgment debtors instituted action on alleged agreement for settlement of judgment and moved to temporarily enjoin creditor from causing execution to issue and upon hearing on this issue creditor claimed his attorney did not have authority to enter into agreement, factual issue was presented as to attorney's authority and when court ordered debtor to deliver draft to clerk for remittance to creditor and upon creditor's failure to satisfy the judgment the clerk was to do so, such order was not denial or grant of injunction but was void attempt to determine merits without consent of parties and hence was not appealable. West's Ann.Code Civ.Proc., § 963, subd. 2.

4. Attorney and Client 🔑70

It may be presumed that counsel has authority for acts done in behalf of their clients.

Lin Griffith, Turlock, for appellant.

John D. Chinello, Fresno, for respondents.

VAN DYKE, Presiding Justice.

Respondents have moved to dismiss the appeal in each of the above entitled cases.

[1, 2] In the case of Anderson v. Joseph, 3 Civil No. 9091, Anderson obtained a judgment against the Joseph Brothers in the sum of $4,694.05 and they appealed. On December 19, 1955, this court filed its decision affirming the judgment. See Anderson v. Joseph, 136 Cal.App.2d 382, 288 P.2d 524. Prior thereto on October 10, 1955, counsel for respondent Anderson, apparently responding to oral suggestions of counsel for appellants, hereinafter called Joseph Brothers, wrote a letter to their counsel stating that Anderson would take in settlement the principal amount of the judgment plus costs or a total of $4,764.05 and would waive the accumulated interest. On October 17th counsel for Joseph Brothers replied, stating that his clients had accepted the offer to settle and that he had written to obtain a draft payable to Anderson and his counsel in full satisfaction of the judgment. He stated that he was writing to this court advising it that the appeal was being disposed of by settlement. Apparently there was some hiatus in these arrangements and this court filed its decision affirming the judgment. Thereupon respondent refused to abide by the settlement agreement and demanded full payment of judgment and interest. Thereafter and because of certain proceedings which will be hereinafter related, the clerk of the trial court entered a satisfaction of the judgment and respondent Anderson has noticed an appeal from the act of the clerk in filing the satisfaction. A motion has been made to dismiss this appeal and it must be granted. No appeal lies from the act of the clerk in satisfying a judgment of record. Where a satisfaction of judgment has been erroneously entered, the remedy is for the judgment holder either to move in the case in which the judgment was rendered for an order cancelling the entry of satisfaction or to commence an independent action in equity. Kinnison v. Guaranty Liquidating Corp., 18 Cal.2d 256, 115 P.2d 450.

After the refusal of Anderson to go through with the settlement which it was claimed he had made through his counsel, Joseph Brothers brought an action against him based upon the alleged agreement. In their complaint they asked a judgment that Anderson be decreed to perform and be ordered to execute satisfaction of judgment upon payment to him of the settlement sum. Joseph Brothers asked for and obtained an order of court directing Anderson to show cause why he should not be temporarily enjoined pending the decision in the cause from causing execution to issue upon his judgment and from causing levy to be made upon property of the judgment debtors. Thereafter, the following occurred: The order to show cause came on for hearing. The letters concerning the settlement were read to the court and there was received an affidavit of Anderson wherein he denied that he had ever offered to settle, or had settled, his judgment claims against Joseph Brothers. Thereupon, the trial court stated that when both attorneys had agreed on the settlement the matter was out of the hands of the client and that if the client had not authorized his attorney to settle, his recourse was against the attorney in a malpractice suit. It then appeared that counsel for Joseph Brothers had in his possession a draft which he had tendered in fulfillment of the alleged agreement and the court instructed him to file the draft with the clerk, stating that the court would order the action of Joseph Brothers v. Anderson to be dismissed, and would also order the clerk to send the draft to the attorney who had represented Anderson in the suit against Joseph Brothers. The court stated that the attorneys had made an agreement and that it would be carried out. It thereupon stated that the temporary injunction would not be granted. The minute book shows the following: "Motion for injunction is denied on condition that the plaintiff deliver to the defendant, a draft in the amount set forth in the judgment and in accordance with the agreement set forth in the exchange of letters between the attorneys. It is further ordered that the Clerk of the Court deliver to Gilbert Moody, attorney for the defendant, the above-mentioned draft. It is further ordered that if the defendant fails to file a Satisfaction of Judgment for which the draft is intended, by January 23, 1956, the Clerk of the Court is instructed and directed to enter said Satisfaction of Judgment for and on behalf of the defendant." The minutes show no order dismissing the action. Thereafter, as above stated, the clerk did enter satisfaction of judgment in the case of Anderson vs. Joseph Brothers.

Anderson filed notice of appeal in the action of Joseph Brothers against him, stating that he appealed from the order and judgment in the action made and entered on January 16, 1956, the date of hearing the motion for temporary injunction, which we construe as being an appeal from the orders reflected in the minute book of the clerk as above stated. Joseph Brothers have moved to dismiss the appeal.

[3, 4] An appeal lies from an order granting or refusing to grant an injunction, Code of Civ.Proc., § 963, subd. 2; Woodbine v. Van Horn, 29 Cal.2d 95, 108, 173 P.2d 17; Gray v. Bybee, 60 Cal.App.2d 564, 571, 141 P.2d 32, but no injunction was granted against Anderson. Although the order denying is conditional in form, yet it does not enjoin him from doing, nor order him to do, any act. The remainder of the court's orders appearing in the minutes of January 16th and referred to in the notice of appeal have to do with ordering counsel for Joseph Brothers to deliver the settlement draft to the clerk of the court and ordering the clerk of the court to deliver the same to Mr. Moody, trial and appeal attorney for Anderson, and with ordering that if Anderson should fail to file a satisfaction of judgment in the other action within a given time then the clerk was to enter the satisfaction for him. These orders had the effect of determining the second action on the merits and there is nothing in the record from which it can be inferred or deduced that the parties consented to such a determination. The court was convened simply to hear the motion for temporary injunction. Apparently the court considered that under the evidence introduced upon that hearing there was no factual issue between the parties, they being bound by the arrangements made by their counsel. It may be presumed that counsel have authority for acts done in behalf of their clients, but that presumption in this case merely created an issue as against the affidavit of Mr. Anderson that in fact he had not given Mr. Moody such authority. "An attorney does not, without specific authorization, possess the power or authority to bind his client by a compromise settlement of pending litigation." (6 Cal.Jur.2d, Attorneys at Law, Sec. 160.) There was, therefore, a factual issue to be determined when the merits of the action should have been heard. In any event, unless based upon stipulation or other satisfactory showings submitting the cause on the merits, the court was without jurisdiction to determine the merits upon the hearing of a motion for a temporary injunction and the orders purporting to do so are void.

The second case stands as follows: The complaint has not been answered, the issues have not been tried, and the cause, therefore, stands in the court undetermined and subject to the usual procedure leading up to and terminating in a trial of the action. The orders made do not constitute final judgment in the action nor is any order made, appealable under Code of Civil Procedure, § 963, subdivision 2.

The motion to dismiss the appeal is granted in each case.

PEEK and SCHOTTKY, JJ., concur.

146 Cal.App.2d 455

ORANGE COAST JUNIOR COLLEGE DISTRICT OF ORANGE COUNTY, California, a body politic, Plaintiff and Respondent,

v.

Henry Clinton ST. JOHN, Defendant and Appellant.

Civ. 5013.

District Court of Appeal, Fourth District, California.

Nov. 30, 1956.

Hearing Denied Jan. 29, 1957.

Proceeding by school district to dismiss a teacher on charges of violations of certain sections of the Educational Code dealing with oath of applicants for employment, and duty to testify. The Superior Court, Orange County, Robert Gardner, J., entered judgment for the district and teacher appealed. The District Court of Appeal, Barnard, P. J., held that the Board of Trustees of a school district could require a teacher, as a condition of continued employment, to state under oath that he was not knowingly a member of the Communist Party.

Judgment affirmed.

1. Constitutional Law ⚷275(1)

Schools and School Districts ⚷133.15

Language of statutes requiring an employee of a school district to answer a question or questions relating to knowing membership in the Communist Party is sufficiently broad to require a teacher, as a condition of continued employment, to answer the question "Are you now a member of the Communist Party?" as a preliminary question, the answer to which would indicate whether any further inquiry with respect to "knowing" membership was necessary or proper, and no unconstitutionality or violation of due process appeared in requiring teacher to answer such a question as a condition of continued employment. West's Ann.Education Code, §§ 12601, 12604, 12605.

2. Schools and School Districts ⚷141(4)

Statute providing that no person who is knowingly a member of the Communist Party shall be employed by, or retained in employment of any school district, imposes a duty on school districts to see that no such person be retained in employment of the district. West's Ann.Education Code, § 12601.

3. Schools and School Districts ⚷127

Under statute providing that prior to first day of service as an employee of any school district the applicant shall state under oath whether or not he is knowingly a member of the Communist Party, the phrase "prior to the first day of service as an employee" may be interpreted as intended to apply to the first day of service of permanent employees after the effective date of the Dilworth Act. West's Ann. Education Code, §§ 12600 et seq., 12601, 13521.

4. Officers ⚷36(1)

Statute prohibiting employment by school district of a person who is knowingly a member of the Communist Party, as applied to present employees, is not in conflict with the meaning and intent of section of constitution providing for an oath or affirmation of office by all public officers and employees that they will not advocate or become a member of any party or organization that advocates the overthrow of the government of the United States or the State of California by force or violence or other unlawful means. West's Ann.Education Code, § 12601; West's Ann.Const. art. 20, § 3.

5. Constitutional Law ⚷82

Schools and School Districts ⚷127

Statutes ⚷96(4)

The purpose of the Dilworth Act is to regulate future employment of persons by school district and not to punish for past acts, and anyone is free to bring himself within its requirements if he so desires, and therefore such act is not unconstitutional as being special legislation, or as being a bill of attainder. West's Ann. Education Code, § 12600 et seq.

6. Schools and School Districts ⚷133.15

The Board of Trustees of a school district could require a teacher, as a condition of continued employment, to state under oath that he was not knowingly a member of the Communist Party. West's Ann.Education Code, § 12600 et seq., § 12601.

7. Evidence ⚷60

Witnesses ⚷297

Matters such as the prohibition against compelling self-incrimination and presumption of innocence, which are applicable in criminal prosecutions, are false quantities which have no logical connection with an inquiry respecting a person's qualification for public employment.

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Wirin, Rissman & Okrand, A. L. Wirin, Fred Okrand, Los Angeles, for appellant.

Joel E. Ogle, County Counsel, George F. Holden and Stephen K. Tamura, Deputy County Counsel, Santa Ana, for respondent.

Harold W. Kennedy, County Counsel, Gerald G. Kelly, Asst. County Counsel, Wm. E. Lamoreaux, Clarence H. Langstaff, James W. Briggs, Deputy County Counsel, Los Angeles, amici curiae for respondent.

BARNARD, Presiding Justice.

This is a proceeding to dismiss a teacher on charges of violations of Sections 12601, 12604 and 12605 of the Education Code. These sections are a part of what is known as the Dilworth Act, adopted in 1953.

The facts are undisputed. The appellant was employed by respondent district in 1948, and acquired tenure in 1952. In 1950 he signed the oath required by Government Code Section 3103. On October 2, 1953, the district sent all of its employees, including appellant, a form of oath identical in form with the one just referred to except for the addition of the words "and I do further swear (or affirm) that I am not knowingly a member of the Communist Party", as required by Section 12601 of the Education Code. Each employee was requested to sign the oath and return it not later than October 13. On October 5, 1953, the appellant was informed by letter that the board of trustees had called a meeting for October 7, 1953, pursuant to the provisions of the Dilworth Act and that his presence was requested.

At the meeting on October 7, a statement was made that "Our district had received a report from the State Department of Education alleging that Mr. St. John had been involved in certain activities in which Communism was also involved"; that the purpose of the meeting was not "to accuse" but to give appellant "an opportunity to clear himself of the allegations which had been made"; and that "We feel that as a public institution when such an allegation comes to us, we are obligated to look into it." The appellant was duly sworn and was asked the question "Are you now a member of the Communist Party?" He refused to answer and at the same time stated that he was returning unsigned the oath which had been previously sent to all teachers. He stated that his refusal to answer was because the question violated his "freedom of conscience" and was an invasion of his "political convictions." He further stated that he had signed one oath and considered it an insult to have to continue repeating such an oath as this, and then said "Membership in the Communist Party nowadays implies he is untrustworthy. It implies that he plans to overthrow the government and is an insult. I answered it at one time and refuse to do so again." Section 12605 of the Education Code was then read to him and he was asked if he were aware of that section. He replied that he was. He was then asked if he still refused to answer as to whether he was now a member of the Communist Party, and he replied that he refused to answer for the reasons he had already given.

On October 13, the respondent served on the appellant notice of its intention to dismiss, together with a statement of charges. Briefly stated, these charges were:

1. That he was guilty of unprofessional conduct in refusing to answer

the question "Are you now a member of the Communist Party?", in violation of Sections 12605 and 12606 of the Education Code.

2. That he violated Section 12601 of that code by refusing to state under oath whether or not he was knowingly a member of the Communist Party, and further stating that he would not do so at any time.

3. That he violated the provisions of Section 12604 of that code in refusing to answer questions relating to his present knowing membership in the Communist Party.

The appellant served upon the district a denial of the charges with a request for a hearing, in which he stated that he challenged the constitutionality of the Dilworth Act and challenged the authority of the Board "to inquire into my political opinions." The district then brought this action as provided for in Section 13529 of the Education Code, and a copy of the charges was included in the complaint. Two causes of action were alleged, the first being based upon Paragraphs 1 and 3 of the charges (refusal to answer questions) and the second upon Paragraph 2 (refusal to execute the oath). The appellant filed a demurrer, which was overruled, and then filed an answer. The matter was then submitted for decision on stipulated facts. The court found, among other things, that the appellant had refused to answer the question "Are you now a member of the Communist Party" in violation of the provisions of Sections 12605 and 12604 of the Education Code, and that he had refused to sign the oath and declined to state under oath whether or not he was knowingly a member of the Communist Party, in violation of Section 12601 of the Education Code. As conclusions of law the court found that the charges were true, that each of said charges constituted sufficient grounds for dismissal under Subdivision (j) of Section 13521 of the Education Code, and that plaintiff was entitled to a judgment decreeing that it may dismiss the defendant from its employ. Judgment was entered accordingly and this appeal followed.

Simply stated, two issues are here presented. 1. Whether the board of trustees of such a district may, under the circumstances shown by the evidence, require a teacher as a condition of continued employment to answer the question: "Are you now a member of the Communist Party?" 2. Whether such a board may require a teacher, as a condition of continued employment, to state under oath that he is not knowingly a member of the Communist Party.

With respect to the first of these issues we think the main problem is sufficiently answered, in principle, by the decision in Steinmetz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617, and the cases there cited. That case (under the Luckel Act and the Government Code) involved a statutory intention which is substantially identical with the provisions of Sections 12604 and 12605 of the Education Code. The nature of the questions, which it is made the duty of the employee to answer, is substantially the same under both statutory provisions. Instead of listing specific questions, both of them require an employee to specifically answer a question or questions "relating to" the subjects or matters set forth, which are the same in each instance.

With respect to this first issue the appellant contends that the evidence was not sufficient to show that he violated Section 12605 of the Education Code since that section refers to the questions set forth in Section 12604; that the questions set forth in Section 12604 refer to a "knowing" membership in such a party; and that the appellant was never asked a single question as to his "knowing" membership in the Communist Party. It is also contended that it would be unconstitutional and in violation of due process to hold that his refusal to answer the question asked him was sufficient to constitute a violation of Section 12604, since the respondent omitted to include in its question the essential element of *scienter* which is present in Section 12604(e) in that the word "knowing" was not included in the question. Reliance is placed on Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216, where it was held that a person could not be dismissed from his employment on the sole basis of his membership in an organization without regard to whether or not he was aware of its activities and purposes.

[1] While the matter suggested in Section 12604(e) is as to present knowing membership in the Communist Party, both Sections 12605 and 12604 require an employee to answer a question or questions relating to the matters set forth in Section 12604. The question here asked of the appellant, as to whether he was then a member of the Communist Party, is clearly related to the suggested matter as to his present knowing membership in that party. It was not only related thereto but it was a preliminary question the answer to which would normally indicate whether any further inquiry with respect to "knowing" membership was necessary or proper. The language of these statutes is sufficiently broad to cover the situation here existing, and it cannot reasonably be held that appellant's refusal to answer this question did not constitute a violation thereof. The question was a proper one and the appellant could have answered yes or no, or could have stated facts as to why he did not know, if such facts existed. Instead of answering or explaining his inability to do so, he took the position that the board had no right to make any such inquiry. In the Steinmetz case the appellant was dismissed not because of his membership in any organization but because of his refusal to answer questions as required by the statute. The facts here are sufficiently similar to bring this case within the principles followed in that case. No unconstitutionality or violation of due process here appears in requiring the appellant to answer this question, which directly related to his membership in the Communist Party. Steinmetz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617; Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517. While a knowledge of the principles of the Communist Party is not here involved, it may be observed that the appellant's statement when he refused to answer the question sufficiently discloses that he was not without such knowledge.

With respect to the second cause of action, based upon the appellant's refusal to state under oath whether or not he is knowingly a member of the Communist Party as required by Section 12601, the appellant contends that Section 12601 applies only to new employees and is not applicable to him. It is argued that this appears from the language of that section since it provides for such a statement to be made under oath by the applicant "prior to the first day of service" as an employee of any school district. It is also contended that if Section 12601 is construed to apply to present employees it is unconstitutional since it requires something in addition to, and is therefore in conflict with, the constitutional oath provided for in Article XX, Section 3 of the State Constitution.

[2, 3] The first sentence of Section 12601 provides that no person who is knowingly a member of the Communist Party shall be hereafter employed by or, with an exception not material here, "retained in the employment of" any school district. This imposes a duty on school districts to see that no such person shall thereafter be retained in the employment of the district. Section 13521 of the Education Code, as amended by the Dilworth Act, expressly made Section 12601 applicable to permanent employees which would include the appellant. In carrying out the intention thus expressed, the phrase "prior to the first day of service as an employee" may be interpreted as intended to apply to the first day of service after the effective date of the Dilworth Act.

[4] Construed as applying to present employees, Section 12601 is not in conflict with the meaning and intent of Section 3

of Article XX of the Constitution. In Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267, 273, the court considered a form of oath required by the Levering Act which differed from the form of oath then prescribed by Section 3 of Article XX to a much greater degree than Section 12601 differs from the constitutional oath as it now reads. It was there held that there was nothing in the Levering oath which went beyond the intent or meaning of Section 3 of Article XX, and that such an oath was not of a type which was intended to be prohibited by that section of the Constitution. The court there said: "Nothing in section 3 of article XX is intended to prevent the state from requiring disclosure of facts relating to an employee's fitness and suitability for public service * * *". A similar situation exists here and it cannot be said that the statement under oath required by Section 12601 is contrary to the spirit, meaning and intent of Section 3 of Article XX as it now reads. At most, it is a mere amplification of the constitutional oath now provided for by adding the name of the Communist Party in line with the findings of the legislature as outlined in Section 12600 of the Education Code.

[5] The further contentions that the Dilworth Act is unconstitutional as being special legislation, and as being a bill of attainder, are without merit. That a similar act was not special legislation was held in the Steinmetz case. The contention that such a law amounts to a bill of attainder has been rejected by the United States Supreme Court, Garner v. Board of Public Works, supra; American Communications Ass'n v. Douds, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925, and in principle is contrary to the decisions in Pockman v. Leonard, supra, the Steinmetz case, and many other cases in this state. The purpose of the Dilworth Act is to regulate future employment and not to punish for past acts, and anyone is free to bring himself within its requirements if he so desires. In the Douds case, the distinction between cases involving punishment for past actions and cases involving possible loss of position only because of matters involving future conduct was clearly pointed out. In concurring with the major holding in the Garner case Justice Frankfurter said [341 U.S. 716, 71 S.Ct. 915]:

> "It would give to the Due Process Clause an unwarranted power of intrusion into local affairs to hold that a city may not require its employees to disclose whether they have been members of the Communist Party or the Communist Political Association. * * * But the two employees who were dismissed solely because they refused to file an affidavit stating whether or when they had been members of the Communist Party * * * cannot successfully appeal to the Constitution of the United States."

In refusing to answer as to whether he was a member of the Communist Party or to sign the required oath the appellant stated that he refused because to do so would violate "my freedom of conscience" and would be "an invasion of my political convictions." In answering a similar contention in Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 384, 96 L.Ed. 517, the court said:

> "It is equally clear that they have no right to work for the State in the school system on their own terms. [Citation.] They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere."

[6] It seems equally clear, both in reason and under the authorities, that the terms of employment established by the Dilworth Act are reasonable, and that the information which the appellant refused to furnish had a direct relationship to those terms and related to matters which the board was entitled to inquire into in order to perform its duty with respect to his continued employment. What the teacher

thinks and believes along these lines are proper subjects of inquiry in relation to such employment, and his refusal to give to the board the required information may properly and lawfully be treated as insubordination and as sufficient evidence of his lack of one of the essential qualifications for this employment.

[7] The importance of a teacher's work in training the young, and the various considerations involved therein, have been stated and emphasized in many decisions and need not be repeated here. Academic freedom, upon which the appellant relies, does not mean much unless the teacher is willing to accept the responsibility which is an inherent part thereof, and is willing to cooperate in maintaining the conditions which make such a freedom possible. Such matters as the prohibition against compelling self-incrimination and the presumption of innocence, which are applicable in criminal prosecutions, are false quantities which have no logical connection with an inquiry respecting a person's qualification for public employment.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER and TRAYNOR, JJ., dissenting.

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146 Cal.App.2d 549

Karl SCHRAMKO, Plaintiff and Appellant,
v.
W. Thomas SAULTER, Defendant and Respondent.
Civ. 8845.

District Court of Appeal, Third District,
California.

Dec. 3, 1956.

As Corrected Jan. 2, 1957.

Action by occupant of truck against owner and operator thereof for injuries sustained in accident. The Superior Court of Mendocino County, Hale McCowen, J., granted defendant's motion for new trial and judgment notwithstanding verdict, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that under conflicting evidence as to occupant's status under guest statute, as result of allegedly paying compensation for ride in truck, grant of judgment notwithstanding verdict was error but grant of new trial was authorized.

Reversed in part, affirmed in part, and appeal from order granting motion for judgment notwithstanding verdict dismissed.

1. Judgment 🔑199(3.9)

Court's power to enter judgment notwithstanding verdict is the same as the power to grant a nonsuit.

2. Automobiles 🔑244(20)

Judgment 🔑199(3.15)

In action against owner and operator of truck for injuries to occupant, implied finding that occupant had given owner compensation for the ride and hence was not barred from recovery under guest statute was supported by substantial evidence, and grant of judgment for defendant notwithstanding verdict was error. West's Ann. Vehicle Code, § 403.

3. Automobiles 🔑242(1)

Even though owners of truck and lumber did not make express agreement as to form or amount of compensation, inference that truck owner was to be compensated, as affecting his liability to owner of lumber under guest statute, could be drawn from their conduct and relationship arising out of common understanding that truck owner should be recompensed for hauling lumber. West's Ann. Vehicle Code, § 403.

4. New Trial 🔑71

In action by occupant of truck against owner for injuries sustained in accident, conflicting evidence with respect to occupant's status under the guest statute authorized award of new trial. West's Ann. Vehicle Code, § 403.

5. Appeal and Error ⚷109

Order granting motion for judgment notwithstanding verdict was not appealable.

Barnett & Robertson, Rodney H. Robertson, San Francisco, for appellant.

Geary, Spridgen & Moskowitz, Santa Rosa, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order granting respondent's motion for a new trial and from the judgment entered in respondent's favor notwithstanding the jury's verdict which awarded appellant damages in the amount of $17,500 for personal injuries sustained when the truck in which he was riding with respondent tipped over and rolled down a steep embankment.

The accident occurred on a narrow, curved highway in Mendocino County on a clear, dry afternoon. Respondent was driving his loaded truck up a steep grade at a speed of approximately six miles an hour when the vehicle suddenly jumped out of gear. Respondent did not attempt to shift, but immediately applied both the tractor and trailer brakes in an effort to come to a complete stop. Upon such application of the brakes, the truck tilted and rolled. The trial court properly instructed the jury that the appellant was entitled to the benefits of the doctrine of res ipsa loquitur and by its verdict the jury impliedly found that the inference of negligence arising therefrom had not been rebutted. The jury also impliedly found that the appellant was not a guest of respondent at the time of the accident. The trial court granted respondent's motion for judgment notwithstanding the verdict on the ground that, as a matter of law, the appellant's status was that of a guest and that, as such, he was precluded from recovering for his injuries by reason of the so-called "guest statute". Veh.Code, sec. 403.

[1, 2] It is well established that the power of the court to enter a judgment in favor of the moving party notwithstanding a verdict is the same as the power of the court to grant a nonsuit. In view of this rule, we have concluded that the trial court erred in granting a judgment notwithstanding the verdict. We think there was substantial evidence to support the jury's implied finding that the appellant had given respondent compensation for the ride. It is admitted that there was no social relationship between respondent and appellant, although for approximately four years prior to the accident respondent had lived near, and traded at, appellant's grocery store. It is likewise admitted that the purpose of the trip was to get lumber for a septic tank which appellant was constructing at his place of business. Appellant testified that he had discussed the matter with respondent and told him he "would like to hire him to haul" the lumber. Respondent testified that appellant said to him: "'You have a truck, why don't you haul me some lumber over here to do some repair work,' or—no, 'to build a cesspool or septic tank', or something; I said, 'Well, I am very busy, but at some time when I am not busy I will haul it for you.' Well, later on—I don't remember just when—but later on he told me, he said someone else, I don't remember who it was, was supposed to have hauled his lumber and didn't. He said, 'I have to get it over here, because I am building a house, and I want this finished before the house is built'; and I said, 'Well, I will tell you what Karl, now in a few days I will have a day off, I won't be busy, and I will go haul the lumber for you.' *He said, 'Well, what would you charge me?'*, and I said, 'I have no BE plates, and I cannot make no charges, but I will haul the lumber for you.'" (Emphasis added.)

Respondent's claim that he stated that he could not charge for hauling the lumber was denied by appellant and his sister, who also was present at the conversation. She testified that respondent said he would be "happy to haul it" because then the grocery bill which he owed appellant would "go down". She further testified that approximately two weeks later respondent came to the store and declared that he was "ready to go for the lumber". Thereupon she summoned appellant and he and respondent departed for the Hollow Tree Lumber Company. There the lumber was purchased and loaded on respondent's truck. On the return trip the accident occurred.

The foregoing evidence supports the implied finding of the jury that appellant gave "compensation" for the ride. In Follansbee v. Benzenberg, 122 Cal.App.2d 466, 471, 265 P.2d 183, 186, 42 A.L.R.2d 832, it is said:

> "* * * To constitute compensation, it is not necessary that it be established that the compensation received by the driver was given 'for such ride' in the sense that the rider obtained transportation for some independent purpose of his own. Where the trip was not primarily for a social purpose, it is sufficient to show that the driver was to derive a benefit from the transportation. * * * An anticipated or prospective profit is a benefit and may be as effectual as an immediate or direct compensation."

[3] The primary purpose of the trip was of a business nature. There was a good reason why appellant went along. He picked out lumber to fit his needs. In so doing he benefited respondent by furthering respondent's hauling the lumber for compensation. Although the respondent and appellant may not have made an express agreement as to the form or amount of compensation, the inference could be drawn from their conduct and relationship that there was a common understanding respondent should be recompensed. Martinez v. Southern Pacific Co., 45 Cal.2d 244, 252–253, 288 P.2d 868. As stated in Fedler v. Hygelund, 106 Cal.App.2d 480, 484, 235 P.2d 247, 249:

> "The discussions that occur when the owner or driver of an automobile takes another into the car for a ride are apt in most cases to be sketchy and fragmentary since neither anticipates an accident, nor does either have the guest statute in mind. They are seldom conscious of making anything in the nature of a bargain. Such was the case here. * * * The jury were further entitled to consider the past relations of respondent and the appellants * * *."

It cannot be held, as a matter of law, that there was no evidence to support a finding that benefit accrued to respondent. Therefore, the trial court erred in granting the motion for judgment notwithstanding the verdict.

[4] The trial court did not err in granting the motion for a new trial on the ground of insufficiency of the evidence to support the verdict and judgment, and that it was against law. For instance and with respect to appellant's status under the guest law, in ruling on the motion for new trial the court was not only entitled, but required, to judge the credibility of witnesses and to weigh the evidence. The trial court could consider respondent's testimony that he not only did not expect to be paid but that he advised appellant that he could make no charge as he did not have a license permitting him to haul for hire. The trial court could also give credence to respondent's denial of having stated that he would be happy to haul the lumber in order to reduce his grocery bill. Turning to the issue of negligence, the same serious conflict is found in the record. Without further detailing the evidence, it may be said that there was sufficient conflict therein and in the inferences which could reasonably be drawn therefrom, to preclude this court from holding the trial court erred in granting a new trial.

[5] The judgment notwithstanding the verdict is reversed; the order granting the motion for a new trial is affirmed; the purported appeal from the order granting the motion for judgment notwithstanding the verdict is dismissed as it is not an appealable order. Scott v. George A. Fuller Co., 41 Cal.App.2d 501, 504, 107 P.2d 55.

SCHOTTKY and PEEK, JJ., concur.

146 Cal.App.2d 530

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Gilbert Manuel MONTES, Defendant and Appellant.

Cr. 5687.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1956.

Defendant was convicted of having possession of marijuana and of a prior conviction, a misdemeanor. From the judgment of conviction and an order denying defendant's motion for a new trial by the Superior Court, Los Angeles County, James G. Whyte, J., the defendant appealed. The District Court of Appeal, Moore, P. J., held that where sheriff's office had been informed by reliable informer that defendant was dealing in and using heroin and marijuana, previous arrests had been justifiably made after acting upon informer's advice, and police officers observed behavior of defendant in giving parties who arrived at his premises objects which were found to be packages of marijuana, defendant's arrest was lawful and a druggist's scale containing fragments of marijuana and a vial containing the same narcotic found during search of defendant's premises were admissible since search was incidental to arrest.

Judgment and order affirmed.

1. Arrest 🔑63(4)

A valid arrest may be made solely by reason of information communicated by a reliable informant.

2. Arrest 🔑63(4), 71

Where sheriff's office had been informed by reliable informer that defendant was dealing in and using heroin and marijuana, previous arrests had been justifiably made after acting upon informer's advice, and police officers observed behavior of defendant in giving parties who arrived at his premises objects which were found to be packages of marijuana, defendant's arrest was lawful and a druggist's scale containing fragments of marijuana and a vial containing the same narcotic found during search of defendant's premises were admissible since search was incidental to arrest. West's Ann.Health and Safety Code, § 11500.

3. Arrest 🔑71

Where narcotic suspect had been lawfully arrested and a reliable informer had given information to police officer that suspect was dealing in and using heroin and marijuana, a search of suspect's premises through part of a night and for part of the next day was not unlawful or unconstitutional because of its duration.

4. Searches and Seizures 🔑3(1, 9)

If a search is authorized by either a search warrant or by information of a reliable informant that a felony has been or is being committed, an officer may continue reasonably to explore every avenue that may lead to discovery of contraband articles.

5. Arrest 🔑71

Where suspect was lawfully arrested, a search of his home was not unreasonable for the reason that suspect's wife and children were present and witnessed the conduct of the officers doing the searching.

6. Searches and Seizures 🔑7(10)

Where police officers had observed arrested narcotic suspect at a place about 20 feet from back door of his home, search that revealed a glass vial containing a marijuana narcotic at that place was not prohibited or forbidden by the Constitution since entry upon a field or driveway is not an unlawful search. U.S.C.A.Const. Amend. 4.

7. Poisons 🔑9

In prosecution for possession of marijuana where search of suspect's home revealed a small scale with fragments of marijuana on it in a kitchen cabinet drawer to which suspect had the key and a vial containing same narcotic was found about 20 feet from back door of home, deductions of the trial court that suspect knew of his own possession of the forbidden weed were reasonable inferences and were sufficient to support the implied finding of the guilt of the suspect.

8. Criminal Law ⚷1159(2)

Where there is evidence, circumstantial or direct, that a crime has been committed and that the suspect was its perpetrator, the reviewing court will not weigh the evidence but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt.

John H. Marshall and Harold J. Ackerman, Los Angeles, for appellant, by John H. Marshall, Los Angeles.

Edmund G. Brown, Atty. Gen., Doris H. Maier, J. M. Sanderson, Deputy Attys. Gen., for respondent.

MOORE, Presiding Justice.

Convicted of having possession of marijuana, Health and Safety Code, § 11500, and of a prior conviction, a misdemeanor, defendant appeals from the judgment and from the order denying his motion for a new trial.

The Narcotics Detail of the Sheriff's Office having been informed by a reliable, confidential person that appellant was dealing in and using heroin and marijuana, placed the latter's home under surveillance on January 11, 1956, about six thirty in the evening. He was on his premises. Officer Vega observed a coupe arrive at the home; saw appellant enter his back door, return to the car, contact its occupant and give him a package. At 7:10 p. m. appellant contacted parties in a sedan. He entered his house, returned and gave some object to the occupants of that car also.

The officers recessed from their watch and pursued both automobiles. As they approached the coupe, a package containing marijuana was thrown from that vehicle. When they searched the sedan, two brown paper bags of marijuana were found. The officers returned at 7:45 p. m. At that time as appellant arrived in a station wagon, they placed him under arrest and searched the house and the premises outside. They found no narcotics in abundance, but in a box, within a drawer of a kitchen cabinet they found a druggist's scale containing fragments of marijuana. About twenty feet from the back door they found a vial containing the same narcotic. The officers had twice observed appellant near the spot where the vial was found, to wit, when the coupe and the sedan separately entered his premises. Appellant admitted the scale belonged to him and testified that no one had used it except his thirteen-year-old son.

Appellant contends that the vial and the scale were not properly admissible for the reason that they were fruits of an illegal search; also, that if properly received, the evidence was insufficient.

The search of appellant's premises and the seizure of the scale and vial were not illegal. They were incidental to a lawful arrest. Officer Vega knew appellant as a narcotic addict. His informant concerning Montes' recent activities was known to the officer to be reliable. Previous arrests had been justifiably made after acting upon this informant's advice. Before they had watched appellant's home an hour, two callers had driven into appellant's driveway and the occupants of both conveyances contacted him under suspicious circumstances. Each visiting car was followed by the officers. From one a package of marijuana was thrown to the ground; in the other on the front seat were two packages of the same leafy substance.

[1, 2] A valid arrest may be made solely by reason of information communicated by a reliable informant. People v. Gonzales, 141 Cal.App.2d 604, 297 P.2d 50; Trowbridge v. Superior Court, 144 Cal.App.2d

13, 300 P.2d 222. Furthermore, the officers had observed the behavior of appellant as the visitors in the two automobiles arrived and later found both cars bore away packages of marijuana. Such evidences afforded reasonable ground for the search of the premises as well as for the arrest of appellant. The arrest was valid and the search was incidental thereto. Willson v. Superior Court, 46 Cal.2d 291, 295, 294 P.2d 36.

[3, 4] Appellant contends that the search was unlawful in that it continued through the night of January 12 and for a part of the next day. The constitutional guaranty contains no specification against a continued search. If a search is authorized by either a search warrant or by information of a reliable informant that a felony has been or is being committed, an officer may, under circumstances such as occurred in this case, continue reasonably to explore every avenue that may lead to a discovery of the contraband article. Where the officer believes from reliable evidence that an arrestee has become a chronic culprit, and possesses evidence of his crime, no pains should be spared to uncover the object of his endeavors.

[5] Neither is the search of a home unreasonable because the wife and children are present and witness the conduct of the officers. A man's family is a part of him. When he decides to defy the law, he thereby contracts for them to witness the ignominy of his arrest, to see his home ransacked and his own person removed in irons. He cannot expect to prescribe the manner in which law-enforcement agencies must perform.

People v. Simon, 45 Cal.2d 645, 650, 290 P.2d 531, is not pertinent to the duration of the search. The officer who arrested Simon had no evidence of a crime having been committed by him. He simply did not like Simon's being in a warehouse district at ten-forty p. m. Neither is People v. Harvey, 142 Cal.App.2d 728, 299 P.2d 310, pertinent. The officers had no encouragement to search Harvey's house other than the casual opinions of the inspectors that "something was wrong." Nothing "wrong" happened. A coupe approached and parked and Harvey entered his own home. When he returned to and crossed the street, he was arrested.

Appellant herein was deservedly a suspect. The officers knew "he had had to do with narcotics for approximately six months." After his arrest, search of the kitchen-cabinet drawer produced the small scale. Appellant had the key to the drawer.

[6] Entry upon a field or a driveway is not an unlawful search forbidden by the Fourth Amendment. Hester v. U. S., 265 U.S. 57; 44 S.Ct. 445, 68 L.Ed. 898; Martin v. U. S., 5 Cir., 155 F.2d 503; People v. Martin, 45 Cal.2d 755, 290 P.2d 855. Therefore, the search that revealed the glass vial containing marijuana was not prohibited. Willson v. Superior Court, supra, 46 Cal.2d 291, 294 P.2d 36; People v. Boyles, 45 Cal.2d 652, 290 P.2d 535.

[7] Not only did the officers observe appellant at or near the vial twice as they watched his movements while the occupants of the visiting automobiles received the packages of marijuana, but he could give no reasonable explanation for their visits. His one explanation was proved false by his own testimony with reference to the use of the scale by his son. The deductions of the trial court that appellant knew of his own possession of the forbidden weed are reasonable inferences and are sufficient to support the implied finding of the guilt of appellant. People v. Simmons, 118 Cal.App.2d 238, 257 P.2d 749; People v. Walker, 121 Cal.App.2d 173, 262 P.2d 640; People v. Douglas, 141 Cal.App.2d 33, 296 P.2d 1.

[8] Finally, it is the rule that where there is evidence, circumstantial or direct, that a crime has been committed and that the defendant was its perpetrator, the reviewing court will not weigh the evidence but "will decide only whether upon the face of the evidence it can be held that suffi

cient facts could not have been found by the jury to warrant the inference of guilt." People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 779.

Judgment and order affirmed.

FOX and ASHBURN, JJ., concur.

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146 Cal.App.2d 69

Harry WYNN, Plaintiff and Respondent,
v.
TREASURE COMPANY, a corporation, and G. de Bretteville, Defendants and Appellants.
Civ. 21639.

District Court of Appeal, Second District, Division 3, California.
Nov. 16, 1956.

Rehearing Denied Dec. 13, 1956.

Suit to quiet title to six 1% participating oil royalty interests, for money had and received as earnings on royalty interests, and to set aside allegedly fraudulent execution sale of two and one half 1% of the royalty interests. The Superior Court of Los Angeles County, J. F. Moroney, J., entered judgment, and defendants appealed. The District Court of Appeal, Vallée, J., held, in part, that where prior judgment determined issue of president's ownership of oil leasehold, and determined issue whether president should be required to account for proceeds of well's production as of certain date, and finding was to effect that corporation was owner of oil leasehold and that president had no duty to account to vice-president, who held certain participating royalty interests, judgment was res judicata on question whether president was individually liable to vice-president, and court improperly entered judgment against president individually.

Judgment affirmed in part and reversed in part with directions.

1. Judgment 🔑720

Where prior judgment determined issue of president's ownership of leasehold, and determined issue whether president should be required to account for proceeds of oil well's production as of December 31, 1939, and finding was to effect that corporation was owner of oil leasehold and that president had no duty to account to vice-president, judgment was res judicata on question whether president was individually liable to vice-president, and court, in subsequent suit involving vice-president's claim to royalty interests, improperly entered judgment against president individually for this period.

2. Pleading 🔑428(7)

Where, though defendants did not plead estoppel, evidence on which claimed estoppel was based was admitted without objection, issue was fully litigated, and any objection that defendants did not plead estoppel was waived.

3. Corporations 🔑34(7)

A person who has acted as director, officer, or agent of an association purporting to be a corporation is estopped from denying its corporate existence both as against alleged corporation itself and its members and stockholders.

4. Corporations 🔑34(7)

Person, having been officer and director of corporation, having acted on its behalf as corporation, having treated it as separate and distinct entity at all times prior to instant case, having sued it in previous action, in which he alleged its corporate existence without any claim that it was alter ego of anyone, was estopped from denying existence of corporation and was estopped from contending that corporation was alter ego of its president.

5. Eminent Domain 🔑158

The United States District Court in oil leasehold eminent domain proceedings had jurisdiction to decide question of title between adverse claimants; and ownership of award, which stood in place of realty, as between adverse claimants, was not merely incidentally involved in that proceeding but was issue which was directly involved and decided.

6. Judgment ⚷713(2)

The doctrine of res judicata is that an existing final judgment on the merits of cause rendered by court of competent jurisdiction is, in all subsequent actions, conclusive of rights of parties thereto and of their privies on all material issues which were or might have been determined.

7. Judgment ⚷634

Application of principle of res judicata in given case depends on affirmative answers to questions: Was issue decided in prior litigation identical with one presented in action in question? Was there a final judgment on merits? Was party against whom judgment is asserted a party or in privity with party to prior litigation?

8. Courts ⚷107

The entire opinion of federal appellate court must be read to understand import of decision.

9. Judgment ⚷829(3)

Where judgment in eminent domain proceeding in federal court involving oil leasehold was affirmed as to vice-president's ownership of six 1% participating royalty interests in leasehold, judgment in that respect was final and was res judicata on question, though judgment of Court of Appeals on appeal prevented vice-president from receiving his proportion of award until manner of division of award was determined in pending state court action.

10. Judgment ⚷829(3)

Where award in federal court eminent domain proceeding involving oil leasehold was value of leasehold interest in property on which well was drilled, and court specifically found that award was not made for oil produced, saved and sold or to be produced, saved and sold, and subsequent action, insofar as it was for money, was for money received from oil, gas and gasoline produced and sold from well, plaintiff's right to recover moneys which corporation had received from production of well was not in issue in prior eminent domain proceedings, and federal judgment was not res judicata with respect thereto.

11. Judgment ⚷829(3)

Where federal court in eminent domain proceedings involving oil leasehold stated that it made no finding pertaining to pending state court action neither as to its merits nor as to its being barred by statute of limitations, federal judgment was not res judicata on issue of statute of limitations in state court action, and, in any event, applicability of statute of limitations to vice-president's claim for money arising from production of well was not in issue before federal court in eminent domain proceedings.

12. Judgment ⚷829(3)

Where question of validity of execution sale of two and one half 1% participating royalty interests was in issue in federal court in eminent domain proceedings involving oil leasehold, and federal court decided that sale was void, federal judgment was res judicata on question.

13. Execution ⚷213

Mines and Minerals ⚷55(4)

Two and one half 1% participating royalty interests in oil leasehold are real property, and their sale on execution by sheriff as personal property was void.

14. Execution ⚷254

Where sale on execution of two and one half 1% participating royalty interests in oil leasehold was to satisfy judgment for costs, and after sale judgment for costs was satisfied of record as consideration for purchase of royalty interests, upon vacation of sale found to be void, court improperly failed to order that satisfaction of judgment for costs be annulled.

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John H. Rice and Nicholas & Mack, Los Angeles, for appellants.

Leland J. Allen, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal by defendants Treasure Company and de Bretteville from an adverse judgment in a suit to quiet title to six 1% participating oil royalty interests, for money had and received as earnings on the royalty interests, and to set aside an alleged fraudulent execution sale of two and a half 1% of the royalty interests.

Treasure Company, referred to as Treasure, is a California corporation. G. de Bretteville has been its president and a director since its inception.

In 1938 Treasure was the owner of a leasehold, known as the Fletcher leasehold, on which an oil well known as Treasure Well No. 8 was being drilled. On April 5, 1938, a contract was executed between Treasure, Walter B. Scoville, and The Adamant Company, a corporation, for the furnishing of funds to complete the drilling of Treasure Well No. 8. Under the terms of the contract, Treasure assigned to Scoville and Adamant certain participating royalty interests in the leasehold.

On April 29, 1938, Treasure, pursuant to a permit of the Commissioner of Corporations, assigned to plaintiff, in escrow, two and a half 1% participating royalty interests in certain oil and gas leaseholds, including the Fletcher leasehold, in consideration of services which had been rendered and which were to be rendered. The royalty interests were issued.

On December 2, 1938, the Commissioner of Corporations authorized Treasure to assign to plaintiff an additional two and a half 1% participating royalty interests in the Fletcher leasehold. The permit expired on March 1, 1939. However, no instrument of assignment of the additional royalty interests was ever executed.

On December 13, 1938, Scoville assigned to plaintiff one 1% participating royalty interest in the Fletcher leasehold.

A controversy arose with respect to the contract of April 5, 1938, and on June 1, 1939, a suit was filed in the superior court of Los Angeles County. Plaintiff here, Walter B. Scoville, The Adamant Company, and one J. O. Seeple were parties plaintiff and Treasure and de Bretteville were parties defendant. The suit was tried before Judge Vickers who entered judgment for the defendants therein on November 27, 1940, to be referred to as the Vickers judgment. The judgment awarded costs against the plaintiffs for $454.65. On July 20, 1942, de Bretteville obtained a writ of execution on the cost judgment and the sheriff levied on the issued two and a half 1% royalty interests then owned by plaintiff. On August 20, 1942, the royalty interests were sold to de Bretteville for $584.04 without notice to plaintiff. The sale was conducted by the sheriff as a sale on execution of personal property and de Bretteville was issued a "Certificate of Sale of Personal Property."

On October 26, 1942, fee simple title to the Fletcher leasehold was seized by the United States in an eminent domain proceeding in the United States District Court. Plaintiff filed an answer in the proceeding claiming damages for the taking of his participating royalty interests. Treasure also filed an answer and claimed damages for the taking of the leasehold.

On June 25, 1943, plaintiff filed his complaint in the present action.

An evaluation trial was had in the United States District Court and on July 11, 1949, judgment was rendered that the compensation payable for the "total working interests in Treasure Company Well Treasure No. 8" was $194,500. The court retained jurisdiction for the purpose of adjudicating adverse interests in or to the award. Later a distribution trial was held by that court before Judge Westover. In the meantime Treasure had assigned all its interest in the award to Reconstruction Finance Corporation, reserving to itself the right to object to the claim of plaintiff, The Adamant Company, Scoville, and others, and to resist the same. On October 30, 1950, judgment was rendered, to be referred to as the Westover judgment, decreeing plaintiff was entitled to 6 per cent of the award less certain deductions not material here, or $11,502, and Reconstruction Finance Corporation was entitled to 51 per cent, or $97,767.

Plaintiff, the United States, the Reconstruction Finance Corporation, and various other parties appealed from the judgment distributing the award. Neither Treasure nor de Bretteville appealed. On May 23, 1952, the Circuit Court of Appeals decided the appeal. United States v. Adamant Co., 9 Cir., 197 F.2d 1.

After the decision of the Circuit Court of Appeals, trial of the present lawsuit which was instituted in 1943 took place in June 1954.

The court found: 1. Plaintiff, from December 13, 1938, up to September 28, 1942, was the owner of six 1% participating royalty interests in all oil, gas, and other hydrocarbon substances produced on described property on which Treasure Well No. 8 was located. 2. Defendants have no claim, interest, or estate in them. 3. The six 1% participating royalty interests are subject to their pro rata share of the operating and maintenance expenses of the well. 4. The execution sale of the issued two and a half 1% royalty interests was null and void. 5. From December 15, 1938, to October 26, 1942, the gross receipts from Treasure Well No. 8 were $205,411.68. 6. There is due and owing from defendants to plaintiff $7,186.55 with interest from September 28, 1942. 7. Plaintiff is entitled to no income on his one 1% participating royalty interest from December 15, 1938, to December 31, 1939, because of his waiver in open court. 8. Because of the Westover judgment, no statute of limitations has run against any of plaintiff's causes of action. 9. In view of the decision of the United States District Court it is unnecessary to make further findings on the allegations in defendants' answer.

The judgment decrees: 1. Plaintiff was the owner in fee as against defendants and has been such owner ever since December 13, 1938 and up to September 28, 1942, of the six 1% participating oil royalties. 2. The execution sale of the two and a half 1% participating royalty interests was null and void. 3. Treasure is the alter ego of de Bretteville. 4. Plaintiff have judgment against Treasure and de Bretteville for $13,622.79. Treasure and de Bretteville appeal.

It is first contended the court erred in holding that de Bretteville is individually liable to plaintiff. It is argued that the issue of de Bretteville's alleged ownership of the Fletcher leasehold and the issue of his duty to account to plaintiff for the proceeds of Treasure Well No. 8's production as of December 31, 1939, were determined in his favor by the Vickers judgment and they are res judicata in this action. Plaintiff says the Vickers judgment did not decide the question of plaintiff's ownership of the royalty interests; that the case before Judge Vickers was on a written contract to which plaintiff was not a party.

The complaint in the suit before Judge Vickers was filed June 1, 1939. The plaintiffs were plaintiff in the present action, Walter B. Scoville, J. O. Seeple, and The Adamant Company, a corporation. The defendants were those in the present action. The cause of action was in part on a written contract and an addendum thereto between the defendants as first party, The Adamant Company as second party, and Scoville as third party. The contract had to do with financing the drilling of Treasure Well No. 8 which was then incomplete, and with alleged participating interests of The Adamant Company and Scoville therein. The complaint alleged that plaintiff in the present action was the owner of two and a half 1% participating royalty interests in all oil, gas, and other hydrocarbon substances produced from the property. The defendants admitted this allegation by failure to deny it. Plaintiff was named in the contract as a member of an executive committee together with Seeple and de Bretteville, "to have joint control and advisory powers with respect to all drilling and producing operations" under the contract. The prayer sought to have the defendants enjoined from interfering with the plaintiffs in the drilling and producing operations of the well under the contract, and to have them account for all receipts and expenditures pertaining to the well and to pay all sums due on the royalty interests, and a receiver to take charge of the well.

Judge Vickers found the allegation that plaintiff in the present action was the owner of two and a half 1% participating royalty interests to be true. He also found Treasure was the owner of the Fletcher leasehold; the contract had been entered into; de Bretteville was not a party to the contract; de Bretteville managed Treasure Well No. 8 for and on behalf of Treasure; an accounting was only necessary for the period from April 5, 1938, to December 31, 1939, inclusive, which had been done; de Bretteville had no duty to account to the plaintiffs; the contract terminated not later than January 31, 1939, so far as control by the committee was concerned; The Adamant Company and Scoville retained their royalty interests in Treasure Well No. 8. Judge Vickers concluded that "as of December 31, 1939, nothing was due or owing by defendants, or either of them, upon the participating royalty interests in said well, 'Treasure No. 8', owned by plaintiffs, or either or any of them."

The Vickers judgment followed the findings as to the termination of the contract, denied an injunction, denied the plaintiffs any money recovery; decree that Adamant and Scoville were entitled to retain their interests in Treasure Well No. 8; adjudged "that plaintiffs are not entitled to judgment for any money whatsoever." The judgment was affirmed on appeal, Scoville v. de Bretteville, 50 Cal.App.2d 622, 123 P.2d 616, and became final.

[1] It is manifest, we think, that the Vickers judgment determined the issue of de Bretteville's ownership of the Fletcher leasehold; and that it determined the issue of whether he should be required to account for the proceeds of the well's production as of December 31, 1939. The finding was that Treasure was the owner of the Fletcher leasehold and that de Bretteville had no duty to account to plaintiff. These matters were directly in issue in the case and the Vickers judgment is res judicata with respect to them.

The court in the present action found that $7,186.56 is due and owing from both defendants as of September 28, 1942. The findings do not tell in what period the $7,186.56 accrued. The complaint alleged defendants received $59,242.09 from Treasure Well No. 8 between November 27, 1938 and December 31, 1939, and $3,465.98 therefrom was due and owing to plaintiff on account of his royalty interest. We assume therefore, as the parties apparently do, that the judgment for plaintiff includes an award against de Bretteville for the period between November 27, 1938 and December 31, 1939. Since the Vickers judgment decreed plaintiff was not entitled to recover anything on his royalty interests for that period from de Bretteville, the judgment against de Bretteville for royalties accruing during that period is erroneous.

In connection with defendant's contention with respect to the personal liability of de Bretteville, there remains to consider the period from December 31, 1939, to September 28, 1942. The complaint alleged Treasure was and is the alter ego of de Bretteville. The answer denied the allegation and alleged that Treasure Well No. 8 was the property of Treasure. Evidence on the issue was received. The court found Treasure was and is the alter ego of de Bretteville, used by him for the purpose of carrying on his private transactions in connection with oil investments.

[2] Defendants assert plaintiff is estopped from contending Treasure was the alter ego of de Bretteville. While defendants did not plead an estoppel, evidence on which the claimed estoppel is based was admitted without objection, the issue was fully litigated, and any objection that defendants did not plead the estoppel was waived. Pacific Finance Corp. v. Foust, 44 Cal.2d 853, 858, 285 P.2d 632.

Treasure is a California corporation. It was incorporated in 1936. Plaintiff was employed by Treasure when it was organized. He became an officer and director. In 1937 he was elected vice-president. He assisted in the promotion of operating capital for the company; obtained leases for it on prospective drilling sites; on behalf of Treasure participated in the negotiation of a contract for funds to complete the drilling of Treasure Well No. 8. He testified he represented Treasure and on its behalf had regular conferences with its attorneys without the presence of de Bretteville. He received from Treasure cash and assignments of five 1% participating royalty interests in leaseholds, including the Fletcher leasehold, for services rendered and to be rendered. The complaint in the Vickers action was verified by plaintiff. He alleged therein that Treasure was a corporation duly organized under the laws of California with its principal office in the County of Los Angeles and that de Bretteville was its president. He did not allege Treasure was the alter ego of de Bretteville. These facts are not disputed.

[3] It is a well-settled general rule that a person who has acted as director, officer, or agent of an association purporting to be a corporation is estopped to deny its corporate existence both as against the alleged corporation itself and its members and stockholders. 18 C.J.S., Corporations, § 110(4), p. 512. "It is a well-established general rule that one who deals with an apparent corporation as such and in such manner as to recognize its corporate existence de jure or de facto is thereby estopped to deny the fact thus admitted. The estoppel extends as well to the privies as to the parties to such transactions. The general rule is applied in actions brought by either of the contracting parties against the other, and in actions by the person dealing with the corporation, wherein the existence of the corporation is assailed for the purpose of establishing individual partnership liability on the part of its members." 13 Am. Jur. 207, § 63. Fletcher says: "A person who has acted as an officer of a pretended corporation, either as director or as president, or in any other capacity, and has thus participated in holding out the corporation as having a legal existence, is estopped to deny such existence." 8 Fletcher Cyclopedia Corporations (Permanent Ed.) 280, § 3940. "An estoppel to deny corporate existence may arise from an express or implied admission of the fact in an action or proceeding brought by or against an alleged corporation. One who sues an alleged corporation as such thereby necessarily admits that it is a corporation, and is estopped to deny its corporate existence either in that action, or in a subsequent action against the members or corporators on the same liability based upon the ground that the corporation was not legally organized." 18 C.J.S., Corporations, § 113, p. 519.

[4] On the undisputed facts plaintiff is estopped to deny the corporate existence of Treasure. Having been an officer and director of the corporation, having acted on its behalf as a corporation, having treated it as a separate and distinct entity at all times prior to the present case, having sued it in the Vickers action, alleging its corporate existence without any claim that it was the alter ego of anyone, it hardly lies in the mouth of plaintiff to deny its corporate existence in the present action and contend it is the alter ego of de Bretteville. The court erred in rendering judgment for money against de Bretteville.

Defendants assert the court erred in concluding that the Westover judgment is res judicata on the issue of plaintiff's ownership of the six 1% royalty interests. Plaintiff and Treasure were defendants and filed answers in the eminent domain proceeding. The judgment was for the "total working interests in Treasure Company Well, Treasure No. 8." Thereafter, Treasure and de Bretteville filed an affidavit in the proceeding stated plaintiff had no interest in the fund. The court then ordered plaintiff to file his petition setting forth his claim of ownership of his six 1% royalty interests. Plaintiff did so in detail. Treasure opposed the petition. The question of plaintiff's ownership of the interests was in issue in the allocation proceeding before Judge

Westover. After an extended hearing Judge Westover found that plaintiff has an "estate, right, title and interest" in the award, that the assignments of the royalty interest to him are valid, and that he was the owner of six 1% participating royalty interests in the Fletcher leasehold; all of Treasure's interest in the award is vested in Reconstruction Finance Corporation; recited the facts with respect to the sale on execution of plaintiff's two and a half 1% royalty interests in the Vickers action; there was an action pending in the superior court of Los Angeles County between plaintiff and defendants, the present action, but that he would make no finding pertaining to that action either as to its merits or as to its being barred by the statute of limitations.

Judge Westover concluded that: the assignments to plaintiff constituted an interest in real property; the assignment of the second two and a half 1% royalty interests should have been executed and delivered by Treasure, and the court would regard it as done in favor of plaintiff and against Treasure; plaintiff is the owner of six 1% participating royalty interests; the sale of the two and a half 1% royalty interests on execution was void; plaintiff is entitled to 6 per cent of the award less certain deductions not material here; "the designation 'total working interests' was meant to fix the value of the leasehold interests in the property on which Treasure Well No. 8 was drilled, and said award of $194,500.00 was not made for oil produced, saved and sold or to be produced, saved and sold, but was for the value of the leasehold and not the value of the well drilled on Lot 9, and that said well was only a part of the leasehold interests." The judgment was that 6 per cent of the award after the deductions, or $11,502, be distributed to plaintiff. Reconstruction Finance Corporation, plaintiff, and various parties appealed to the Circuit Court of Appeals. Neither Treasure nor de Bretteville appealed.

The judgment of the Circuit Court of Appeals was:

"The cause is, therefore, remanded to the trial court with direction to stay the execution and enforcement of the judgment as to the appellants other than Reconstruction Finance Corporation (as set forth in Paragraphs II and III of the judgment) until the actions pending in the state and federal courts are determined, or the parties settle them and agree upon a manner of division of the award. The trial court will retain power to hold such further hearings as may be called for by the determination or settlement of the pending actions. In all other respects, the judgment stands affirmed." United States v. Adamant Co., 197 F.2d 1, 13.

Defendants' argument is that the Westover judgment is not a final judgment and therefore it is not res judicata as to any issue in the present case. We think the judgment is res judicata as to some issues and that it is not as to others.

[5] The United States District Court had jurisdiction to decide the question of title between the adverse claimants, including plaintiff and defendants. In United States v. Certain Parcels of Land, etc., D.C., 85 F.Supp. 986, 993, the court held it had "the jurisdiction in a condemnation proceeding to determine the ownership of real property as between adverse claimants thereto, regardless of diversity of citizenship." The ownership of the award, which stood in place of the realty, as between the adverse claimants was not merely incidentally involved in the proceeding before Judge Westover, as defendants argue. It was an issue directly involved and decided.

[6, 7] The doctrine of res judicata is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is, in all subsequent actions, conclusive of the rights of the parties thereto and of their privies on all material issues which were or might have been determined. French v. Rishell, 40 Cal.2d 477, 479, 254 P.2d 26; Dillard v. McKnight, 34 Cal.2d 209, 213, 209 P.2d 387, 11 A.L.R.2d 835;

Bliss v. Security-First Nat. Bank, 81 Cal. App.2d 50, 58, 183 P.2d 312. The application of the principle in a given case depends on affirmative answers to these questions: Was the issue decided in prior litigation identical with the one presented in the action in question? Was there a final judgment on the merits? Was the party against whom the judgment is asserted a party or in privity with the party to the prior litigation? Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892. "The doctrine of res judicata applies to those parts of a judgment which have become final. Moore v. Wood, 26 Cal.2d 621, 629, 160 P.2d 772. ' "A decree may be partly final and partly interlocutory; final as to its determination of all issues of fact and law, and interlocutory as to its mode of execution." 10 R.C.L., p. 555.' Perry v. West Coast Bond, etc., Co., 136 Cal.App. 557, 559, 29 P.2d 279." Klinker v. Klinker, 132 Cal.App.2d 687, 693, 283 P.2d 83, 87.

[8] Defendants' argument that the Westover judgment is not final is predicated on the opinion and decision of the Circuit Court of Appeals. The opinion is lengthy and no purpose would be served in quoting from it at length. The entire opinion must be read to understand the import of the decision. United States v. Adamant Co., 197 F.2d 1. We do not construe it as do defendants. The opinion called the distribution of the award a division of "the proceeds of the sale of leaseholder's interest among the lessee's participating royalty holders," and likened it to a division of such proceeds among the stockholders of a corporation prior to dissolution. It referred to the fact that the present action was pending; that rights of creditors of the claimants to the award might be involved; that this and another action might determine the amounts to which the claimants would be entitled; that they might "be entitled to more or less"; and if, "on accounting and liquidation, the claimants are entitled to more than the share of the award, the awards can be applied to the satisfaction of the claims. If they are entitled to less, the court will have to determine to whom the surplus is to go"; that "the court reached a correct determination of the proportions in which, other things being equal, the award should be distributed"; and that the court had "determined properly how the assertion of ownership shall be measured in terms of the award".

[9] In other words, the Circuit Court of Appeals was satisfied that Judge Westover reached a correct determination of the proportionate interests of the claimants in the leasehold. The judgment of that court merely prevented plaintiff from receiving his proportion of the award until the present case was completed and it was determined whether plaintiff would recover on the accounting and be entitled to a sum in addition to its award of the value of the total working interests in the leasehold found in the condemnation proceeding, or whether it would have to decrease his award to an amount found due for his pro rata share of charges against the leasehold. Only the "manner of division of the award" was left open. In all other respects the judgment was affirmed. Plaintiff's ownership of six 1% participating royalty interests in the leasehold was affirmed. The judgment in that respect is final and res judicata as to that matter.

[10] However, we are of the opinion that the Westover judgment is not res judicata on the issue of plaintiff's right to recover a money judgment against Treasure in the present action. The award in the eminent domain proceeding was the value of the leasehold interest in the property on which Treasure Well No. 8 was drilled, which leasehold interest was taken by the United States. Judge Westover specifically found the award "was not made for oil produced, saved and sold or to be produced, saved and sold." The Circuit Court of Appeals agreed. The present action, insofar as it is for money, is for money received by defendants from oil, gas, and gasoline "produced and sold" from Treasure Well No. 8. Plaintiff's right to recover moneys

which Treasure had received from the production of the well was not an issue either directly or incidentally in the proceeding before Judge Westover. That matter was not litigated or decided and the Westover judgment is not res judicata with respect thereto.

[11] In the present action defendants plead that the causes of action alleged in the complaint are barred by the statute of limitations. The court found that because of the decision of Judge Westover "no statute of limitation has run against any of the causes of action in plaintiff's complaint and his supplemental complaint." Referring to the present action, Judge Westover found "[t]hat this Court makes no Finding pertaining to said action neither as to its merits nor as to its being barred by the Statute of Limitations." Since Judge Westover did not determine the applicability of the statute of limitations, the court erred in not determining that issue in the present action. Further, the applicability of the statute of limitations to plaintiff's claim for money arising from production of Treasure Well No. 8 was not in issue before Judge Westover.

[12, 13] Finally, defendants claim the court erred in holding that the execution sale in the Vickers action covering the two and a half 1% interests was null and void. That question was in issue before Judge Westover and was decided by him adversely to defendants' claim. The Westover judgment is res judicata on the question. Further, it is obvious that the sale was null and void. The two and a half 1% participating royalty interests are real property. La Laguna Ranch Co. v. Dodge, 18 Cal.2d 132, 136–138, 114 P.2d 351, 135 A.L.R. 546. As held by Judge Westover, they were an interest in the leasehold, not merely a right to receive a share of the net profits from the operation of a well on the leasehold. They were sold by the sheriff as personal property. The sale was void.

[14] In any event, say defendants, the sale to de Bretteville should not have been vacated without refunding to the purchaser his purchase money. The contention has merit. The sale on execution was to satisfy a judgment for costs in favor of defendants and against plaintiff and others in the Vickers action. After the sale the judgment for costs was satisfied of record as the consideration for the purchase of the royalty interests. The court erred in not ordering that the satisfaction of the judgment for costs be annulled.

We conclude: 1. The judgment insofar as it quiets title in plaintiff to six 1% participating royalty interests in the property described therein is correct. 2. Plaintiff is estopped to contend Treasure is the alter ego of de Bretteville, and therefore plaintiff is not entitled to judgment against de Bretteville for money received by Treasure from the production of Treasure Well No. 8. 3. The Westover judgment is not res judicata as to moneys received by Treasure from the production of Treasure Well No. 8. 4. The Westover judgment is not res judicata on the issue of the statute of limitations with respect to plaintiff's claim for money. 5. The finding that the sale on execution in the Vickers action of the two and a half 1% royalty interests was null and void is supported by the evidence. 6. The court erred in not ordering annulment of the satisfaction of the judgment for costs in the Vickers action.

The judgment, insofar as it quiets title in plaintiff to six 1% participating royalty interests in the property described therein, and insofar as it adjudges that the sale on execution of the two and a half 1% royalty interests owned by plaintiff was null and void, is affirmed; insofar as it adjudges Treasure is the alter ego of de Bretteville, and insofar as it adjudges that plaintiff shall recover $13,622.79 from defendants, it is reversed. The superior court is directed to order that the satisfaction of the judgment for costs in the Vickers action be annulled. The parties shall bear their own costs on appeal.

SHINN, P. J., and PARKER WOOD, J., concur.

146 Cal.App.2d 662

Estate of Alfred C. HELVEY, a/k/a A. C. Helvey, Deceased.

Eva TAYLOR, as Administratrix, etc., Appellant,

v.

Edna M. HELVEY, Objector and Respondent.

Civ. 5291.

District Court of Appeal, Fourth District, California.

Dec. 6, 1956.

Proceedings on objections to an administratrix' account. The Superior Court of Riverside County, Hilton H. McCabe, J., entered the judgment challenged by the administratrix' appeal. The District Court of Appeal, Griffin, J., held that Probate Court could not try title to property, which decedent's widow contended was part of decedent's estate and required to be accounted for by his administratrix, but which administratrix contended had been the subject of general grant deed executed by husband in favor of his wife.

Reversed.

1. Courts ⚷200½

When controversy as to ownership of property is between representative of decedent's estate and the estate, probate court has jurisdiction to determine validity of claims of ownership, but probate court is without jurisdiction to try title to property as between a representative of the estate and a stranger to it.

2. Courts ⚷200½

Probate court could not try title to property, which decedent's widow contended was part of decedent's estate and required to be accounted for by his administratrix, but which administratrix contended had been the subject of a general grant deed executed by husband in favor of his wife.

◆

William Morris Taylor for appellant.

Jesse E. Jacobson, Banning, and Harry B. Cannon, Palm Desert, for respondent.

GRIFFIN, Justice.

The deceased, A. C. Helvey, who specialized in obtaining title to property at tax sales, etc., was married to K. F. Helvey. They were close friends to William M. Taylor, his attorney, who appeared for him in many actions in which decrees of title were secured under some partnership agreement or arrangement whereby Taylor would subsequently take an interest in the property acquired. Oftentimes actions were maintained in the name of K. F. Helvey. She died and executed a general grant deed conveying to A. C. Helvey all interest she had in any real property in the State. He, thereafter, made a will dated April 28, 1950, naming Father Weinig executor and leaving his real and personal property to Maymie Hoffman. He and attorney Taylor continued operations in securing title to real property. Subsequently, he married Edna C. Helvey and did not change his will naming her as a beneficiary. He continued to file similar actions in her name as well as his own. On December 29, 1952, he executed a general grant deed of all his interest in any real property in California to her. His wife now claims it was never delivered to her but was placed among his papers and was not found until after his death which occurred as a result of an automobile accident in November, 1953. She testified that after the funeral she sent his box of papers to her advisor and attorney for her husband, Mr. Taylor, who was familiar with his affairs and he later telephoned her he had discovered this general grant deed and told her about it, and that he had it recorded in the several counties in the State where her husband had real property interests. Taylor testified that Edna gave him the general grant deed and said: "Al gave it to me" and wanted to know what to do with it and he advised her to record it.

On December 16, 1953, Taylor prepared some form of agreement between himself and Edna Helvey. It recited that she was the sole heir of Al Helvey; that Taylor and Helvey were partners "in many parcels of land and actions", and to adjust them Eva Taylor would act as administrator with the will annexed and Taylor would act as attorney for the estate and he would waive his ordinary fee; that it was agreed that Edna Helvey and William Taylor each owned an undivided one-half interest in certain described property and owned a one-half interest in all real property or claims thereto in California standing in A. C. Helvey's name and which belonged to him. He agreed that if he sold certain of those properties he would pay her ten per cent of the sums realized from such sales. On January 5, 1954, Edna conveyed to Taylor her one-half interest in certain described real property. On March 23, 1954, she signed a grant deed to Taylor, for services rendered and to be rendered, of all real property she owned in California with certain specific exceptions. Edna Helvey claimed that he represented to her that all these properties, not excepted, were of doubtful title and value and it would take considerable legal work to secure any title to them. They involved between twenty-five and thirty thousand acres of forest lands, oil and gas leases, reversionary rights in Santa Ana Line of Pacific Electric Railway Company, and many other parcels of real estate in several counties of the State. He produced in evidence an unacknowledged and unrecorded grant deed to him dated August 17, 1915, from A. C. Helvey of a one-half interest in certain of those properties. On January 12, 1955, the administratrix presented her final account and petition for distribution showing $3436.26 in cash that came into her hands less certain claimed credits including statutory attorneys' and administratrix' fees, leaving a balance of $2934.96 for distribution.

Edna M. Helvey, through her then attorney, filed objections to the hearing of the final account and petition alleging that it had come to her attention that through the collusion with her husband William M. Taylor, the administratrix concealed numerous assets belonging to said estate, consisting of parcels of real estate in several different counties, and that she failed to include them in the inventory or final account. She prayed that the hearing on that matter be continued until further investigation could be made to ascertain the facts. Apparently she had employed her then attorney under a 40 per cent recovery contract. He continued his investigation of the records in these several counties to ascertain the true facts.

Eva Taylor, as administratrix, answered the charge, denied generally these allegations, and alleged that on December 29, 1952, A. C. Helvey made and executed a general grant deed conveying all of his real property to his wife; that this deed was exhibited to the administratrix and it appeared regular upon its face; that she believed it had been duly delivered to Helvey's wife during his lifetime and had been duly recorded in the several counties; that said deed conveyed to her all the right, title and interest of A. C. Helvey in his real property and that she believed Helvey thereafter had no real property to list as part of the assets of his estate; and that there was no record of him acquiring any real property since the execution of that deed. She then listed the real property which she believed was owned by A. C. Helvey separately or held jointly with William M. Taylor or others and set out the agreement and assignment and grant deeds by Edna M. Helvey to William Taylor above mentioned. She stated that Edna Helvey did not point out any real property that she claims should be inventoried in said estate but in fact permitted certain portions of it to be sold under the general grant deed and accepted payments on it. She further alleged that Edna Helvey never before claimed that the general grant deed to her had not been, in fact, delivered to her by her husband during his lifetime.

Objection was made that the Probate Court had no jurisdiction to determine title standing of record or claimed by third persons. Considerable evidence was introduced indicating the record title of considerable real property did stand in decedent's name prior to the date of the general deed. The court found generally that the general deed, dated December 29, 1952, from A. C. Helvey to Edna M. Helvey, was never delivered to her with intention to pass title and accordingly was invalid and a nullity and therefore it was true that all the real property and interest included therein remains a part of the assets of the estate and the administratrix was directed to account for it in the estate. Judgment was entered accordingly. The administratrix appealed.

Numerous claims are raised, including estoppel on the part of Edna Helvey to raise the defense that there had been no delivery of the general grant deed because of the conveyance of certain properties under it and the acceptance of money from payments due thereon; that objector failed to prove the existence of real property belonging to said estate; that the objections filed presented no issue as to the delivery of the general grant deed and if so the Probate Court had no jurisdiction to determine its validity in this proceeding.

Assuming the invalidity of the general grant deed, if established in a proper proceeding, there is sufficient evidence to show that there would be certain real property belonging to said estate which was unlisted and for which the administratrix did not account.

[1] The jurisdiction of the Probate Court, when the controversy as to ownership of property is between a representative of the estate and the estate, indicates it has jurisdiction to determine the validity of claims of ownership. In re Estate of Bruck, 140 Cal.App. 300, 35 P.2d 431. But it is an established principle of law that a Probate Court is without jurisdiction to try title to property as between a representative of the estate and a stranger to it.

In Merola v. Superior Court, 125 Cal.App. 2d 1, 269 P.2d 664, it was held that Probate Code, §§ 613–615, relating to proceedings for discovery of property, create no exception to this rule, and that a widow who claims that certain property is her sole property as a result of its having been given to her by her deceased husband during his lifetime, claims as a stranger to the estate and therefore the Probate Court cannot try title to such property as between her and the executor. To the same effect is Ex parte Casey, 71 Cal. 269, 12 P. 118; Koerber v. Superior Court, 57 Cal.App. 31, 206 P. 496; Miers v. Betterton, 18 Tex.Civ.App. 430, 45 S.W. 430; and West's Annotated California Codes, Vol. 53, p. 268, Prob.Code, § 613, and cases cited.

Here the title to the real property is directly in issue, depending on the validity of the general grant deed. Acting under that deed, Edna Helvey granted her interest in the property to attorney Taylor, who now holds record title. It appears that there was other property disposed of to innocent purchasers for value and for which Edna Helvey was receiving payments. These parties certainly were interested parties and were not made parties to these probate proceedings.

[2] We conclude that the Probate Court, upon such a summary proceeding as that taken here, may be justified in postponing the hearing on the petition for approval of the account until the title to the real property involved is determined, but it had no jurisdiction to try and determine the title to said real property and render a judgment which would, in effect, defeat the title of those claiming an interest in the property, particularly where they were not made parties to the proceeding. It therefore becomes unnecessary to determine the other questions raised.

Judgment reversed.

BARNARD, P. J., and MUSSELL, J., concur.

146 Cal.App.2d 561

Winifred BENJAMIN, Plaintiff and Appellant,

v.

Robert B. RUTHERFORD, Virgil E. Williams, Mason C. Williams, and Standard Paint Company, a copartnership, Defendants and Respondents.

No. 16973.

District Court of Appeal, First District, Division 1, California.

Dec. 4, 1956.

Action for injuries sustained by employee while being transported to work in company automobile by fellow employee, pursuant to arrangement whereby company furnished automobiles for this purpose to employees who desired service. The Superior Court, County of Alameda, Ralph E. Hoyt, J., entered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence warranted finding that plaintiff had not paid compensation for service, and was not passenger, but guest within automobile guest statute, in view of possibility that service was company gratuity, rather than that for which company received tangible benefit.

Judgment affirmed.

1. Automobiles 🔑181(2)

Under automobile guest statute, compensation may but need not be monetary in form; it may be a tangible benefit received by person who furnishes ride, a benefit which is a motivating influence for supplying the transportation. West's Ann. Vehicle Code, § 403.

2. Automobiles 🔑242(1)

A rider claiming the status of passenger, when automobile guest statute is involved, has burden of proving that he was a passenger, namely, that he gave compensation for the ride. West's Ann.Vehicle Code, § 403.

3. Automobiles 🔑245(24)

Determination of question whether injured occupant of automobile was passenger or guest, under automobile guest statute, is one of fact unless evidence admits of but a single inference, as, for example, that occupant gave compensation for the ride. West's Ann.Vehicle Code, § 403.

4. Trial 🔑139(1)

If evidence is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved, court must instruct that fact so proved has been established as matter of law.

5. Automobiles 🔑245(24)

If fact that reasonable minds can differ on question whether automobile occupant gave compensation for ride, within automobile guest statute, is sole inference that reasonably may be drawn from evidence, question is one of fact, not of law. West's Ann.Vehicle Code, § 403.

6. Automobiles 🔑244(20)

In action for injuries sustained by employee while being transported to work in company automobile by fellow employee, pursuant to arrangement whereby company furnished automobiles for this purpose to employees who desired service, evidence warranted finding that plaintiff had not paid compensation for service, and was not passenger, but guest within automobile guest statute, in view of possibility that service was company gratuity, rather than that for which company received tangible benefit. West's Ann.Vehicle Code, § 403.

7. Automobiles 🔑181(2)

That business relationship exists between rider and person who furnishes ride, does not necessarily make rider a passenger, rather than a nonpaying guest, within automobile guest statute. West's Ann.Vehicle Code, § 403.

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Dibble & Jacobs, San Francisco, for appellant.

Weinmann, Rode, Burnhill & Moffitt, Oakland, Cyril Viadro, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiff-appellant assigns as error the submission to the jury of the question whether plaintiff rode as a guest or as a passenger in a passenger car owned by her employer and driven by defendant, a fellow employee, at the time of the collision which caused her injuries. She claims that the evidence shows, as a matter of law, that she was riding as a passenger.[1]

The applicable statute declares that *"No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride* * * * has any right of action for civil damages against the driver of such vehicle * * * on account of personal injury to * * * such guest during such ride, unless the plaintiff in any such action establishes that such injury * * * proximately resulted from the intoxication or wilful misconduct of said driver." Veh.Code, § 403; emphasis added.

[1] The parties are in substantial agreement as to the meaning of "compensation" as used in this statute. It may but need not be monetary in form. It may be a tangible benefit received by the person who furnishes the ride, a benefit which is a motivating influence for supplying the transportation. See Martinez v. Southern Pacific Co., 45 Cal.2d 244, 250–253, 288 P.2d 868; also, McCann v. Hoffman, 9 Cal.2d 279, 283–287, 70 P.2d 909. Each reviews the case law.

[2] A rider claiming the status of passenger, when this statute is involved, has the burden of proving that he was a passenger; i.e., that he gave compensation for the ride. Martinez v. Southern Pacific Co., supra, 45 Cal.2d 244, 250, 288 P.2d 868.

[3–5] The determination of that question is one of fact unless the evidence admits of but a single inference; in this case, an inference that plaintiff gave compensation for the ride.[2] If reasonable minds can differ on the question whether that is the sole inference that reasonably may be drawn from the evidence, the question is one of fact, not of law.

The evidence to be examined in the light of these principles is as follows:

About a week before the commencement of the Key System strike in the summer of 1953, the employer of plaintiff and defendant (the place of employment was San Francisco) posted on a bulletin board a notice that anybody who wanted transportation from and to the East Bay area should submit his name and address. Plaintiff, who had been employed as a clerk-typist for about four months and who lived in the East Bay, submitted her name and address. She commuted with four fellow employees (including the driver) in an employer-owned car driven by defendant for about four weeks at the time of the accident. The employer furnished three cars for the purpose of transporting employees who desired the service, purchased the gasoline, and paid the bridge tolls and other expenses involved. No monetary compensation was paid, directly or indirectly, by plaintiff or the other commuting employees who availed themselves of this offer. The use of this service by them was entirely voluntary (not imposed or required by or on behalf of the employer); plaintiff was free to drive over in her own car, or to have her husband drive her over or to make arrangements with other people who might be going over. At no time was there an agreement between plaintiff and her employer that the latter would furnish her with transportation, nor did she at any time do any of the driving. Plaintiff testified that the arrangement was satisfactory to her although it involved arriving at the office earlier and leaving later (without change in the hours of work at the office) and no change in the rate of monetary compensation for her work. Upon one occasion defendant gave a ride to non-employees, plaintiff's daughter and a friend of the latter, at plaintiff's request; he drove them home from San Francisco with plaintiff and the other employee commuters.

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[1] Plaintiff requested and the court refused an instruction that at the time of the accident "plaintiff * * * was a passenger of the defendant" driver and that "defendant owed to * * * plaintiff the duty to exercise ordinary care."

[2] Thus, "if the evidence is clear, positive, uncontradicted and of such a nature that it cannot rationally be disbelieved the court must instruct that a fact so proved has been established as a matter of law." Roberts v. Del Monte Properties Co., 111 Cal.App.2d 69, 75, 243 P.2d 914, 917.

Defendant, who also lived in the East Bay area, testified that he received no "compensation or extra pay of any kind for driving the" car.

Prior to these events plaintiff and defendant had had no social contact outside the office; e.g., neither had visited the other at their respective homes, nor had plaintiff ever ridden in a car owned or driven by the defendant.

From these facts, plaintiff says, only one inference can be drawn, the inference that by rendering this service the employer received a tangible benefit (that of facilitating the task of the commuting employees by assuring that they would get to work on time and put in a full day's work during a suspension of public transportation which made the accomplishment of such purposes doubtful if the employees were left to their own resources) and that the receipt of this tangible benefit was a motivating influence for the furnishing of such transportation.

That conceivably is *an* inference but *not necessarily the only* inference the triers of the facts reasonably could draw from the evidence.

The employer may have received the tangible benefit plaintiff describes. For aught that appears the employer well might have received that benefit without furnishing this transportation. It does not necessarily appear that plaintiff could not and would not have gotten to work on time if left to her own resources.

Also, there is no direct evidence as to the motives of the employer. Plaintiff asked no question of defendant pertaining to that, nor did she call any executive or employee of the employer as a witness for interrogation on that subject. For aught that appears the service described may have been tendered and rendered as a gratuitous accommodation for the personal convenience and benefit of the commuting employees, including plaintiff.

[6] Under these circumstances we are persuaded that the evidence supports the implied finding of the jury that plaintiff did not give compensation for the ride and that it would have been error, prejudicial error, if the trial court had given the instruction requested by plaintiff, one that would have told the jury that plaintiff was a passenger toward whom defendant owed a duty to exercise ordinary care.

No extended review of the law seems necessary when, as here, the issue is essentially one of fact and the applicable legal principles are clear. Plaintiff leans heavily upon Huebotter v. Follett, 27 Cal.2d 765, 167 P.2d 193, which held that under the circumstances of that case it appeared as a matter of law that the plaintiff was a passenger, a rider who gave compensation for the ride. But that was a share-the-ride case: "Plaintiff, defendant, and one Wilson were, under a share-the-ride arrangement, riding together in defendant's car to their employment at Los Angeles Harbor. Each of the three men drove his own automobile two days of each week and on such days transported the other two with him between their homes and their work." 27 Cal.2d at page 767, 167 P.2d at page 194. The "consideration given by plaintiff to defendant for riding to work in defendant's car was a reciprocal ride by defendant in plaintiff's car, thus reducing the cost of transportation to each. No factual issue was presented on this phase of the controversy. This court held in Peccolo v. City of Los Angeles, 1937, 8 Cal.2d 532, 537, 66 P.2d 651 (adopting in part an opinion of the District Court of Appeal prepared by Mr. Justice Shinn, then acting pro tempore), that one riding in the automobile of another under such an agreement gave compensation for his ride and was a passenger in such automobile within the intent of section 403 of the Vehicle Code, supra. Consequently plaintiff was entitled to instructions that plaintiff was a passenger and that defendant owed to him a duty to drive with ordinary care. (See, also, Walker v. Adamson, 1937, 9 Cal.2d 287, 289, 70 P.2d 914.)" At page 769 of 27 Cal.2d, at page 195 of 167 P.2d. The distinction between those facts and the facts of the instant case seems too clear to require comment.

[7] Plaintiff seems also to contend that whenever there is a business relationship between the rider and the person who furnishes the ride, the court must find that the rider is a passenger, not a nonpaying guest. That is not the law. The cases she cites do not support her. In each the issue was treated as one of fact, not of law: Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47; Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 139 P.2d 941; Thompson v. Lacey, 42 Cal.2d 443, 267 P.2d 1; Martinez v. Southern Pacific Co., supra, 45 Cal.2d 244, 288 P.2d 868.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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146 Cal.App.2d 539

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Joseph LUNBECK, Defendant and Appellant.

Cr. 5666.

District Court of Appeal, Second District, Division 3, California.

Dec. 3, 1956.

Hearing Denied Dec. 27, 1956.

Defendant was found guilty by the Superior Court, Los Angeles County, Allen T. Lynch, J., sitting without a jury, of unlawful possession of marijuana, and he appealed from the order suspending proceedings and granting probation. The District Court of Appeal, Vallée, J., held that the evidence supported the finding of guilt.

Affirmed.

1. Poisons 🔑4

"Possession" of a narcotic is established when it is shown that a person has physical control thereof with intent to exercise such control, or having had such physical control has not abandoned it, and no other person has that possession. West's Ann.Health & Safety Code, § 11500.

See publication Words and Phrases, for other judicial constructions and definitions of "Possession".

2. Poisons 🔑9

Essential facts could be established, in prosecution for unlawful possession of marijuana, by circumstantial evidence and reasonable inferences drawn therefrom.

3. Poisons 🔑9

Where marijuana had been found in defendant's automobile, whether he had "knowingly" had possession of it was a factual question. West's Ann.Health & Safety Code, § 11500.

4. Poisons 🔑9

Evidence supported finding that defendant had been guilty of unlawful possession of marijuana. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen. Code, § 1237, subd. 1.

Harrison M. Dunham, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., and John S. McInerny, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

Defendant was found guilty by the court, sitting without a jury, of the unlawful possession of marijuana. Health & Safety Code, § 11500. Proceedings were suspended and he was granted probation. He appeals from the order, which is deemed to be a final judgment for the purpose of appeal. Pen.Code, § 1237(1). His only contention is that the evidence is insufficient to support the finding of guilt.

On July 29, 1955 Jones, a federal narcotic agent, arrested Foy for illegal possession of marijuana. Foy told Jones defendant was supplying him with marijuana at regular intervals. Jones placed defendant and his home in Los Angeles under surveillance.

About 8:40 p. m. on October 14, 1955 Jones, Corbit, and Gullon, also federal narcotic agents, saw defendant come out of his house, enter his automobile, and drive away at a rapid speed in an erratic manner. The agents followed defendant who stopped at a drive-in restaurant. They parked their car alongside defendant's car. Jones got out and walked over to defendant; greeted him; observed his face was flushed and that his eyes did not react normally to light when it was shone in them. Jones was of the opinion defendant was under the influence of a narcotic and placed him under arrest.

Gullon then asked defendant whether they could search his car. Defendant told them to go ahead. Jones and Corbit searched the car while Gullon and defendant stood nearby and watched them. In the car the agents found a partially smoked marijuana cigarette under the front seat on the driver's side. They also found small portions of marijuana seeds under the seat and on the floor mats. The agents showed what they found to defendant and asked him if he could explain their presence. Defendant at first denied any knowledge of the marijuana and then said it must have been dropped by some people who had been riding in the car and had been rolling marijuana cigarettes. Later that evening he told the agents he had previously used heroin for a number of years but that he had cured himself of that habit and was using marijuana instead, and "that it is quite possible that some of the marijuana found in the car was the result of having been carried in the automobile."

Defendant testified, denied any knowledge of marijuana in the car, denied having told the agents he was using it, and denied having stated the marijuana in the car might have been the result of his use. Foy testified and denied having told Jones defendant had supplied him with marijuana.

Defendant graciously concedes we are bound to view the evidence in the light most favorable to the People but says the rule is conditional in that the evidence must be of a substantial nature. He then argues the evidence fails to establish he had any knowledge there was marijuana in the car; that the evidence does no more than raise a suspicion of guilt.

[1-4] The statute does not require proof the accused had the narcotic on his person. Health & Saf. Code, § 11500. Possession of a narcotic is established when it is shown a person has physical control thereof with the intent to exercise such control, or having had such physical control has not abandoned it, and no other person has that possession. People v. Batwin, 120 Cal.App.2d 825, 827, 262 P.2d 88. The essential facts may be shown by circumstantial evidence and reasonable inferences that may be drawn therefrom. The evidence was substantial. It did more than raise a suspicion of guilt. Defendant was under the influence of a narcotic. Marijuana was found in his car. Defendant admitted it was possible some of the marijuana found in his car was a result of his rolling cigarettes. Whether he knowingly had possession of it was a factual question. People v. Brown, 102 Cal.App.2d 60, 62, 226 P.2d 609; People v. Torres, 98 Cal.App.2d 189, 193, 219 P.2d 480. The evidence supports the finding of guilt.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

MARTIN SCHOOL OF AVIATION, Inc., a corporation, Plaintiff and Appellant,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, as Executor of the Estate of Charles E. Rhoades, Deceased, Defendant and Respondent.*

Civ. 21882.

District Court of Appeal, Second District, Division 2, California.

Nov. 28, 1956.

Rehearing Denied Dec. 20, 1956.

Hearing Granted Jan. 23, 1957.

Bailor's action against bailee's executor for recovery of value of bailed airplane which crashed killing bailee. The Superior Court of Los Angeles County, Frederick F. Houser, J., entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Ashburn, J., held that with respect to stipulation in contract that airplane be flown only if weather was clear, evidence was insufficient to support trial court's finding on weather issue adverse to bailor.

Judgment reversed.

1. Bailment ⚷31(1)

Bailor who sues bailee in conversion for breach of contract may safely rest after proving bailment and failure to redeliver, and burden rests upon bailee to excuse failure to return property through proof that it was not due to negligence or other fault.

2. Appeal and Error ⚷883

In bailor's action against bailee's executor to recover value of bailed airplane which crashed killing bailee, bailor's counsel by acquiescing in court's view that burden rested upon bailor to prove violation of condition in contract that plane was not to be taken off ground unless weather was clear precluded bailor from thereafter claiming that burden rested upon bailee with respect to that phase of case involving breach of contract.

3. Evidence ⚷83(1)

In view of statutory presumption that official duty was properly performed, where pilot called weather bureau before leaving home to check on weather, it was to be presumed that bureau furnished him with report of weather in that area and at that time. West's Ann.Code Civ.Proc., § 1963, subds. 15, 20.

4. Evidence ⚷594

Undisputed testimony could not be arbitrarily rejected.

5. Appeal and Error ⚷1011(1)

Appellate court will not interfere with judgment where there exists substantial conflict in evidence, and there must be more than a conflict of mere words.

6. Appeal and Error ⚷1011(1)

To constitute a "conflict in evidence" to justify an appellate court's interference with judgment, there must be more than conflict in mere words and contrary evidence must be of substantial character.

See publication Words and Phrases, for other judicial constructions and definitions of "Conflict in Evidence".

7. Trial ⚷139(1)

Jurors are sole judges of fact, but question as to whether there is substantial evidence in support of plaintiff's case is one of law for court, and, in determining question, credulity of court is not to be deemed commensurate with facility or vehemence with which a witness swears.

8. Appeal and Error ⚷996

Rule that findings of trial court will not be disturbed on appeal if record discloses substantial evidence to support them had no pertinency where evidence without conflict clearly established the impropriety of the inferences drawn by court from the uncontroverted facts.

9. Aviation ⚷245

Verbal stipulation in airplane bailment agreement that flight was not to be made unless weather was clear, properly construed, meant that flight was not to be made unless weather was such that flight was safe for all in airplane, for other flyers in sky, so that flight would result in safe return of bailed airplane, and that flight could be made in conformity with safety rules established by competent authority. West's Ann.Civ.Code, §§ 1647, 1648, 1649.

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* Opinion vacated 312 P.2d 251.

10. Evidence ⚷47

Court would take judicial notice of Civil Aeronautics Board rules applying to intrastate and interstate flights.

11. Evidence ⚷47

Reviewing court could take judicial notice of Civil Aeronautics Board's flight rules regardless of whether trial court had done so.

12. Aviation ⚷247

In bailor's action against bailee's executor for recovery of value of bailed airplane which crashed killing bailee on ground that airplane had been flown when weather was not clear, in violation of stipulation made by bailor, evidence was insufficient to sustain trial court's finding on weather issue adverse to bailor.

13. Bailment ⚷31(1)

In bailor's action against bailee for nonreturn of bailed goods, burden rests upon bailee to exonerate himself of charge of negligence growing out of failure to return bailed goods.

14. Bailment ⚷31(1)

In bailor's action for nonreturn of bailed goods, presumption or inference of negligence on defendant's part immediately arose when bailment and nonreturn of goods were proved.

15. Aviation ⚷247

In bailor's action for non-return of bailed airplane which crashed, evidence of flying in violation of regulations, if such occurred, would create presumption of negligence.

16. Death ⚷58(1)

Fact that pilot was killed in accident raised presumption that he exercised due care throughout flight, and such presumption inured to benefit of his employer

17. Evidence ⚷88

Judge presented with conflicting presumptions was under duty to weigh each against other and in conjunction with the circumstantial evidence tending to sustain one or other.

18. Aviation ⚷247

In bailor's action against bailee's executor for value of bailed airplane destroyed in crash killing bailee, evidence was sufficient to support findings that there was no agreement that airplane was not to be taken up until dawn.

Winthrop O. Gordon and Nathan W. Tarr, Santa Ana, for appellant.

William J. Cusack, Los Angeles, for respondent.

ASHBURN, Justice.

Plaintiff-Appellant, Martin School of Aviation, Inc., a corporation, sues as assignee of a partnership consisting of Floyd R. Martin, Joseph G. Hager and J. W. Martin, Jr., which had been doing business under the firm name Martin School of Aviation. Defendant is sued as "Executor of the Estate of Charles E. Rhoades, Deceased." For convenience the said partnership will be referred to as plaintiff and said Rhoades as defendant.

Plaintiff owned a Bonanza airplane which it rented to Rhoades for an early morning flight to the Imperial Valley for the purpose of shooting doves. The arrangement was made for Rhoades by one O. A. Kier, an experienced and competent pilot, who acted in said matter and in piloting the plane on the occasion in question as Rhoades' agent. The plane was located at Orange County Airport near Santa Ana, and the flight began at about 5:26 a. m. on the morning of September 2, 1953. Within three minutes and about three miles the plane crashed near Costa Mesa, which is to the southwest of the airport. Imperial Valley lies to the southeast. Rhoades, Kier and one C. O. Gregg were occupants, and all were killed in the accident. The action is for recovery of the value of the airplane. Judgment was rendered for defendant after a nonjury trial and plaintiff appeals.

Plaintiff's first amended complaint, upon which the case was tried, contains three counts. The first alleges that the bailment was made to Rhoades upon condition "that they would not take, or cause said plane to be taken, off from the ground until after daybreak and unless the weather was clear"; that the plane took off before daybreak and before the weather was clear; also that it was so negligently operated as to cause it to crash to the ground. This count seems to sound in negligence although it is also susceptible of treatment as one for breach of specific terms of the letting. The second cause of action incorporates by reference the averments as to the terms of the renting, includes an allegation of negligence and concludes with the charge that defendants "failed to return said airplane to plaintiffs in violation of their said agreement of bailment, and wrongfully breached said agreement of bailment to plaintiffs' damage." This seems intended as an action for breach of contract. The third count incorporates the previous averments of the terms of the bailment and further says that defendants "promised to return said airplane in good condition and wilfully and negligently failed and refused to return said airplane to plaintiffs and converted the same to *his* own use." Plainly this is a charge of conversion. The court found that defendant and Kier "agreed that they would not take or cause said plane to be taken from the ground if the weather was not good"; that they did not agree that the plane would not be taken from the ground "until after daybreak"; that when the flight started "the weather was good at that time"; that the plane was not operated negligently; the terms of the bailment were not breached; and there was no conversion.

[1] At the trial plaintiff's counsel did not elect to avail himself of the rule that the burden of proof rests upon the defendant in a case such as this. It has long been established law in this state as elsewhere (see 6 Am.Jur. § 368–370, pp. 456–459), that a bailor who sues his bailee for conversion or breach of contract may safely rest after proving the bailment and failure to redeliver, because the burden rests upon the bailee to excuse his failure to return the property through proof that it was not due to his negligence or other fault. See discussion in George v. Bekins Van & Storage Co., 33 Cal.2d 834, at page 839, et seq., 205 P.2d 1037, at page 1041. There has been considerable uncertainty as to whether this rule applies to an action which sounds in negligence only. The George case definitely holds that it does apply to those instances which fall within the purview of the Uniform Warehouse Receipts Act. See 33 Cal.2d at pages 839–841, 205 P.2d at pages 1041–1042. Later cases indicate that the same rule applies to bailments not covered by the uniform act. See Downey v. Martin Aircraft Service, Inc., 96 Cal.App.2d 94, 98, 214 P.2d 581; Gardner v. Jonathan Club, 35 Cal.2d 343, 348, 217 P.2d 961; Redfoot v. J. T. Jenkins Co., 138 Cal.App.2d 108, 112, 291 P.2d 134.

[2] In the case at bar the court ruled that the burden rested upon plaintiff to prove violation of the condition that the plane not be taken off the ground unless the weather was clear. Plaintiff's attorney acquiesced in that view and the case was tried upon that theory, which was expressly carried into the court's findings. Plaintiff's counsel, by such acquiescence, precluded it from thereafter claiming that the burden rested on defendant with respect to that phase of the case,—breach of contract. Redfoot v. J. T. Jenkins Co., supra, 138 Cal.App.2d 108, 112, 291 P.2d 134, and authorities there cited.

Appellant's counsel, impliedly recognizing this, argue that plaintiff did successfully carry the burden of showing a violation of the condition that the plane not be taken off the ground "unless the weather was clear." The finding is that, plaintiff having failed to prove that the weather was not good, "the court finds that the weather was good at that time."

There is nothing in the record to show that the phrases "clear weather," "good weather," "bad weather," have any secondary or technical meaning. They are to be interpreted in the light of the subject matter of the contract. "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates." Civ.Code § 1647. "However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract." Civ.Code § 1648. "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Civ.Code § 1649. In this connection it is interesting to note the different ways in which various persons expressed the weather idea. The complaint refers to clear weather, the findings to good weather. Mr. Elliott, who overheard part of the conversation which established the bailment, testified that J. W. Martin, Jr. (one of the partners) said "You could take the Bonanza providing that you didn't fly it at night or in an overcast." Mr. Pemberton, who also heard part of the same conversation, gave this version: "And Johnny said that, 'If you take the Bonanza, you don't take off before daylight or you won't fly in the fog,' and Red says, 'Sure, Johnny, you know me; I wouldn't do it.'" Martin himself testified that "I told Mr. Kier that if he had to leave early, he couldn't leave before daylight or if the weather was bad, and we had been having bad weather." This different phrasing of the idea points to the central thought that the atmospheric conditions were to be such that flying would be reasonably safe. The phrase "clear weather" is used in this sense in Wilson & Bryan on Air Transportation, at page 160: "Air traffic control is maintained by the administration of the Civil Air Regulations promulgated by the Civil Aeronautics Board. Two sets of flying rules—Visual Flight Rules and Instrument Flight Rules—are used; their use is determined by weather conditions prevailing at the time along the course of flight. In '*clear weather*,' when the pilots can navigate their planes by 'pilotage,' that is, by visual operation from markings and landmarks along the airways, and can clearly see other aircraft or obstructions in time to avoid collision, flights may be governed by the Visual Flight Rules. These rules specify the distance that aircraft shall fly from clouds both in control zones and control areas, and elsewhere, together with ground and flight visibility and cruising altitudes when visibility is under three miles." (Emphasis added.) "Clear weather" is the phrase used by Martin in his complaint.

[3] The flight was started at 5:26 a. m., daylight saving time, on September 2, 1953. According to Mitchell Cervantes, a deputy sheriff stationed at the airport, it was dark at the time and though there was visibility for about a mile on the ground there was fog at an elevation of about 400 feet. On cross-examination, after being confronted with the Weather Bureau report, hereinafter mentioned, he said the ceiling could have been 400, 800 or 1,000 feet high. Mrs. Kier testified that her husband, the pilot, called the Weather Bureau before leaving home and checked on the weather. It is to be presumed, Code Civ.Proc., § 1963, subds. 15, 20, that official duty was properly performed and that he was furnished the information which is disclosed by exhibit C, a Weather Bureau report on the state of the weather in that area and at that time. It says, in part: "Coastal cloudiness spread onshore during the evening, reaching the Santa Ana area near midnight and spreading inland to the coastal mountains by 0530 Pacific Daylight Saving Time * * *. The cloud base from the Los Angeles basin to Santa Ana was 800 to 1200 feet above sea level * * *. Top of the cloud layer was approximately 2000 feet above sea level. Visibility in the Long Beach-Santa Ana area at 0530 daylight time was mostly 4 to 7 miles, lowering to zero at cloud level. Above the 2000-foot level and inland over the remainder of southern California skies were clear and visibility was unrestricted * * *. The El Toro Marine Base

near Santa Ana reported at 0528 daylight time that the sky was overcast, ceiling 800 feet, visibility 7 miles * * *." Of course, the El Toro report was not made until 5:28 a. m. and it could not have been known to Mr. Kier, who left the ground at 5:26 a. m. The fact is, however, that the ceiling at El Toro was 800 feet and that base is about the same distance from the ocean as the airport. When Rhoades and Kier arrived to start their flight, Kier pointed skyward and said to Cervantes: "Good morning. How long has it been like this?" As the plane left the ground Rhoades waved and said: "This is a hell of a time of the morning to go out and kill a few birds."

Just before the plane crashed it circled a few times over Costa Mesa and this was heard by William F. Moore who lived there. He testified that he got out of bed, went outside to see whether the plane was lost in fog, but the ceiling was very low, about 200 feet, and he could not see the plane. After the crash he viewed it about two blocks from his home. Mrs. Robert Neighbors also lived in Costa Mesa. She said she was awakened by the roar of the plane, got out of bed and saw it circling above her home. She gave a plain reason for seeing it, namely, that the rear third of it was engulfed in flames. She "did not notice any fog." If the plane was aflame there would be little likelihood of her noticing fog, if any were present. Mrs. Elese Becker, also living in Costa Mesa, heard but did not see the plane. Just before it crashed the room occupied by her and others suddenly "lit up" and all of them screamed. The crash was across the street from them and their evergreen tree was set afire. She was not asked about fog or clouds.

[4–8] The only evidence that there was no fog was the statement of Mrs. Neighbors that she noticed none. However, there was a definite conflict between her testimony and that of Mr. Moore. He could not see the plane as it circled over Costa Mesa and she saw it clearly. For present purposes, Mrs. Neighbors' version of having seen the plane must be accepted. But absence of fog over Costa Mesa did not disprove its existence at the airport, some miles away, at the time of the take-off. Costa Mesa is close to the ocean and well may be free of fog or overcast while the airport is cloaked in it. The testimony of Cervantes stands undisputed as to the existence of a layer of clouds at that point and it cannot be rejected arbitrarily. Joseph v. Drew, 36 Cal.2d 575, 579, 225 P.2d 504; 19 Cal.Jur.2d § 475, p. 238. In the circumtsances, the testimony of Mrs. Neighbors that she "noticed" no fog cannot be accepted as substantial evidence opposed to the testimony of Cervantes and the official showing of the Weather Bureau report above quoted. "The rule is that an appellate court will not interfere with the judgment where there exists a substantial conflict in the evidence. * * * '* * * There must be more than a conflict of mere words to constitute a conflict of evidence. The contrary evidence must be of a substantial character, such as reasonably supports the judgment as applied to the peculiar facts of the case. The rule announced in Morton v. Mooney, 97 Mont. 1, 33 P.2d 262, 266, correctly states the rule which has been approved by this court in a number of our decisions. It thus stated: "While the jurors are the sole judges of the facts, the question as to whether or not there is substantial evidence in support of the plaintiff's case is always a question of law for the court * * and, in determining this question, 'the credulity of courts is not to be deemed commensurate with the facility or vehemence with which a witness swears. "It is a wild conceit that any court of justice is bound by mere swearing. It is swearing creditably that is to conclude its judgment."' " ' " Hall v. Osell, 102 Cal.App.2d 849, 853, 228 P.2d 293, 296. "While it is true that 'the findings of the trial court will not be disturbed on appeal if the record discloses substantial evidence to support them' * * * such rule has no pertinency where the evidence without conflict clearly establishes the impropriety of the inferences drawn by the court from the uncontroverted facts." In re Estate of Tarrant, 38 Cal.2d 42, 51, 237 P.2d 505, 509, 28 A.L.R.2d 419. See also, In re Estate of Teed, 112 Cal.App.2d 638, 644, 247 P.2d 54, as to what constitutes substantial evidence.

[9] It is clear that Kier took off under a ceiling which was not less than 200 feet nor more than 1,000 feet above the ground. In that situation a visual contact flight could not be made without violation of the applicable air traffic rules. At this point § 1648, Civil Code, becomes peculiarly pertinent. These men were not talking about weather for an automobile trip, or one in a sailboat or yacht, nor weather for a baseball or football game. What they obviously had in mind was a flight which would be safe for all in the plane, for other flyers in the sky, and which would result in a safe return of the rented plane. It cannot be said reasonably that the specification of clear weather could mean anything less than a flight which could be made in conformity with the safety rules established by competent authority.

[10, 11] We take judicial notice of those rules, Parker v. James Granger, Inc., 4 Cal.2d 668, 677, 52 P.2d 226, which apply to intrastate, as well as interstate, flights (7 Cal.Jur.2d § 15, p. 465).[1] They comprise Part 60 of Civil Air Regulations (Code of Federal Regulations, Title 14, Civil Aviation). Pertinent portions are set forth in the margin.[2] There is nothing to suggest and the evidence precludes the inference that this was or was to be an instrument flight.[3]

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[1] And do so regardless of whether the trial court has availed itself of such information (cf. 18 Cal.Jur.2d § 23, p. 445).

[2] Section 60.12 says: "*Careless or reckless operation.* No person shall operate an aircraft in a careless or reckless manner so as to endanger the life or property of others." And explanatory note (b): "The operation of aircraft at an insufficient altitude endangers persons or property on the surface or passengers within the aircraft. Such a flight may also constitute a violation of § 60.17."

Section 60.17 prescribes minimum safe altitudes. So far as pertinent here it says: "*Minimum safe altitudes.* Except when necessary for take-off or landing, no person shall operate an aircraft below the following altitudes: * * * (b) *Over congested areas.* Over the congested areas of cities, towns or settlements, or over an open-air assembly of persons, an altitude of 1,000 feet above the highest obstacle within a horizontal radius of 2,000 feet from the aircraft. * * * (c) *Over other than congested areas.* An altitude of 500 feet above the surface, except over open water or sparsely populated areas. In such event, the aircraft shall not be operated closer than 500 feet to any person, vessel, vehicle, or structure. * * * (d) *IFR operations.* The minimum IFR altitude established by the Administrator for that portion of the route over which the operation is conducted. * * *"

The Visual Flight Rules are prescribed by § 60.30, which says: "*Ceiling and distance from clouds.* Aircraft shall comply with the following requirements as to ceiling and distance from clouds: (a) *Within control zones.* Unless authorized by air traffic control, aircraft shall not be flown when the ceiling is less than 1,000 feet, or less than 500 feet vertically and 2,000 feet horizontally from any cloud formation. (b) *Elsewhere.* When at an altitude of more than 700 feet above the surface aircraft shall not be flown less than 500 feet vertically and 2,000 feet horizontally from any cloud formation; when at an altitude of 700 feet or less aircraft shall not be flown unless clear of clouds."

Ceiling is defined in § 60.72: "*Ceiling.* The distance from the surface of the ground or water to the lowest cloud layer reported as 'broken clouds' or 'overcast'."

"IFR" means instrument flight rules (§ 60.82), and "IFR conditions" are defined as: "Weather conditions below the minimum prescribed for flights under VFR." (§ 60.83.)

"VFR conditions" are defined as: "Weather conditions equal to or above the minimum prescribed for flights under VFR." (§ 60.89.)

Before starting an instrument flight a "flight plan shall be filed with air traffic control." (§ 60.41.)

[3] "Under the IFR, the planes must be operated by use of flight instruments and radio communication facilities. The pilots are required to file their flight plans with Air Traffic Control and to receive approval prior to departure.

"A pilot flying under IFR conditions must receive approval of his flight plan

[12] With a ceiling of 800 feet, or even 1,000 feet the visual flying rules could not be met. The minimum altitude of the plane must be not less than 500 feet above any structure in any event and when over any town or settlement not less than 1,000 feet (60.17). The top of the cloud formation was 2,000 feet above sea level, making it some 1,200 feet in thickness. When the plane is more than 700 feet high it must be flown not less than 500 feet below the ceiling, which would not be possible with a 1,000 or an 800 foot ceiling. When at 700 feet or less the plane must not be flown unless clear of clouds, and it cannot fly at that level over any city, town or settlement (60.17). As a practical matter the weather was such that a visual flight could not be made (60.83, 60.89). It is not a reasonable inference that the conditions existing at the Orange County Airport amounted to good weather or clear weather for an airplane flight, or within the meaning of the contract made by the parties. The insufficiency of the evidence to support the weather finding requires that the judgment be reversed.

[13] Because of the necessity of a new trial it is appropriate to comment upon the negligence issue. We hold, upon the authority of the Gardner, Downey and other cases above cited, that the burden rests upon defendant to exonerate himself from a charge of negligence growing out of the failure to return the rented airplane. "The principles which apply are in the nature of those which are involved in the doctrine of res ipsa loquitur. In fact this doctrine has been by some authorities mentioned as applicable. * * This holding puts negligence in ex delicto bailment cases and negligence in other tort cases on a parity. Moreover, it brings the ex-contractu action for breach of the contract of bailment because of loss or damage in line with the action for negligence for such loss or damage. There is no real reason why the form of action should materially change the remedy or fasten on the plaintiff a greater burden in one case than in the other. If the law is otherwise, holdings which will bring it in accord with this policy are overdue." Romney v. Covey Garage, Utah, 111 P.2d 545, 546. Counsel for plaintiff did not waive this point during the trial, or at all.

[14-17] A presumption or inference of negligence on defendant's part immediately arose when the bailment and non-return of the plane were proved. See Redfoot v. J. T. Jenkins Co., supra, 138 Cal.App. 2d 108, at page 114, 291 P.2d 134, and authorities there cited. Likewise, flying in violation of the regulations, if that occurred, created such a presumption. Hall v. Osell, supra, 102 Cal.App.2d 849, 852, 228 P.2d 293. The fact that Mr. Kier was killed in the accident raises the presumption that he exercised due care throughout, Scott v. Burke, 39 Cal.2d 388, 394, 247 P.2d 313, and that presumption also inures to the benefit or decedent Rhoades, his employer. Wells Truckways, Ltd. v. Cebrian, 122 Cal.App.2d 666, 679, 265 P.2d 557; Pacific Tel. & Tel. Co. v. Wellman, 98 Cal.App.2d 151, 156-157, 219 P.2d 506. The trial judge is therefore presented with conflicting presumptions which must be weighed against each other and in conjunction with the circumstantial evidence tending to sustain the one or the other. Scott v. Burke, supra, 39 Cal.2d at page 399, 247 P.2d at page 319. On the new trial of this case the question of negligence will be open for determination either way by the judge or jury.

[18] Concerning the issue of whether the parties agreed that the plane should not be taken off the ground until after daybreak the evidence, though surprisingly

from the airway traffic-control center nearest the point from which he proposes to take off before commencing flight. After the plane takes off, the pilot is required to maintain continual communication with ground radio stations throughout the flight." (Wilson & Bryan on Air Transportation, supra, p. 161.)

weak, compels a holding that it was legally sufficient to support the finding that there was no such agreement. The positive evidence of three witnesses, Elliott, Pemberton and Martin, Jr., was rejected in favor of an inference deduced from a report made by Martin (one of the partners who owned the plane) to the Civil Aeronautics Board,—that, plus Martin's reactions when confronted with the same upon examination under § 2055, Code of Civil Procedure. That too will be open for examination upon a new trial.

Plaintiff has appealed from the judgment except the portion in favor of defendant Don W. Brookmeyer.

The portion of the judgment from which the appeal was taken is reversed.

MOORE, P. J., and FOX, J., concur.

146 Cal.App.2d 599

Patricia L. WITCZAK, Plaintiff and Appellant,

v.

Donald W. JOHNSON et al., Defendants and Respondents.

Civ. 5293.

District Court of Appeal, Fourth District, California.

Dec. 4, 1956.

Action by patient against doctors for malpractice in diagnosing an ailment and prescribing and administering medical treatment therefor. The Superior Court, San Bernardino County, Archie D. Mitchell, J., entered an order striking patient's seventh amended complaint and dismissing her action and patient appealed. The District Court of Appeal, Griffin, J., held that patient's complaint for doctors' malpractice in diagnosing an ailment and prescribing and administering medical treatment therefor stated a cause of action for malpractice, even though it could have set forth in more definite and certain terms the issues to be met.

Order and judgment reversed with directions.

1. Appeal and Error 🔑884

Where patient, in malpractice action, amended her fifth and subsequent amended complaints, after demurrers were sustained to them with leave to amend, District Court of Appeal was precluded from considering rulings on such previous demurrers.

2. Appeal and Error 🔑866(1)

District Court of Appeal had jurisdiction to review ruling of trial court striking amended complaint, on appeal from a judgment of dismissal. West's Ann.Code Civ. Proc., § 963.

3. Physicians and Surgeons 🔑18(4)

Patient's amended complaint for doctors' malpractice in diagnosing an ailment and prescribing and administering medical treatment therefor, stated a cause of action for malpractice, even though it could have set forth, in more definite and certain terms, the issues to be met.

King & Mussell, San Bernardino, for appellant.

Wilson & Wilson, San Bernardino, for respondent Donald W. Johnson.

Swing & Gillespie, and Everett H. Swing, San Bernardino, for respondent T. G. Harward.

Overton, Lyman, Prince & Vermille, Los Angeles, for respondent J. E. Andes.

GRIFFIN, Justice.

Plaintiff and appellant Patricia L. Witczak brought this action for claimed malpractice against defendants and respondents Doctors Donald W. Johnson, J. E. Andes and T. G. Harward (erroneously sued as Howard) in diagnosing an ailment and prescribing and administering medical treatment therefor at various times between January 19, 1950, and April 9, 1953.

She filed her original complaint on April 7, 1954, and separate demurrers were sustained (with leave to amend within ten days) to six successive amended complaints. On June 24, 1955, following this last order, she filed her seventh amended complaint. Each defendant thereafter moved to strike it. The motions were heard before another judge and granted on October 24, 1955. Thereafter, on November 4, 1955, on motion, a formal judgment of dismissal of the action was entered. This appeal is from the judgment and the order striking the seventh amended complaint.

[1] By amending the fifth and subsequent amended complaints, after demurrers were sustained to them, "with leave to amend", precludes us from considering the ruling on these previous demurrers. Alhambra Transfer & Storage Co. v. Muse, 41 Cal.App.2d 92, 106 P.2d 63; Sheehy v. Roman Catholic Archbishop, 49 Cal.App.2d 537, 122 P.2d 60; 21 Cal.Jur. p. 212, sec. 145.

It is respondents' position that the order striking the seventh amended complaint was not an appealable order, citing Section 963 of the Code of Civil Procedure, and the attempted appeal therefrom should be dismissed; that since appellant, in respect to her right to amend her sixth amended complaint, filed a seventh amended complaint, she thereby waived her right to maintain that the sixth amended complaint did state a cause of action and, having failed to file a sufficient and adequate seventh amended complaint within the time prescribed, the action of the trial court dismissing the action on this ground was proper, and the question whether the sixth or seventh amended complaint stated a cause of action is not subject to review on appeal from the judgment; that even if the rulings on the demurrers to these particular amended complaints could be reviewed on appeal from the judgment, neither stated a cause of action and the seventh one was properly stricken as being sham and not pleaded in good faith, citing such authority as Taliaferro v. Prettner, 135 Cal.App.2d 157, 286 P.2d 977; Neal v. Bank of America, 93 Cal.App.2d 678, 209 P.2d 825; Wilson v. Shea, 194 Cal. 653, 229 P. 945; 42 Cal.Law Review 356, and cases considered; also Alhambra Transfer & Storage Co. v. Muse, supra.

The reasons for striking the seventh amended complaint is not indicated by the order. The grounds stated in the motion are that it was sham, contained redundant and irrelevant matters, and did not constitute a complaint amended substantially different from the sixth, to which a demurrer was sustained with leave to amend.

Assuming it did not state a cause of action, that it was, in its entirety, sham and redundant and not pleaded in good faith, then the trial court might be justified in ordering it stricken. Neal v. Bank of America, 93 Cal.App.2d 678, 209 P.2d 825. On the other hand, if it was timely, filed in good faith, was not sham, and did properly plead a cause of action, then the trial court had no authority to strike it and enter a judgment of dismissal of the action.

[2, 3] There is authority for the contention that an appeal lies from an order striking an amended complaint where such action may constitute a "final judgment". Honan v. Title Insurance & Trust Co., 9 Cal.App.2d 675, 50 P.2d 1068; Howe v. Key System Transit Co., 198 Cal. 525, 246 P. 39; Wilson v. Sharp, 42 Cal.2d 675, 268 P.2d 1062. On an appeal from a judgment of dismissal, based upon the ruling of the trial court striking out plaintiff's seventh amended complaint, such ruling can be reviewed on an appeal from the judgment. Dalzell v. Kelly, 104 Cal.App.2d 66, 230 P.2d 830; Saunders v. Hibernia Sav. & Loan Soc., 23 Cal.2d 738, 146 P.2d 683; Holden v. Cal. Employment etc. Com., 101 Cal.App.2d 427, 225 P.2d 634. Under either theory the pivotal question, as we view it, is whether the seventh amended complaint did, in fact, and as a matter of law, sufficiently allege

a cause of action and could not be considered, in its entirety as sham and redundant and not filed in good faith. In re Estate of McCabe, 219 Cal. 742, 29 P.2d 195; Continental Building & Loan Ass'n v. Boggess, 145 Cal. 30, 78 P. 245; Allerton v. King, 96 Cal.App. 230, 274 P. 90.

It alleges generally that defendants are licensed physicians and surgeons, practicing in San Bernardino County; that in January, 1950, plaintiff employed defendant Harward to diagnose and treat an ailment of her right leg which was weak and diseased; that the nature and extent of such ailment was unknown to plaintiff but was well known to said defendant; that thereafter and until July, 1953, defendant undertook to diagnose and treat said right leg and said ailment and did so; that during November, 1951, he diagnosed it as a paralyzed nerve and in the month of January, 1953, diagnosed it as peripheral neuritis; that between 1950 and 1953, he made other and different diagnoses; that from January, 1950, to July, 1953, he treated said condition by various injections and other medicines and drugs not known to plaintiff but well known to defendant; that said diagnoses and treatment were improper and erroneous; that at no time did said defendant make a correct diagnosis of said condition or properly treat it; that the treatment given was improper and was negligently, carelessly and recklessly administered and rendered; that the medicines, drugs and injections were the wrong medicines, drugs and injections and were harmful and injurious to the health of the plaintiff; that said diagnoses and treatment were performed negligently, carelessly and recklessly and without the care, knowledge and skill ordinarily employed by licenced physicians in that locality; that as a direct and proximate result plaintiff sustained severe personal injury to her body and particularly to the right arm and right leg; and that said injury to the right leg consists of a disease, strain, inflammation and deterioration of the muscles, ligaments, tendons, nerves, blood vessels and soft tissues thereof; all to her damage in the sum of $50,000.

It then alleges that upon information and belief, during all the times mentioned, all of the defendants were associated and acting in the business of the medical profession as joint venturers; that the injuries caused by defendant Harward were not discovered until after the termination of the treatment mentioned, i. e., July, 1953; that plaintiff relied upon his skill and veracity and believed his statement that plaintiff's ailment was a simple thing; that she could expect good results and would not become a cripple; that accordingly she refrained from seeking or securing other physicians and surgeons' advice; that plaintiff first learned that the diagnosis was incorrect and the treatment given was improper and negligently performed in August, 1953. As a second cause of action she realleges these same charges as against defendant Dr. Andes, and in a third cause of action a similar charge is alleged against Dr. Johnson. A fourth cause of action alleges that all defendants committed the acts above charged and then concludes that plaintiff was in doubt as to whether she was entitled to redress from each or all of the defendants, and asked the court to determine whether they are jointly or severally liable. Separate demurrers to this complaint, both general and special, which also raised the question of the statute of limitations, Sec. 340, subd. 3, Code Civ.Proc., were never heard.

The sixth amended complaint contains similar allegations but alleges that each defendant was the *servant, agent and employee* of the other defendants. Then follows an allegation that all were copartners and joint venturers and were so acting at the time. Apparently, as gleaned from plaintiff's brief, the main distinction between the sixth and seventh amended complaints is that the sixth seeks a recovery from all defendants upon the theory of agent, servant and employer-employee relationship, and the seventh omitted this allegation and relied solely upon the theory of joint venturers.

The reason given, if any, for sustaining the demurrers to the sixth amended complaint is not indicated in the record. One of the grounds advanced in the special demurrers was uncertainty. That complaint alleged many various theories upon which plaintiff claimed all defendants were liable, and the seventh amended complaint may well have been amended to make it definite and certain that plaintiff was relying solely on the theory of joint venture. At least there is nothing to show that appellant knew the particular grounds upon which the demurrers were sustained or that she was aware of them, or that she acted in bad faith in attempting to amend it. From a review of the allegations of the complaint, when considered as a whole, it appears to us that it constitutes a cause of action although it may have set forth, in more definite and certain terms, the issues to be met so that it might acquaint the defendants with the nature, source and extent of the cause of action.

In Rannard v. Lockheed Aircraft Corp., 26 Cal.2d 149, 157 P.2d 1, a malpractice case where the general rule applicable to pleading such actions is set forth, a similar question was presented. It was there stated that all that is required of a plaintiff, even as against a special demurrer, is that his complaint set forth the essential facts of the case with reasonable precision and with sufficient particularity to acquaint the defendant with the nature, source and extent of the cause of action, and that where a complaint against a surgeon alleges in general terms his negligence in diagnosis, operation and subsequent treatment, it is unnecessary to detail a specific act or omission on which plaintiff relies, as these are matters of evidence which may be shown under the scope of the general negligence charge. Some consideration is also given to the situation of the opposing parties and the rule permitting the pleading of negligence in general terms where the defendant has at least equal, if not superior knowledge of the affair in comparison to that of the injured party. Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 114 P.2d 1; Stafford v. Shultz, 42 Cal.2d 767, 270 P.2d 1; Modica v. Christ, 129 Cal.App.2d 144, 276 P.2d 614.

In the instant complaint the plaintiff alleged that the exact nature and extent of plaintiff's ailment was unknown to her but well known to the defendants, and that the nature of the treatments and various injections made were not known to plaintiff but were well known to defendant.

In Kraft v. Smith, 24 Cal.2d 124, 148 P.2d 23, it was held that in a malpractice action it is permissible to join as parties defendant two physicians who had separately treated plaintiff for the same injury at different times and places where it was alleged that each defendant was negligent in the treatment he had administered, and plaintiff was in doubt as to whether he was entitled to redress from one or the other physician or from both of them.

We therefore conclude that the court erred in striking the seventh amended complaint in its entirety. It should therefore be reinstated. It was sufficient, as against the general demurrer, and it may well lie within the discretion of the trial court to require the clarification of uncertainties or ambiguities. Guilliams v. Hollywood Hospital, supra, 18 Cal.2d at page 104, 114 P.2d 1; Washer v. Bank of America, 21 Cal.2d 822, 833, 136 P.2d 297, 155 A.L.R. 1338; Wennerholm v. Stanford University etc., 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358.

Order and judgment reversed with directions to reinstate the seventh amended complaint subject to the special demurrers interposed.

BARNARD, P. J., and COUGHLIN, J. pro tem., concur.

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47 Cal.2d 447

George Huntington HARTFORD, II, Petitioner,

v.

The SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, Respondent.

Edward Barton Colt, a Minor, by Florence Barton Brangenberg, his Guardian ad litem, Real Party in Interest.

L. A. 24144.

Supreme Court of California, in Bank.

Dec. 5, 1956.

Mandamus proceeding was brought against the Superior Court of the State of California, in and for the County of Los Angeles. The Supreme Court, Traynor, J., held that where defendant, over whom jurisdiction was acquired by publication of summons, was not at any relevant time a domiciliary of the state, personal judgment could not be entered against him in action for declaration that defendant was the father of the plaintiff, and that since Superior Court was without personal jurisdiction over defendant, plaintiff was not entitled to maintain the action.

Peremptory writ issued as prayed for.

1. Mandamus 🔑143(1)

When section 416.1 of the Code of Civil Procedure dealing with notice of motion to quash service of summons for lack of jurisdiction and effect of extension as appearance, and section 416.3 dealing with mandamus to compel quashing of service of summons, are construed together, it is apparent that they provide alternative methods of securing an additional 20-day period to petition for a writ of mandate and that a failure to secure an extension under section 416.3 does not preclude issuance of the writ, if petition is filed within time permitted to plead under section 416.1. West's Ann.Code Civ.Proc., §§ 416.1, 416.3.

2. Judgment 🔑17(1)

The word "resident" as used in statute providing that where jurisdiction is acquired over a person, who is outside of the state, by publication of summons, court shall have power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint and was a "resident" of the state at the time of the commencement of the action or at the time of service, means domiciliary. West's Ann.Code Civ.Proc., §§ 412, 413, 417.

See publication Words and Phrases, for other judicial constructions and definitions of "Resident".

3. Bastards 🔑75

Where defendant, over whom jurisdiction was acquired by publication of summons, was not at any relevant time a domiciliary of the state, personal judgment could not be entered against defendant in action for declaration that defendant was the father of the plaintiff. West's Ann.Civ. Code, § 231; West's Ann.Code Civ.Proc., §§ 412, 413, 416.1, 416.3, 417.

4. Bastards 🔑35

Action could not be maintained to secure a declaration that defendant was the father of the plaintiff, where court was without personal jurisdiction over defendant. West's Ann.Civ.Code, § 231.

Loeb & Loeb and Herman F. Selvin, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, William E. Lamoreaux, Asst. County Counsel, Los Angeles, David Mix, Granada Hills, and Thomas H. Carver, Deputy County Counsel, Los Angeles, for respondent.

Bernard B. Cohen and Henry S. Cohen, Los Angeles, for real party in interest.

TRAYNOR, Justice.

On November 30, 1955, plaintiff, by his guardian ad litem, commenced an action pursuant to Civil Code section 231[1] to secure a declaration that defendant is his father. In his verified complaint he alleged that he is seventeen years old and that since he was ten days old he has been in the exclusive care and custody of his grandmother with whom he resides. For more than eight years plaintiff and his grandmother have been domiciled in Los Angeles County, California, "and during all of said time have been and now are residents of and physically present in said County and State." Plaintiff was born in New York in 1938, the child of his mother and defendant, who were never married. His mother died in 1941. To conceal the fact that plaintiff was his natural child, defendant directed that the names of plaintiff's grandmother and stepgrandfather be entered as his parents on his birth certificate, and this was done. Defendant has always "exhibited sincere interest in and concern for the welfare of plaintiff," and has visited him in California when he has been in the state in connection with businesses he maintains here. He established a trust fund of which plaintiff is beneficiary and from which his guardian receives an income of over $800 per month for plaintiff's care and maintenance, and ultimately plaintiff will receive the corpus of the trust, which is now worth more than $375,000. Accordingly, "it is not necessary for defendant to pay or contribute any money or anything else toward plaintiff's support." Shortly before the commencement of this action, defendant "for the first time denied, and he now denies that he is the natural father of plaintiff and denies that the relationship of parent and child exists between them." Defendant came to California on July 10, 1955, on a business trip but left on August 31, 1955, on learning that plaintiff intended to file this action. Plaintiff finally alleges that although he "is identified on his birth certificate as 'Edward Barton Colt,' for many years last past plaintiff has refrained from using the surname 'Colt' and has used only the name 'Edward Barton.' Plaintiff has obtained a Federal Social Security number under the name of 'Edward Barton,' and is registered in school and for many years has been and now is known among his friends and acquaintances as 'Edward Barton.' In the near future, plaintiff expects to become a member of the United States Armed Forces, and also intends to apply for a passport so that he may travel abroad. Considerable confusion has resulted and will result from plaintiff's use of the name 'Edward Barton' when he is identified on his birth certificate as 'Edward Barton Colt.' Moreover, because his birth certificate falsely states that John Colt is his father, and plaintiff is identified thereon as 'Edward Barton Colt,' it is impossible for plaintiff legally to establish his true identity or that of his true father. It is therefore necessary that it be judicially determined that defendant George Huntington Hartford, II, is the natural father of plaintiff and that the relation of parent and child exists between them, so that hereafter plaintiff will have no difficulty legally establishing the true identity of himself and his father, especially when he enters the Armed Forces and when he applies for a passport." The complaint concludes with the prayer that "the Court by its decree adjudge that defendant is the natural father of plaintiff, and that the relation of parent and child exists between plaintiff and defendant * * *."

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[1] "An action may be brought for the purpose of having declared the existence or nonexistence between the parties of the relation of parent and child, by birth or adoption."

Pursuant to Code of Civil Procedure section 412 plaintiff secured an order for service by publication based on an affidavit stating that defendant resides outside of the state, and defendant was personally served in the State of New York. (See, Code Civ.Proc. § 413.) The order for service by publication provided that it was "applicable only to that portion of the relief prayed for in the complaint which is based on an action 'in rem'."

On January 6, 1956, defendant appeared specially and made a motion for an order quashing service. Affidavits were filed in support of and in opposition to the motion, which was denied on January 11th. The order of denial also provided: "Pursuant to stipulation defendant is allowed 30 days to answer or otherwise plead to plaintiff's complaint." On February 9th, defendant filed this petition for a writ of mandate to compel the court to enter its order quashing the service of summons.

The procedure for attacking the jurisdiction of the court over the person of defendant by motion to quash or writ of mandate is now set forth in Code of Civil Procedure sections 416.1 [2] and 416.3,[3] which were enacted in 1955.

Since in the present case written notice of the court's order denying the motion to quash service was served on January 12th and since defendant's petition for a writ of mandate was not filed until 18 days later and no extension pursuant to section 416.3 was obtained, plaintiff contends that the writ was filed too late. Defendant contends, however, that he sufficiently complied with the statute by filing his petition within the 30 days allowed him under section 416.1 to "answer or otherwise plead to plaintiff's complaint."

[1] The obvious purpose of sections 416.1 and 416.3 is to permit a defendant to challenge the jurisdiction of the court over his person without waiving his right to defend on the merits by permitting a default to be entered against him while the jurisdictional issue is being determined. (See, 1 Witkin, California Procedure, 1955 Statutory Supplement, 17–19.) To achieve this purpose, when relief has been denied in the trial court, is is necessary that relief be sought in the appellate court

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2. "Any defendant or cross-defendant upon whom service of summons has been made may serve and file, on or before the last day on which he is required to plead, or within such further time as the court may for good cause allow, a notice of motion to quash the service of summons, upon the ground of lack of jurisdiction of the court over him. * * * In the event of the service and filing of such motion, the time of the moving party to plead to the complaint or cross-complaint shall be extended, and no default may be entered against him, until the expiration of 10 days following service upon him of written notice of entry of an order of the court denying the motion. Upon good cause being shown, the court may extend the latter 10-day period for an additional period not exceeding 20 days. Neither an application to the court by any defendant or cross-defendant for an extension of time within which to plead, nor the granting of such extension nor entering into a stipulation of the parties for such extension, shall constitute a general appearance by said defendant or cross-defendant."

3. "If a motion of a defendant or cross-defendant to quash service of summons, as provided in Section 416.1 of this code, is denied by the court, he may, before pleading, and within 10 days after service upon him of written notice of the order of the court denying the motion, or within such additional time not exceeding 20 days as the court may allow, petition an appropriate appellate court for a writ of mandate directed to the court wherein the action or proceeding is pending requiring the entry of its order quashing the service of summons. If he shall thereupon serve upon the adverse party and file with the clerk of the latter court a notice that he has petitioned for such writ of mandate, his time to plead shall be extended, and no default may be entered against him, for a period of 10 days following written notice of the final judgment in the mandamus proceeding, which time for good cause may be extended by the court for an additional period of not to exceed 20 days."

before the time to plead has expired. Otherwise the defendant would be compelled to elect between permitting the entry of a default or waiving the jurisdictional issue by pleading to the merits. If, however, the writ is filed in the appellate court within the additional 20-day period permitted to plead in the trial court under section 416.1, no purpose would be served by requiring the defendant to duplicate the 20-day extension secured under section 416.1 by securing a concurrent extension under section 416.3. Accordingly, when the two sections are construed together, it is apparent that they provide alternative methods of securing an additional 20-day period to petition for a writ of mandate and that a failure to secure an extension under the provisions of section 416.3 does not preclude issuance of the writ, if the petition is filed within the time permitted to plead under section 416.1.

[2, 3] Defendant contends that the relief sought by plaintiff is necessarily a personal judgment against him and that since he is not a California domiciliary, see, Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, it would deny him due process of law to sustain the service of process made outside the state. It is unnecessary to decide whether any constitutional basis other than domicile may exist in this case for asserting personal jurisdiction over defendant by process served elsewhere. (See, Ehrenzweig, Personal Jurisdiction, 65 Yale L.J. 289; Ehrenzweig and Mills, Personal Service, 41 Calif.L. Rev. 383.) Code of Civil Procedure section 417 provides that "Where jurisdiction is acquired over a person who is outside of this State by publication of summons in accordance with Sections 412 and 413, the court shall have the power to render a personal judgment against such person only if he was personally served with a copy of the summons and complaint, and was a resident of this State at the time of the commencement of the action or at the time of service." Since the term resident in this statute means domiciliary, Smith v. Smith, 45 Cal.2d 235, 240, 288 P.2d 497, and since it is undisputed that defendant was not at any time relevant herein a domiciliary of California, section 417 precludes the entry of a personal judgment against him.

Plaintiff contends that since the purpose of the proceeding is only to establish the status of the parties as parent and child, it is a proceeding in rem and that therefore personal service within the state is not required. He argues that the state of his domicile has sufficient interest in his status as defendant's child to adjudicate that status without securing personal jurisdiction over defendant. We do not believe, however, that because the present proceeding is concerned solely with status it must necessarily be classified as a proceeding in rem, particularly if such a classification would result in making the judgment binding as to the status of the parties in subsequent litigation between them or others. The purpose of the particular action brought under Civil Code section 231 must be considered to determine how it should be characterized.

That section provides for declarations of both the existence and nonexistence of the relation of parent and child by birth or adoption, and a distinction may reasonably be drawn between a proceeding to establish that the defendant is not the plaintiff's parent and one to establish that he is. By analogy to the rule applicable to ex parte divorces, it could reasonably be contended that the state may adjudicate the nonexistence of the parent-child relationship between its domiciliary and a person not subject to its jurisdiction if adequate notice is provided. See, Williams v. State of North Carolina, 317 U.S. 287, 303, 63 S.Ct. 207, 87 L.Ed. 279; Bing Gee v. Chan Lai Yung Gee, 89 Cal.App.2d 877, 884, 202 P.2d 360; In re Estate of Smith, 86 Cal. App.2d 456, 465, 195 P.2d 842; In re Estate of Hampton, 55 Cal.App.2d 543, 559-562, 131 P.2d 565; In re Soderberg, 26 Ariz. 404, 226 P. 210, 211; cf., May v. Anderson, 345 U.S. 528, 534, 73 S.Ct. 840, 97 L.Ed. 1221. The severing of a relationship or an adjudication that it never existed for the purpose of establishing the parties' freedom from it in the future is not the same thing, however, as creating it or establishing its present existence. (See, Fraser, Jurisdiction by Necessity, 100 U. of Pa.L.Rev. 305, 312.) Thus it has been recognized that a decree of divorce is a judgment in rem only to the extent it determines that the parties are thereafter free to remarry and is in personam to the extent it determines that a marriage existed at the time it was entered. Rediker v. Rediker, 35 Cal.2d 796, 800–801, 221 P.2d 1, 20 A.L.R.2d 1152. Basically the difference is between the state's power to insulate its domiciliary from a relationship with one not within its jurisdiction and its lack of power to reach out and fasten a relationship upon a person over whom it has no jurisdiction. (See, Dodd, Jurisdiction in Personal Actions, 23 Ill.L.Rev. 427, 439.)

Plaintiff correctly concedes that if the purpose of the present action were to enforce a duty of support or some other personal obligation growing out of the parent-child relationship, personal jurisdiction over defendant would be essential. See, Baldwin v. Baldwin, 28 Cal.2d 406, 415, 170 P.2d 670; In re Hindi, 71 Ariz. 17, 222 P.2d 991, 993. This requirement cannot be avoided by limiting the relief sought to a binding adjudication of the parties' status, since such an adjudication would prevent relitigation of the basic issue on which defendant's personal obligations to plaintiff must rest and to that extent would necessarily constitute a personal judgment against him. See, In re Hindi, supra; Rediker v. Rediker, supra.[4] Moreover, the fact that it may appear unlikely that plaintiff will ever have occasion to assert any personal rights against defendant based on the claimed relationship between them cannot justify giving any judgment that might be obtained an effect to which it would otherwise not be entitled.

Although there is language in Urquhart v. Urquhart, 185 Misc. 915, 57 N.Y.S.2d 734, 737, and in Fordham v. Marrero, 1 Cir., 273 F. 61, 67, that supports the contention that a child's status may be determined without personal jurisdiction over his alleged parent, the holding in neither case is inconsistent with the conclusion we have reached here. Thus in the Urquhart case the absent parent attacked the court's jurisdiction over the subject matter rather than over his person. Moreover, the action was brought against both of the parents and one of them was subject to the jurisdiction of the court. Accordingly, there was clearly jurisdiction to award part of the relief sought and it was appropriate that the absent parent be given notice of the action, whether or not he would be bound by the adjudication. In the Fordham case the determination of parentage was ancillary to the administration of an estate subject to the court's jurisdiction, and the court had power to determine the question of heirship without securing personal jurisdiction over all of the parties. See, In re Estate of Wise, 34 Cal.2d 376, 385, 210 P.2d 497.

[4] The question remains whether plaintiff is entitled to maintain this action despite the court's lack of power to make a binding determination that he is defendant's child without personal jurisdiction over defendant. Plaintiff is primarily concerned with establishing his true identity and reducing or eliminating the evidentiary effect of his alleged false birth certificate, see, Vanderbilt v. Mitchell, 72 N.J.Eq. 910, 67 A. 97, 99, 14 L.R.A.,N.S., 304, to facilitate his dealings with military and other governmental officials. It has been recognized that even when it is not res judicata, a determination of pedigree may constitute evidence of the facts adjudicated, Morecroft v. Taylor, 225 App. Div. 562, 234 N.Y.S. 2, 6; see, Health and

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4. It is unnecessary to determine whether, given personal jurisdiction over both of the parties, a judgment establishing the parent-child relationship would be in rem so as to be binding on third parties less directly concerned with the question in issue. (See, 2 Armstrong, California Family Law 918–919.)

Safety Code, §§ 10600–10607; In re Lee Fong Fook, D.C., 74 F.Supp. 68, 71; Casares-Moreno v. United States, 9 Cir., 226 F.2d 873, 874; Bayse, Determination of Heirship, 54 Mich.L.Rev. 737, 747–749, and such a determination may be sufficient to satisfy governmental authorities that require for one purpose or another satisfactory evidence of birth and identity. Moreover, the fact that it might be used as evidence in subsequent litigation would not constitute a denial of due process just as the use of any public record based on ex parte statements would not.[5] Accordingly, it must be determined whether section 231 may reasonably be interpreted as authorizing an action to secure a judgment the effect of which would necessarily be limited to constituting evidence of the facts adjudicated. We have concluded that it may not. By its express terms it provides for an action "between the parties" for the declaration of "the existence or nonexistence * * * of the relation of parent and child, by birth or adoption," and normally the judgment in such an action would be res judicata. (See, Code Civ.Proc. § 1908.) In the present case, however, the judgment could not have that effect in whole or in part in the absence of personal jurisdiction over defendant. It could not, as in the case of an ex parte divorce, conclusively adjudicate the future relationship of the parties to one another, see, Rediker v. Rediker, supra, 35 Cal.2d 796, 802, 221 P.2d 1, 20 A.L.R.2d 1152, and its purpose is not to adjudicate any interest in defendant's property located in this state. In the latter situation it has been recognized that a judgment obtained without personal jurisdiction is not even evidence against the defendant except as it affects his interest in the property involved, First National Bank of Riverside v. Eastman, 144 Cal. 487, 491–492, 77 P. 1043; Brown v. Campbell, 100 Cal. 635, 641, 35 P. 433, and there is no basis for assuming that in making general provisions for various types of actions the Legislature intended that final judgments obtained without personal jurisdiction should have purely evidentiary effect in some cases but not in others. There is nothing in the language of section 231 that suggests that actions thereunder should be treated differently from other actions in this respect, and it is significant that in the Health and Safety Code the Legislature has made provision for the securing of evidentiary records of vital statistics by means of ex parte judicial and administrative procedures. Health and Safety Code, §§ 10575–10578; 10600–10607; 10615–10618; see also Code Civ.Proc. § 2084(2) (perpetuation of testimony with respect to questions of pedigree). Whether plaintiff may invoke any of these procedures to secure the evidence he desires is a question not before us in this proceeding. The existence of such remedies, however, even though they may not provide relief in all circumstances, fortifies the conclusion that section 231 contemplates only an ordinary civil action. Since under the circumstances of this case, personal jurisdiction over defendant is essential for such an action, the service upon him outside the state was ineffective.

Let the peremptory writ issue as prayed for.

GIBSON, C. J., and SHENK, CARTER, SCHAUER, SPENCE and McCOMB, JJ., concur.

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[5] Code of Civil Procedure section 585(3) provides that before a default judgment may be entered in a proceeding of this sort, the court must "require proof to be made of the allegations of the complaint."

47 Cal.2d 469

STOCKTON THEATRES, Inc., a corporation, Plaintiff and Appellant,
v.
Emil PALERMO and Forrest E. Macomber, Defendants and Respondents.

STOCKTON THEATRES, Inc., a corporation, Plaintiff and Appellant,
v.
Emil PALERMO and Forrest E. Macomber, Defendants and Respondents.
Sac. 6600, 6732.

Supreme Court of California.
In Bank.
Dec. 7, 1956.

Plaintiff's appeal from orders of the Superior Court of San Joaquin County, Thomas B. Quinn and George F. Buck, Judges, entered on remittitur. The Supreme Court, Carter, J., held that plaintiff was entitled to recover, as part of costs on appeal, bond premiums paid by it to preserve its attachment on appeal, and that it had been error to release plaintiff's attachment without taking into consideration bond premium cost which was subject of pending appeal.

Reversed with directions.

Opinion, 296 P.2d 361, vacated.

1. Appeal and Error 🔑446

Civil Procedure Code section, making appeal ineffective to continue attachment in force unless undertaking is filed, applies also to an appeal by plaintiff from a judgment deemed inadequate. West's Ann.Code Civ.Proc., § 946.

2. Courts 🔑92

Discussion or determination not necessary to disposition of question that is decisive of appeal is generally regarded as obiter dictum and not as law of case.

3. Courts 🔑92

Where court merely presupposed a situation for purpose of illustrating its theory of how statute should be construed, and its decision was not predicated upon such construction of statute, such construction did not become law of case.

4. Statutes 🔑228

In construing statute, court cannot create exception.

5. Costs 🔑251

Civil Procedure Code section, permitting premium on surety bond to be recovered as part of costs, includes cost of bond premium at both trial and appeal stages. West's Ann.Code Civ.Proc., § 1035.

6. Costs 🔑251

Bond premiums, paid by lessee to preserve its attachment pending appeal from inadequate judgment in its action against lessor for restitution, were recoverable as part of costs on appeal, even though bond was obtained prior to effective date of Civil Procedure Code section permitting recovery of bond premium as part of costs, where such section was in force at time judgment for costs on appeal was entered. West's Ann.Code Civ.Proc., § 1035.

7. Appeal and Error 🔑162(2)

Judgment creditor may accept tender of that portion of judgment favorable to him and to which he is admittedly entitled without losing his right to appeal from severable portion unfavorable to him.

8. Attachment 🔑184
Judgment 🔑894

Where defendant failed to comply with Civil Procedure Code section, relative to discharge of attachment upon furnishing of undertaking, and plaintiff's appeal, from refusal to include attachment bond premium as part of costs on appeal, was pending, it was error to release plaintiff's attachment, without taking into consideration bond premium which was subject to pending appeal, and to order a full satisfaction of judgment. West's Ann.Code Civ.Proc., §§ 554, 555.

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Freed & Freed, Eli Freed and Eugene A. Mash, San Francisco, for appellant.

Smith & Zeller, Stockton, for respondent Palermo.

CARTER, Justice.

Stockton Theatres, Inc., appeals from two orders: (1) that portion of an order retaxing costs filed on December 17, 1954, which granted the motion of defendant Palermo to retax costs as to the premiums on a surety bond to preserve an attachment on appeal; (2) from a minute order of January 27, 1955, granting the motion of defendant Palermo to enter satisfaction of judgment and to discharge the liens created by the recording of abstracts of judgment and to release all levies of attachment or execution.

On June 5, 1944, Emil Palermo, the owner and lessor of the Star Theatre in Stockton, brought an action for declaratory relief against the lessee, Stockton Theatres, Inc., in an endeavor to have the lease declared void because the stockholders of the lessee were Japanese nationals. On June 11, 1945, the lease was declared void. Immediately thereafter Palermo brought an action for forcible detainer and a judgment was rendered in his favor whereby he obtained possession of the theater. Stockton Theatres appealed from both judgments. The judgment in the declaratory relief action was reversed by this court in Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 195 P.2d 1. This had the effect of adjudicating that the lease was valid and that under it Stockton Theatres was entitled to possession of the theater as a tenant thereof.

Stockton Theatres then brought an action for restitution. During the pendency of the first appeals Palermo had operated the theater profitably and Stockton Theatres asked that he be compelled to account to it for the income he had derived therefrom. The trial court took an account and adjudged that Stockton Theatres recover from Palermo the sum of $13,658.75. Both parties appealed. The appeal was decided in favor of Stockton Theatres and the judgment of the lower court was modified to provide that Stockton Theatres recover the sum of $45,992.12 rather than the sum of $13,658.75 and that Stockton Theatres was entitled to recover costs on appeal. Stockton Theatres, Inc., v. Palermo, 121 Cal.App.2d 616, 264 P.2d 74.[1]

Stockton Theatres levied an attachment concurrently with the filing of the action for restitution. After the judgment was rendered against Palermo and prior to filing notice of appeal, Stockton Theatres filed an undertaking to preserve the attachment on appeal. Palermo then moved to discharge the attachment on the ground that Stockton Theatres had not complied with the time limitation of section 946 of the Code of Civil Procedure. The motion was denied in Stockton Theaters v. Palermo, 109 Cal.App.2d 616, 619, 241 P.2d 54, 56 (no petition for hearing), where the court had this to say: "Defendants' second motion, which is predicated upon their interpretation of said Section 946 of the Code of Civil Procedure as to its applicability to the situation here presented, does not appear to be well founded. In the instant case plaintiff was the prevailing party in the trial court. Had the situation been reversed, that is, if the judgment had been in favor of Palermo, and had plaintiff sought to appeal, then the situation would have come squarely within the statute cited and relied upon by defendants. *However, such is not the case, and since the lien of attachment has now merged with the judgment said section has no applicability.*" (Emphasis added.) It appears that the court in the last cited case was of the opinion that because Stockton Theatres had recovered a portion of its demand in the trial court (even though it later appealed on the ground that it was entitled to recover the full amount of its demand) the section was inapplicable. Section 946 provides in part that: "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the *appellant* by at least two sureties, in double the amount of the debt claimed by him, that the *appellant* will pay all costs and damages which the respondent may sustain by reason of the attachment, in case the order of the court below be sustained; and unless, within five days after written notice of the entry of the order appealed from, such appeal be perfected." (Emphasis added.)

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[1] A detailed statement of the history of the litigation may be found in 32 Cal.2d 53, 195 P.2d 1 and 121 Cal.App.2d 616, 264 P.2d 74.

On the appeal in the restitution case, Stockton Theatres argued that it was entitled to $116,341.25. The bond premium necessary (in accordance with section 946, Code of Civil Procedure) for a sufficient bond to preserve the attachment during the pendency of the appeal amounted to a total sum of $6,980.49. When the remittitur came down, Stockton Theatres filed its memorandum of costs and disbursements on appeal. This memorandum included the amount of $6,980.49 for premium on the bond to preserve the attachment on appeal. Palermo objected to the inclusion of the bond premium as an item of costs. The court granted Palermo's motion to tax costs on appeal as to this item on the ground that section 1035 of the Code of Civil Procedure did not apply to costs on appeal. An offer of costs less the amount of the bond premium as full satisfaction was refused by plaintiff. Palermo then moved to require Stockton Theatres to release the attachment and enter a satisfaction of judgment; Stockton Theatres objected on the ground that there was unpaid interest due on the judgment owing it, and on the ground that an appeal had been taken by it from the order retaxing costs. At the hearing on Palermo's second motion the interest due Stockton Theatres was paid by Palermo. Subsequently a written order was entered granting Palermo's motion that satisfaction of judgment be entered in the action; that the levy of attachment be released and that the liens created by recordation of abstracts of judgment be discharged.[2]

[1-3] As a preliminary matter Palermo's argument concerning the "law of the case" must be discussed. It will be recalled that the District Court of Appeal in Stockton Theaters v. Palermo, 109 Cal.App.2d 616, 619, 241 P.2d 54, held that section 946 of the Code of Civil Procedure had no application to a situation where a *plaintiff* who has recovered a smaller amount than that sued for, appeals from the judgment to an appellate court. Section 946 is not so limited. It provides that "An appeal does not continue in force an attachment, unless an undertaking be executed and filed on the part of the *appellant* by at least two sureties, in double the amount of the debt claimed by him, that the *appellant* will pay all costs and damages which the *respondent* may sustain * * *" etc. It therefore clearly appears that the statement in the opinion of the District Court of Appeal is incorrect. Palermo argues here that because of the holding which he contends has become the law of the case, Stockton Theatres has no legal authority to seek the cost of the premium on the bond as an item of costs on appeal. It seems that for the purposes of the law of the case, the statement heretofore referred to which held that section 946 was only applicable where the defendant had prevailed in the trial court may be considered dictum. The court concluded as follows: "The motion to vacate the attachments is denied, and, as previously noted, the motion to dismiss plaintiff's appeal is deferred, to be considered and determined together with the appeal on its merits." *If*, as previously set forth, the District Court believed that the lien of attachment had "merged with the judgment [and] said section [946] has no applicability," it would appear that defendants' motion to discharge the attachment should have been granted rather than denied. This could, however, apply only insofar as the judgment went—to the sum of $13,658.75 awarded to plaintiff. The discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally regarded as obiter dictum and not as the law of the case. We held in Allen v. California Mutual Bldg. & Loan Ass'n, 22 Cal.2d 474, 489, 139 P.2d 321, 329, that "This discussion is obviously based upon the erroneous assumption that the presentation of a claim by the investor was still required under the 1935

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[2] This matter will be discussed.

amendment, and this in spite of the inclusion of the words 'without presenting a claim' in the statute. And the doctrine of the law of the case does not require this court to follow an interpretation which is clearly obiter dictum. The statement of facts in the discussion, assumed for the purpose of illustrating the necessity of the court's construction of the statute, presupposed a situation. * * *" In the instant case the court presupposed a situation for the purpose of illustrating its theory of how the statute should be construed. The illustration was clearly erroneous and it is obvious that the decision was not predicated upon the court's construction of the statute. Hence, we are not bound to follow the District Court's erroneous interpretation of the scope of section 946 of the Code of Civil Procedure under the doctrine of the law of the case. See, also, Hammond v. McDonald, 49 Cal.App.2d 671, 122 P.2d 332; 4 Cal.Jur.2d, § 698, p. 604; Millsap v. Balfour, 158 Cal. 711, 112 P. 450; Mulford v. Estudillo, 32 Cal. 131. In order to avoid confusion the holding of the District Court of Appeal in this respect is specifically disapproved.

Section 961 of the Code of Civil Procedure, which became effective in 1943, provides that "The Judicial Council shall have the power to prescribe by rules for the practice and procedure on appeal, and for the time and manner in which the records on such appeals shall be made up and filed, in all civil actions and proceedings in all courts of this State. * * *

"The rules reported as aforesaid shall take effect on July 1, 1943, and thereafter all laws in conflict therewith shall be of no further force or effect."

Section 1034 of the Code of Civil Procedure provides that "In appeals from the superior and municipal courts, costs shall be awarded as provided in rules adopted by the Judicial Council. * * * The party entitled to costs, or to whom costs are awarded, may recover all amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal. * * *" Stats. 1945, ch. 40, § 5.

Section 26(c) of the Rules on Appeal, 36 Cal.2d 22, 23, lists certain costs which may be recovered. The premium paid on a bond to preserve an attachment on appeal is not one of the items of costs listed.

Section 1035 of the Code of Civil Procedure, which was added to the Code in 1951, Stats.1951, ch. 1327, § 1, provides: "Whenever in this code or by other provision of law costs are allowed to a party to an action or other proceeding, such costs shall include the premium on any surety bond which was procured by the party entitled to recover costs in connection with the action or proceeding unless the court determines that the bond was unnecessary."

[4] Section 1035 has, apparently, never before been construed by an appellate court. Stockton Theatres argues that it is a general provision and applies to the appellate stage of a proceeding as well as to the trial stage; Palermo contends that it applies only to the trial stage and that Rule 26(c) of the Rules on Appeal is the exclusive measure of the costs which may be recovered on appeal. Stockton Theatres argues that the Legislature had the power to adopt section 1035 and that it superseded any rule in conflict with it. Palermo concedes that the Legislature had the power to provide in section 1035 that the premium on a surety bond was a proper item of costs on appeal, but argues that it did not do so because the appeal stage was not specifically set forth in the section. The statute is general—it specifies neither the trial nor appeal stage of an action or proceeding. The general rule is that a court is not authorized in the construction of a statute, to create exceptions not specifically made. If the statute announces a general rule and makes no exception thereto, the courts can make none. 23 Cal.Jur., § 120, p. 743; Gagliardo v. Hoberlin, 18 Cal. 394, 396; Los Angeles Railway Corp. v. Los Angeles County Flood Control Dist., 78 Cal.App. 173, 248 P. 532; In re Goddard, 24 Cal.App.2d 132, 74 P.2d 818; In re De Neef, 42 Cal.App.2d 691, 109 P.2d 741; Adams v. Herman, 106 Cal.App.2d 92, 234 P.2d 695; People v. Clark, 106 Cal.App.

2d 271, 235 P.2d 56; Certified Grocers of California v. State Bd. of Equal., 100 Cal. App.2d 289, 223 P.2d 291.

[5] It appears to us that the Legislature intended, by the enactment of section 1035 of the Code of Civil Procedure in 1951 to include the cost of a bond premium at both the trial and appeal stages. In so holding, section 1035 does not repeal section 1034 as contended by Palermo, but merely adds an additional item of recoverable costs to those set forth in Rule 26(c) of the Rules on Appeal. Section 961 of the Code of Civil Procedure does not provide that the Judicial Council shall have the power to prescribe all the rules for the practice and procedure on appeal, although it does provide that after the effective date of the Rules on Appeal all laws in "conflict therewith shall be of no further force or effect." It cannot seriously be argued that the Legislature does not have the power to enact, subsequently, a statute which would have the effect of amending the existing rule (26(c)) listing additional items of costs to be recovered on appeal. Section 1a of article VI, subsection (5), of the state Constitution provides that the Judicial Council shall "Adopt or amend rules of practice and procedure for the several courts *not inconsistent with laws that are now or that may hereafter be in force;* and the council shall submit to the Legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure." (Emphasis added.) As the court said in Lane v. Superior Court, 104 Cal. App. 340, 344, 285 P. 860, 862: "The rule-making power of the Judicial Council would seem to be limited by any existing law, the Constitution reserving to the Legislature and the people the primary and higher right to provide rules of procedure for our courts, with the secondary right in the Judicial Council, to adopt rules only, when and where the higher authority of the Legislature and the people has not been exercised."

[6] There is no merit in Palermo's contention that section 1035 is not applicable to the case at hand because Stockton Theatres' appeal was taken and the bond posted on June 7, 1951 and section 1035 did not become effective until September, 1951. We held in Hogan v. Ingold, 38 Cal.2d 802, 814, 243 P.2d 1, 8, 32 A.L.R.2d 834, that "'[C]osts are given only by statutory direction and their allowance depends on the terms of the statute in force at the time of the accrual of the right to have them taxed. This time, in regard to costs on appeal, is the time of the rendition of the judgment on appeal. It follows that the rule pertaining to the allowance of costs may be changed or modified by statute during the pendency of the proceeding.'" In the case under consideration Stockton Theatres, Inc. was allowed costs on appeal by a decision rendered on November 30, 1953. See Stockton Theatres, Inc., v. Palermo, 121 Cal.App.2d 616, 264 P.2d 74.

Section 1035 which permits the premium on any surety bond to be included as an item of costs to the party to whom costs are allowed includes the qualification "unless the court determines that the bond was unnecessary." Palermo argues that the court's order disallowing the premium on the bond is, in effect, a finding that the bond was unnecessary. The trial court, however, disallowed the cost of the bond premium on the ground that such a cost was not specified in Rule 26(c), Rules on Appeal, and that section 1035 of the Code of Civil Procedure did not apply at the appeal level

Having concluded that section 1035 of the Code of Civil Procedure permits as an item of costs on appeal the premium on a bond where one is required by law, Code Civ.Proc., § 946, in order to preserve an attachment, the cause must be reversed and remanded for a determination by the trial court as to whether or not a bond was necessary in the case under consideration.

[7, 8] The second appeal involved here is from the order directing the entry of a

satisfaction of judgment and a release of all attachments. Stockton Theatres argues that it was entitled to rely upon its attachment for security for recovery of the bond premiums; that if defendant Palermo desired to have the levy of attachment released he could have given an undertaking under sections 554 and 555 of the Code of Civil Procedure in the amount of the costs demanded by Stockton Theatres. It is contended that a satisfaction of the judgment is the last act and the end of the proceedings, Brochier v. Brochier, 17 Cal. 2d 822, 825, 112 P.2d 602; Cason v. Glass Bottle Blowers Ass'n, 113 Cal.App.2d 263, 247 P.2d 931, and that except where a valid release is given, or there is a lawful agreement otherwise providing, a judgment may be satisfied or discharged only by payment in full with accrued interest and costs (2 Freeman on Judgments, 5th ed., page 2329). It would appear that since the judgment creditor (Stockton Theatres, Inc.) cannot prevent the judgment debtor (Palermo) from avoiding possible liability for accruing interest, pending an appeal, by refusing tender of the amount due, People v. Roath, 62 Cal.App.2d 241, 144 P. 2d 648, that the trial court properly entered a satisfaction of judgment as to the amount of the judgment, interest, and the undisputed costs. However, Stockton Theatres appealed from the order retaxing costs as to the amount of $6,980.49 which was stricken by the trial court. The judgment creditor may accept a tender of that portion of the judgment favorable to him and to which he is admittedly entitled without losing his right to appeal from a severable portion of the judgment unfavorable to him. Stein v. Simpson, 37 Cal.2d 79, 230 P.2d 816. Section 554 of the Code of Civil Procedure provides, in part, that whenever any defendant has appeared in the action "such defendant may upon reasonable notice to the plaintiff, apply to the court in which the action is pending, or to the judge thereof, for an order to discharge the attachment wholly, or in part; and upon the execution of the undertaking mentioned in the next section, an order may be made releasing from the operation of the attachment, any or all of the property of such defendant attached * * *." Section 555 provides for the undertaking which the court or judge "must require" before making such an order.

It appears that the trial court erred in releasing Stockton Theatres' attachment without taking into consideration the amount of the cost of the bond premium which was the subject of a pending appeal, and in ordering a full satisfaction of judgment. The order of the trial court would have been correct had defendant complied with sections 554 and 555 of the Code of Civil Procedure as heretofore set forth.

For the reasons heretofore set forth the orders appealed from are reversed and the trial court directed to determine the necessity for the bond required to preserve the attachment pending appeal, and, if it is determined that such bond was necessary, allow the amount of the premium paid therefor as an item of the costs on appeal to which plaintiff is entitled. The amount so allowed to be a lien upon any property of Palermo covered by the attachment heretofore levied.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

47 Cal.2d 428

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a corporation, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent;

Helen Corrick et al., Real Parties in Interest.

S. F. 19562.

Supreme Court of California.

Dec. 4, 1956.

Proceeding for writ of mandate by automobile insurer against Superior Court in and for County of San Francisco to sever its declaratory judgment action against insured from personal injury actions against insured and to compel prior trial of declaratory judgment action. The Supreme Court, Spence, J., held that under statute providing that consolidation may be ordered, in discretion of court, when it will not prejudice a substantial right, injury actions by riders in automobile, against motorist, should not have been consolidated with motorist's insurer's declaratory judgment action against motorist, where, in declaratory judgment action, insurer wished to assert that riders were passengers for charge and, in defending motorist, that riders were within guest statute, but that mandate was not available to compel trial of declaratory judgment action.

Peremptory writ issued.

Carter, J., dissented.

1. Automobiles 🔑181(2)

Insurance 🔑435.5

A person may be a "traveler for compensation" under guest law but not necessarily a "passenger" for "consideration" or "for a charge" under an insurance policy. West's Ann.Vehicle Code, § 403.

See publication Words and Phrases, for other judicial constructions and definitions of "Passenger for a Charge", "Passenger for Consideration" and "Traveler for Compensation".

2. Action 🔑57(2)

Under statute providing that consolidation may be ordered, in discretion of court, when it will not prejudice a substantial right, injury actions by rider in automobile against motorist could not be consolidated with motorist's insurer's declaratory judgment action against motorist without impairment of such a substantial right of insurer, where, in declaratory judgment action, insurer wished to assert that riders were passengers for charge within meaning of exclusionary provisions of policy, and, in defending motorist, that riders were within guest statute, and court committed abuse of discretion in ordering consolidation. West's Ann.Code Civ.Proc., § 1048; West's Ann.Vehicle Code, § 403.

3. Mandamus 🔑28

Mandate lies to control judicial discretion when it has been abused.

4. Appeal and Error 🔑106

An order of consolidation is not appealable but is reviewable only upon appeal from subsequent judgment. West's Ann.Code Civ.Proc., § 963.

5. Mandamus 🔑32

Mandate would issue to compel severance of automobile insurer's declaratory judgment action against insured motorist from actions by persons injured while riding in motorist's automobile against him, in view of facts that insurer wished to contend, in declaratory judgment action, that riders were paying passengers and, in injury action, that they were guests, and that insurance would be disclosed to jury, and that appeal from judgment would not be adequate remedy. West's Ann.Code Civ. Proc., §§ 963, 1048; West's Ann.Vehicle Code, § 403.

6. Declaratory Judgment 🔑5

Entertaining of declaratory judgment action and granting of declaratory relief are matters within discretionary power of court. West's Ann.Code Civ.Proc., §§ 1061, 1062a.

7. Trial ⚷15

Statute providing that declaratory judgment actions shall take precedence over other cases, except older matters of same character and matters to which special precedence may be given, is not intended to compel trial court to delay trial of course of action until after trial of declaratory relief action merely because coercive action might involve determination of same or somewhat similar issues. West's Ann. Code Civ.Proc., §§ 963, 1061, 1062a.

8. Mandamus ⚷48

Trial ⚷15

Where persons injured while riding in insured motorist's automobile brought injury actions against him which were at issue and set for trial before insurer brought declaratory relief action against insured on contention that riders were paying passengers and within exclusionary provisions of policy, trial court could properly determine that granting of declaratory relief was not necessary or proper at the time, as affecting order of trial, and court could not be compelled by mandate to order trial of declaratory action prior to injury actions. West's Ann.Code Civ.Proc., §§ 963, 1061, 1062a.

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Bledsoe, Smith, Cathcart, Johnson & Phelps and Joseph W. Rogers, Jr., San Francisco, for petitioner.

No appearance for respondent.

Delany, Fishgold & Freitas and Matthew M. Fishgold, San Francisco, for real parties in interest.

SPENCE, Justice.

Petitioner seeks a writ of mandate to compel respondent court to sever its declaratory relief action from certain personal injury actions and to proceed first with the trial of is declaratory relief action. It contends that respondent court abused its discretion (1) in ordering the consolidation for trial of the declaratory relief action and the personal injury actions; and (2) in failing to order that the declaratory relief action be tried prior to the trial of the personal injury actions. Code Civ.Proc. § 1062a. We have concluded that petitioner's position should be sustained as to the first point but not as to the second point.

Petitioner commenced a declaratory relief action against its policyholder Collins to determine whether its policy covered a collision of two automobiles, one of which was operated by Collins. Persons riding in both cars were injured. While the declaratory relief action was pending, several personal injury actions were filed against Collins. The personal injury actions were at issue and were consolidated for a jury trial. Thereafter the declaratory relief action was set for trial, with a jury as demanded by defendants, and for the same day previously set for trial of the personal injury actions. Petitioner's motion to vacate the order for a jury trial in the declaratory relief action was denied, and defendants' motion to consolidate that action with the personal injury actions was then granted. The trial date for the personal injury actions was not a date certain but the time when the cases should be ready for trial and thereafter would "trail," subject to being called for assignment when a department was available.

[1] Petitioner concedes that "actions may be consolidated, in the discretion of the court, whenever it can be done without prejudice to a substantial right." Code Civ.Proc. § 1048. However, as petitioner contends, the consolidation here does result in such prejudice to petitioner. In seeking damages against Collins for their injuries, the riders in his car charged him with both negligence and wilful misconduct but did not allege their status, whether passengers or guests, at the time of the accident. Petitioner's policy provided that there was no coverage while the insured's automobile was "used as a public or livery

conveyance, or used for carrying persons for a charge," with the exception of persons sharing expenses, going to and from work or school. The order for consolidation puts petitioner in an inconsistent position for argument of the status of Collins' riders in the consolidated actions: (1) in the declaratory relief action petitioner would be urging on its own behalf that Collins' riders were passengers "for a charge" within the meaning of the policy; but (2) in defending Collins in the personal injury actions, petitioner would be urging on Collins' behalf that his riders were guests within the meaning of the guest statute, so that Collins would be liable only in the event of proof of wilful misconduct. Veh.Code, § 403; Pennix v. Winton, 61 Cal.App.2d 761, 143 P.2d 940, 145 P.2d 561. The tests for determining these respective issues in the actions thus consolidated would not be the same. A person may be a traveler for "compensation" under the guest law but not necessarily a "passenger" for "consideration" or "for a charge" under an insurance policy. Western M. Co. v. Bankers I. Ins. Co., 10 Cal.2d 488, 490–491, 75 P.2d 609; Porter v. Employers' Liability Assur. Corp., 40 Cal.App.2d 502, 506–510, 104 P.2d 1087. Substantially the same evidence might be involved in the adjudication of these issues, but petitioner would be forced into contradictory arguments based upon conflicting testimony, or at least upon conflicting inferences arising from the evidence, with regard to these distinguishable relationships. Moreover, the consolidation would unquestionably confuse the jury in determining under differing tests set out in the instructions the consequences of any particular factual situation which the jury might find to exist.

[2] Petitioner does not now challenge the propriety of respondent's granting a jury trial in the declaratory relief action. The general rule is stated in 13 A.L.R.2d at page 778: "* * * if the issues of fact arising would have been triable by a jury as of right in an action which might have been substituted for the declaratory judgment action by either party, then there is a right to jury trial on such issues." While Kaliterna v. Wright, 94 Cal.App.2d 926, 212 P.2d 32, appears to hold that, regardless of the circumstances, the court in a declaratory relief action may dispose of all factual issues without a jury, such view fails to preserve the distinction between legal and equitable issues, and it must be disapproved. See Robinson v. Puls, 28 Cal.2d 664, 665–666, 171 P.2d 430. In short, the "courts will not permit the declaratory action to be used as a device to circumvent the right to a jury trial in cases where such right would be guaranteed if the proceeding were coercive rather than declaratory in nature." 15 Cal.Jur.2d § 43, pp. 172–173; see Pacific Electric Ry. Co. v. Dewey, 95 Cal.App.2d 69, 71–72, 212 P.2d 255; Mallarino v. Superior Court, 115 Cal.App.2d 781, 784, 252 P.2d 993. However, petitioner properly complains of the order for consolidation here in that it provides for the trial of both the declaratory relief action and the personal injury actions before the same jury. The fact of Collins' liability insurance would thus be disclosed to the jury which would be determining the issues involved in the personal injury actions, a circumstance which is generally held a matter of prejudice. See cases collected: 11 So.Cal.L.Rev. 407; 21 So.Cal.L.Rev. 227. It is therefore clear that the declaratory relief action and the personal injury actions could not be consolidated for trial "without prejudice to a substantial right" of petitioner, and that the trial court abused its discretion in ordering such consolidation.

[3–5] Mandate lies to control judicial discretion when that discretion has been abused. Hays v. Superior Court, 16 Cal.2d 260, 265, 105 P.2d 975; Simmons v. Superior Court, 96 Cal.App.2d 119, 132, 214 P.2d 844, 19 A.L.R.2d 288; Gromeeko v. Superior Court, 114 Cal.App.2d 754, 757, 251 P.2d 29. "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all of the circumstances before it being considered." Berry v. Chaplin, 74 Cal.App.

2d 669, 672, 169 P.2d 453, 456. An order of consolidation is not appealable, Code Civ. Proc. § 963, but is reviewable only upon appeal from a subsequent judgment, which remedy would not be adequate under the circumstances above reviewed. I. E. S. Corporation v. Superior Court, 44 Cal.2d 559, 564, 283 P.2d 700; see Phelan v. Superior Court, 35 Cal.2d 363, 370, 217 P.2d 951. We therefore conclude that petitioner is entitled to a writ of mandate ordering respondent to sever its declaratory relief action from the personal injury actions.

[6–8] However, petitioner may not insist that the declaratory relief action be tried first. The entertainment of such action and the granting of declaratory relief are matters within the discretionary power of the court. Code Civ.Proc. § 1061; Hannula v. Hacienda Homes, 34 Cal.2d 442, 448, 211 P.2d 302, 19 A.L.R.2d 1268. It is true that it is provided that such actions "shall be set for trial at the earliest possible date and shall take precedence of all other cases, except older matters of the same character and matters to which special precedence may be given by law." Code Civ.Proc. § 1062a. But said section 1062a does not purport to override the discretionary power given to the trial court to "refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances." Code Civ.Proc., § 1061. The trial court therefore had, and still has, the discretion to determine whether the declaratory relief action should be entertained "at the time under all the circumstances." In the present case, the personal injury actions were at issue and set for trial before the declaratory relief action was at issue. In our view, section 1062a was never intended under such circumstances to compel the trial court to delay the trial of the coercive actions until after the trial of the declaratory relief action merely because the coercive actions might involve the determination of the same or a somewhat similar issue. Any conclusion to the contrary would permit the use of an action for declaratory relief as a device to delay the trial of any such coercive action previously at issue and set for trial. We therefore conclude that the trial court could have properly determined in its discretion, and may still determine following the severance, that the granting of declaratory relief is not "necessary or proper at the time under all the circumstances." There is therefore no basis for the issuance of a writ of mandate commanding the trial court to order the trial of the declaratory relief action prior to the trial of the personal injury actions.

Let a peremptory writ of mandate issue but solely for the purpose of commanding respondent court to sever for trial petitioner's declaratory relief action from the personal injury actions hereinabove discussed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., concur.

CARTER, Justice.

I dissent.

The majority holds that a trial court cannot in the exercise of its discretion consolidate for trial an action by the plaintiff-insurer for declaratory relief to ascertain the rights and liabilities of the insurer and the insured under a policy of public liability insurance on an automobile in which defendant Collins is the insured, with an action by other plaintiffs against Collins for personal injuries suffered by them when riding with Collins in the automobile covered by such policy; that mandamus is the appropriate method for reviewing the consolidation order. It bases that holding on two grounds: (1) That the insurer would be required to take inconsistent positions in that it would argue that the personal injury plaintiffs were passengers for hire and not covered by Collins' policy on the one hand, and, as to the liability of Collins to plaintiffs on the other, that they were mere guests, and wilful misconduct by Collins would have to be shown to establish his liability; (2) that the insurance coverage of Collins would be injected into the personal injury action because of its consolidation with the declaratory relief action contrary to the rule that the existence of insurance should be withheld from the jury. I do not believe that either of these grounds will stand analysis and that in any case mandamus is not the proper remedy.

With respect to the inconsistent positions which it is claimed the consolidation will require the insurer to take, it should be first observed that the majority is itself inconsistent as it arrives at the conclusion of inconsistent positions while at the same time holding that a different test must be applied to determine whether the personal injury plaintiffs were fare-paying passengers and not covered by the policy, and to determine whether plaintiffs were guests, and hence whether negligence or wilful misconduct must be proved.[1] There being a different test, the insurer is not required to take inconsistent positions. Hence there is no merit in that ground for denying consolidation of the actions.

In addition, however, it should be noted that law suits are not games in which the cleverest mover should prevail. The ultimate factor involved is getting at the true facts and that should not depend on some nice consideration for the contentions that may or may not be made by the opposing parties. The insurer's position should be to urge what the evidence fairly shows. The facts being ascertained, the law must be applied thereto. Suppose the actions were not consolidated, would it be proper for the insurer to argue in one action (declaratory relief) that the policy did not cover the accident because the vehicle was for hire, and in the other, that it was not, and thus plaintiffs were guests and must, therefore, prove wilful misconduct on Collins' part? There would not only be the "embarrassment" of taking inconsistent positions, assuming the positions would be incongruous, but there might be a serious question as to whether both could stand on appeal. As said in Southern Pacific Co. v. City of Los Angeles, 5 Cal.2d 545, 548, 55 P.2d 847, 849, speaking of two actions tried separately in which different results were reached on substantially the same evidence: "It would be most anomalous for such decisions to stand, reaching diametrically opposite conclusions as to the legal effect of the same occurrence, where the essential facts are similarly presented, and are in most particulars undisputed. The rule that a reviewing court is bound by the findings of the trial court on conflicting evidence cannot apply to a situation such as this, where two lower courts, dealing with substantially the same evidence, have reached different conclusions of law, on the legal issue of whether from this evidence legal responsibility is imposed by the law upon the defendant. It is within the proper function of this court, upon petition for hearing, to eliminate this confusion, and to determine the legal effect of the evidence in both cases." Thus I see nothing more disadvantageous to the insurer in trying the matters together than in trying them separately. If inconsistent positions must be taken, that is because of the situation presented over which none of the parties had control; it was not created by the order for consolidation for trial. It must be remembered that the same evidence, testimony of witnesses (plaintiffs and Collins), as to the nature of the arrangement between them in connection with their presence in Collins' car would be used in both trials or one if there is consolidation. Both parties will have to rely on the same witnesses, and the inconsistency of positions, if there be such, is no greater for the insurer than for the plaintiffs and Collins. If plaintiffs establish only ordinary negligence they will want to urge that there was a passenger-driver rather than guest-host relationship and thus risk having no coverage under the policy. It is not reasonable to suppose that they want to jeopardize any recovery by excluding the insurer as the one who would ultimately have to pay. Yet they make no objection to the consolidation; in fact, they initiated the move to obtain it. All parties will have to do what is required of them in an endeavor to ascertain the true facts. At least that is a factor which could have been considered by the trial court when it exercised its discretion and consolidated the actions.

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[1] It has been held (as stated by the majority) that the tests as to the coverage of the policy and whether there is a passenger or guest relationship are different. Western M. Co. v. Bankers I. Ins. Co., 10 Cal.2d 488, 75 P.2d 609; Porter v. Employers' Liability Assur. Corp., 40 Cal.App.2d 502, 104 P.2d 1087.

In regard to the existence of insurance coming before the jury, it is clear that the insurer took the calculated risk of having that occur. In its action it named plaintiffs as well as Collins defendants and claimed that a jury trial was not proper. It thus made known that plaintiffs were possible claimants in a personal injury action against Collins in which it would be involved, and no doubt it considered that a judgment after a court trial in its favor would end the matter, or in the event it lost, that it could still litigate the issue of Collins' liability to plaintiffs. This considered course of conduct is tantamount to a waiver on its part of the issue of insurance coming into the case. It should have anticipated that with plaintiffs named as defendants along with Collins in its action, the evidence on the issue of insurance coverage and liability would come from Collins and those plaintiffs seeking damages for personal injuries against him, and that the actions would be consolidated to save the duplication of their testimony in two separate trials. Since the insurer's action is one which may be tried by a jury, as held by the majority, and the personal injury plaintiffs were defendants in that action, the jury necessarily would be informed that insurance was involved, it is not reasonable to hold that the insurer has not forfeited any right to have insurance kept out of the consolidated trial. The insurance issue was just as much likely to affect the jury in one case as in the consolidated cases. Moreover, with all the recent publicity that has been given to insurance in automobile accident cases, stressing the effect on premiums for such insurance, it cannot be said that jurors are ignorant on the subject, nor that the insurers want them to be. The claimed danger of injection of insurance into the case has lost much of the sting assumed to exist formerly. In recent widespread publicity jurors have been told generally not to give large awards of damages and to avoid giving any except in the clearest cases. While it is true that in an ordinary personal injury action, with minor exceptions, the existence of insurance is not material to any issue, it must be assumed that the jurors know that all motorists carry insurance. Where actions such as these are consolidated and insurance is material and relevant, the mention of the insurance issue cannot possibly be considered prejudicial to the insurer.

The foregoing discussion of waiver also stands as an answer to the asserted embarrassment of the insurer in taking inconsistent positions. If the positions are inconsistent the insurer has brought it on itself. It should be remembered that inconsistent positions may be taken by a plaintiff in his complaint or by a defendant in the defenses pleaded in his answer and no one is considered to be prejudicially embarrassed thereby. 21 Cal.Jur. 134–136; 9 So.Cal.L.Rev. 388.

Mandamus should not be granted in this case. There was no palpable abuse of discretion by the trial court. The majority opinion fails to give consideration to all of the factors considered by the trial court when it exercised its admitted discretion and ordered consolidation.

It should first be noted that the basis of the majority finding of abuse of discretion is wholly speculative and conjectural. It is supposed that the evidence will be such that the insurer will have to argue for different results—one as to the insurance policy coverage and the other as to the relation between Collins and the riders in his car. We do not know whether that is true or not because we do not know what the evidence will be; it may be that it will not call for any inconsistent construction. As to the issue of insurance we should not suppose that the jury will not be instructed to ignore the insurance element in considering the liability of Collins to plaintiffs in the personal injury action and that such instructions will be followed. The majority opinion assumes without so stating that there will be no such instructions or at least that the jury will not follow them. None of these things will be known with clarity and certainty until after the consolidated cases are tried. Only then will this court be in a position to ascertain whether there has been a miscarriage of justice. Therefore mandamus is not the proper remedy at this time. The matter may be fairly determined only on appeal from the judgment where the record will disclose what occurred at the trial, and there may not be any claim of error insofar as the question of consolidation is concerned, assuming the insurer and Collins lose in the trial court. If they win, the course, the question is moot.

The witnesses, including Collins, who would be conversant with the arrangement between Collins and plantiffs are non-residents and hence the difficulty and expense of having their testimony available at two separate trials, if the cases are not consolidated, is patent; yet the majority gives no consideration to that factor in determining whether the trial court abused its discretion.

All of the foregoing matters point unerringly to a proper exercise by the trial court of its discretion. It had to balance those factors in arriving at a decision to consolidate the cases. The majority does not show that the trial court did not weigh the pertinent problems or that its sense of where the merits fell was wanting in reasonableness or propriety.

It is obvious that this case will become the basis for numerous attempts of litigants to control the discretion of trial courts in similar cases and thus interrupt the orderly disposition of business by our greatly overworked trial courts.

I would deny the petition for the writ.

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146 Cal.App.2d 481

Patricia U. RIGGS, Plaintiff and Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, Defendant and Respondent.
Civ. 17094.

District Court of Appeal, First District, Division 1, California.
Dec. 3, 1956.
Rehearing Denied Jan. 2, 1957.
Hearing Denied Jan. 30, 1957.

Action for injuries sustained by passenger when attempting to board a bus. From an adverse judgment in the Superior Court, City & County of San Francisco, Eustace Cullinan, J., the plaintiff appealed. The District Court of Appeal, Bray, J., held that an erroneous instruction was not prejudicial to the plaintiff.

Judgment affirmed.

1. Negligence ⚿4

Public carriers owe to intending passengers and to the public generally a duty to exercise ordinary care to keep from injuring them.

2. Negligence ⚿139(1)

Instruction that if jury found that plaintiff was not a passenger at the time she suffered her alleged fall defendant did not owe any duty to plaintiff, was erroneous.

3. Carriers ⚿320(2)

Where plaintiff testified that her right foot was on the bottom step of a bus and she was placing her left foot on the second step when the door was closed breaking her grip and throwing her backwards, under plaintiff's testimony she was actually on the bus as a matter of law and was a passenger.

4. Appeal and Error ⚿1064(1)

In action for injuries sustained by passenger boarding a bus, where jury returned verdict for defendant, erroneous instruction that plaintiff was not a passenger and that defendant did not owe a duty to the plaintiff, was not prejudicial where case was submitted to jury on the sole theory of carrier-passenger and plaintiff's sole right to recover depended upon a jury finding that relationship was that of carrier and passenger.

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Theodore M. Monell, John H. Smissaert, San Francisco, for appellant.

Dion R. Holm, City Atty. of the City and County of San Francisco, William E. Mullins, Deputy City Atty., San Francisco, for respondent.

BRAY, Justice.

Plaintiff's appeal from an adverse judgment upon a jury verdict raises the sole question of whether the giving of a certain erroneous instruction was prejudicial.

The Instruction.

> "If you find that the plaintiff was not a passenger at the time that she suffered her alleged fall, then the defendant did not owe any duty to the plaintiff, and hence your verdict must be for the defendant, City and County of San Francisco."

[1, 2] Obviously, the instruction was erroneous. (Defendant does not contend otherwise.) Public carriers owe to intending passengers and to the public generally a duty to exercise ordinary care to keep from injuring them. Connor v. Pacific Greyhound Lines, 1951, 104 Cal.App.2d 746, 232 P.2d 500; Reilly v. California Street Cable R. R. Co., 1946, 76 Cal.App.2d 620, 173 P.2d 872; Sipperly v. San Diego Yellow Cabs, 1949, hearing denied by Supreme Court, 89 Cal.App.2d 645, 201 P.2d 543.

Was the Error Prejudicial?

To determine this question it is first necessary to consider the evidence. Plaintiff testified that she intended to board defendant's trolley bus at the bus stop. Arriving there she observed several people awaiting the bus. It stopped about two feet from the curb and was crowded. Some of the passengers alighted from the front of the bus. Plaintiff was the last of the group getting on. She started to enter the right side of the bus door, which had opened inwardly. She had grasped the door handle with her right hand. Her left hand was holding her purse and bus fare. Her right foot was on the bottom step and she was placing her left foot on the second step when she heard the operator ask if everybody was on. She hollered "No." The door then shut, breaking her grip, throwing her backwards so that she fell on the small of her back, striking the curb and injuring her.

One Mower testified that he was also waiting for that bus. It was so crowded that he was undecided whether to get on or not. Two or three persons attempted to get on, the rest staying on the sidewalk. He paid little attention to the other persons so would not remember whether or not he saw plaintiff before the accident. He decided to get on and could get only as far as the first step on the bus. He got on the right hand side of the door. The operator then warned that he was going to close the doors. Mower had to squeeze up onto the next step to clear the door. He could not see the operator. About simultaneously with the closing of the door he heard a scream. Looking around he saw plaintiff lying on the sidewalk and he assisted her to a bench. When asked whether any one got on behind him, he said, "No, I couldn't say. That I know, nobody got on behind me."

Harvey, the bus operator, testified that at the stop the bus was so crowded he could not see if any one got off nor could he see the door. He inquired if the door was clear and some one said it was. He then closed the door. Before he started the bus some passenger called out not to start it, that there was a woman on the sidewalk who needed assistance. He got off the bus and summoned an ambulance. (While the bus was stopped he saw plaintiff for a fraction of a second crossing the street in front of the bus. Plaintiff testified that she did not arrive at the bus stop from that direction.)

[3] The court fully instructed on the duty of defendant towards plaintiff as

a passenger. Under plaintiff's testimony, as she was actually on the bus she, as a matter of law, was a passenger. See Riley v. Davis, 57 Cal.App. 477, 207 P. 699. Harvey's testimony in nowise contradicted her on this subject. While Mower's testimony would indicate that plaintiff had not yet gotten on the bus, as he was occupying the area she claimed to have occupied, yet his testimony did not exclude the possibility that she had entered the bus before the door closed, thereby making her a passenger. From his testimony, when taken with that of the witness Payne, which we will next discuss, it could be concluded that plaintiff at the time the door was closed had not yet acquired the status of a passenger. Thus, there was evidence from which the jury could have determined plaintiff's status as either a passenger or not.

Payne testified that he succeeded in getting on the bus and stood facing the doorway. The bus was "pretty well packed." He saw the operator stand up, get out of his seat a little bit, look at the doors and say "'Look out, I am going to close the doors.'" He heard no reply to that remark. The doors were closed. Looking out a window he saw a woman "sort of make a little dash, or whatever you want to call it, toward the door, to sort of get on the bus, and 'boom-bo,' she smacked into the doors of the bus and bounced back * * *" The woman ran three or four steps before hitting the doors.

[4] Plaintiff's complaint is broad enough to support either the theory that she was a passenger and hence defendant owed her the duty of utmost care, or the theory that she had not yet become a passenger but defendant owed her the duty of ordinary care. A reading of the transcript demonstrates that plaintiff tried the case on the passenger theory alone. Defendant injected the nonpassenger theory through its witnesses Mower and Payne, and the offering of the erroneous instruction. However, it is clear that in spite of the giving of the erroneous instruction the case was submitted to the jury on the sole theory of carrier-passenger. This is demonstrated by the fact that plaintiff offered no instruction on the nonpassenger theory, but did submit instructions on the passenger theory, and by the giving of the following instruction *to which plaintiff does not object;* "If you find that the plaintiff fell before boarding the bus, or any part thereof, then in this case you are instructed that the carrier-passenger relationship did not exist and your verdict must be in favor of the defendant, City and County of San Francisco."

Thus the court in the erroneous and in the last mentioned instruction was, in effect, instructing the jury that there was no issue concerning plaintiff's status as a nonpassenger and that, as a matter of law, there was no evidence of any negligence on the part of defendant as to plaintiff as a nonpassenger. We agree with the trial court in this respect. Under the facts of this case and the manner in which it was tried, plaintiff's sole right to recovery depended upon a finding by the jury that the relationship was that of carrier and passenger. Any other relationship would not have supported a verdict in her favor. Under the circumstances the giving of the erroneous instruction could not have been prejudicial.

Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

146 Cal.App.2d 605

Ara PENNINGTON, Paulette Pennington, Alice Pennington, Ronald Pennington, and David Pennington, Minors, by Ara Pennington, their guardian ad litem; and Irene Pennington, a Minor, by Virginia Pennington, her Guardian ad litem, Plaintiffs and Appellants,

v.

SOUTHERN PACIFIC COMPANY, a corporation, J. R. Johnston, Lester J. Weese, First Doe, Second Doe, Schuckl & Co., Inc., a corporation, Third Doe, Fourth Doe and Fifth Doe, individually and as co-partners transacting business under the firm name and style of Black & White Company, Red & Black Company, a corporation, Sixth Doe and Seventh Doe, Defendants and Respondents.

No. 16675.

District Court of Appeal, First District, Division 2, California.
Dec. 5, 1956.

Action against railroad, and a canning company located next to a crossing, and others, by widow and her minor children for wrongful death of decedent who was killed when the truck he was operating was struck at the crossing by railroad's train. The Superior Court, Santa Clara County, Byrl R. Salsman, J., entered judgment in favor of defendants and plaintiffs appealed. The District Court of Appeal, Kaufman, J., held that failure of court to grant plaintiffs' requested instructions on fact that statutes, and orders of the Public Utilities Commission, dealing with crossing protection, were minimum requirements not in all cases discharging railroad's duty of exercising reasonable care in all matters concerned with crossing protection, was prejudicial error.

Judgment reversed in part and affirmed in part.

1. Railroads ⚷307(3), 350(5)

Statutory regulations concerning railroad-crossing signals and warnings constitute only the minimum measure of care required by a railroad and it is usually a matter for the jury to determine whether something more than the minimum was required under the evidence in the case.

2. Appeal and Error ⚷1067
Railroads ⚷351(1)

In action against railroad by widow and her minor children for wrongful death of decedent who was killed when truck he was operating was struck at a crossing by railroad's train, failure of court to grant plaintiffs' requested instructions on fact that statutes, and orders of the Public Utilities Commission, dealing with crossing protection, were minimum requirements not in all cases discharging railroad's duty of exercising reasonable care in all matters concerned with crossing protection, was prejudicial error.

3. Railroads ⚷328(2)

At an obstructed railroad crossing there is no absolute duty on the part of an approaching motorist to stop, but such duty exists only in cases where a reasonably prudent person in the exercise of ordinary care would have considered a stop to be necessary.

4. Appeal and Error ⚷1064(1)

In action against railroad by widow and her minor children for wrongful death of decedent who was killed when the truck he was operating was struck at a crossing by railroad's train, instruction pertaining to decedent's duty to stop, look, listen and alight, combined with an instruction pertaining to the lesser degree of caution necessary in looking and listening for an approaching train at a guarded crossing, was not so misleading as to be prejudicial.

5. Negligence ⚷65

The standard of care required by a person with impaired faculties is that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances.

6. Appeal and Error ⚷1064(1)
Railroads ⚷351(14)

In action against railroad by widow and her minor children for wrongful death of decedent who was killed when the truck he was operating was struck at a crossing by railroad's train, instruction stating that decedent, in view of lack of sight in one eye was required to make an extraordinary use of other senses to compensate for his handicap, without making any reference to the existing circumstances, was prejudicially erroneous.

7. Trial ⚷252(8)

In action against railroad by widow and her minor children for wrongful death of decedent who was killed when the truck he was operating was struck at a crossing by railroad's train, instruction on statute concerned with adequacy of brakes to bring a motor vehicle to a stop within certain distances, and instruction on stopping distances, was erroneously given in view of lack of evidence as to condition of the brakes on the truck decedent was operating. West's Ann.Vehicle Code, § 670.05.

8. Trial ⚷296(8)

In action against railroad by widow and her minor children for wrongful death of decedent who was killed when the truck he was operating was struck at a crossing by railroad's train, instruction concerning testimony of one witness, worthy of belief, being sufficient for proof of any fact, and justifying a verdict in accordance with such testimony even if a number of witnesses had testified to the contrary, was not prejudicial in view of a preceding instruction which told the jury that the final test was not in the relative number of witnesses, but in the relative convincing force of the evidence. West's Ann.Code Civ. Proc., § 1844.

9. Trial ⚷260(8)

In action against railroad by widow and her minor children for wrongful death of decedent who was killed when the truck he was operating was struck at a crossing by railroad's train, refusal of plaintiffs' requested instruction on effect of negative evidence was not prejudicial in view of fact that under other instructions jury must have understood that testimony of a witness in position to hear, that he heard no whistle, was equivalent to evidence that no whistle was blown.

10. Negligence ⚷35

Where an obstruction to the view of a railroad crossing by a canning factory located next to the crossing was caused by the reasonable use of canning company's property, and truck driver who was killed when struck by a train at such crossing was familiar with the obstruction, there was no violation on part of canning company of any duty owed to such truck driver.

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Edward J. Niland, Boccardo, Blum, Lull & Niland, San Jose, for appellants.

Rankin, Oneal, Luckhardt, Center & Hall, San Jose, Michael di Leonardo, San Jose, of counsel, for respondents Southern Pac. Co. and J. R. Johnston.

Bronson, Bronson & McKinnon, San Francisco, for respondent Schuckl & Co.

KAUFMAN, Justice.

Plaintiffs appeal from a judgment in favor of defendants in a wrongful death action. Plaintiffs are the widow and five minor children of Santford Pennington, who was killed on August 25, 1952, when the truck which he was operating was struck by respondent Southern Pacific Company's train at the Fair Oaks Avenue railroad crossing in Sunnyvale. The railroad company and two of its employees were charged in the complaint with negligence in the management and operation of the train, and the company was charged with maintaining its crossing in a dangerous and defective condition in that the crossing protection was inadequate, the crossing was obstructed, and that the physical character of the crossing rendered it hazardous and unsafe. The other respondent, herein, Schuckl & Company, which operated a canning company near the Fair Oaks Avenue crossing was charged with having negligently caused this crossing to be dangerous and unsafe by piling boxes and installing certain appurtenances and structures, and by causing great noise in the vicinity of the crossing.

All defendants denied negligence and alleged contributory negligence on the part of plaintiff's decedent. Lester J. Weese, a defendant, the fireman on respondent's train, filed a cross-complaint for his injuries received in the crash, against respondent Schuckl & Company and against Disposal Service, Inc., the employer of decedent Pennington. He alleged that the cannery had so negligently operated its property as to obstruct the crossing rendering its physical character dangerous, defective and unsafe, and also charged negligence in the operation of the truck of decedent's employer.

The jury returned a verdict against plaintiffs and in favor of defendants Southern Pacific Company and Schuckl & Company, and a verdict in favor of cross-complainant Weese against Disposal Service, Inc. and Schuckl and Company. The action against the individual defendants, J. R. Johnston and Lester Weese, the engineer and fireman, were dismissed by plaintiffs.

The accident occurred at about 8:20 p.m., daylight saving time, when Santford Pennington, an employee of Disposal Service, Inc., was hauling a load of waste material from Schuckl & Company's plant. Fair Oaks Avenue is a paved street running north and south. The railroad tracks run east and west, and there are six parallel sets of tracks at this crossing. The tracks were numbered from south to north on the map used at trial. Track 4 is the main line track, east-bound, while track 5 is the main line west-bound track. Tracks 1 and 2 are spur tracks; 3 and 6 are drill tracks. The main line tracks run straight for a distance of 548 feet east of the crossing, then curve to the north. Schuckl and Company operates its cannery adjacent to the railroad tracks just south of the crossing. The main building is on the west side of Fair Oaks Avenue, and on the east side is a shed and box yard. An overhead conveyor extends above and across the street about fifteen feet south of track number 1.

The crossing is protected by Griswold type crossing signals erected at the northwest and southeast corners. These signals consist of two illuminated cross-arms, an illuminated stop sign the size of an ordinary boulevard stop sign, a bell, and two red lights eight inches in diameter. When activated the stop sign swings down to face traffic, the bell rings, and the red lights flash alternately. These signals were set to operate automatically whenever a westbound train reached a point 3,000 feet east of the San Jose side of the crossing, and operate continuously until the train had passed to the San Francisco side of the crossing. The two crossing signals are separately wired and operate independently. Power is supplied from the P. G. & E. power lines, and in case of power failure from storage batteries. If all current failed, a weight would be released causing the stop sign to swing into place, but respondent's engineer was not certain whether or not the lights and bell would function in the last situation. There was testimony that respondent railroad had checked the signals on the morning of August 25, 1952, the day of the accident, and that they were then functioning properly. Three hours after the accident they were checked and found to be in proper working order. They were checked at a point near the crossing, and not at the point 3,000 feet distant, where they would be first activated by a train. However, there was testimony that another train coming from the north which passed later on the evening of the accident, activated the signals.

Respondent's fireman Weese and engineer Johnston, as well as a train passenger Lambert, and James, a truckdriver, all positively testified that the crossing signals were working just before the accident. A truck driver, Williams, testified that he had stopped his truck on the north or opposite side of the crossing and was walking toward the cannery restaurant when he heard the bells start to ring and heard the train whistle. Both crossing signals were operating. He saw Pennington's truck approaching under the conveyor. It proceeded onto the tracks at about eight miles per hour. He saw it collide with the train. It had stopped at no time while he was watching it. He first saw the train about 500 feet distant. He heard only two whistles from the train, and then for the first time observed the truck approaching.

The truck driver James, who was loading boxes at Schuckl and Company, saw Pennington's truck drive diagonally across the road and start toward the crossing going very slowly. At about that time the south crossing signal began to operate. After the signal began working and he saw the truck approaching, he heard the train whistle, and saw the train at the corner of the pile of boxes. He heard the crash of the collision. He had not continued to watch the truck from the time he had observed it near the crossing. He had heard the crossing bell before the sound of the train whistle. All of these observations occurred within a few seconds, possibly 30, he said.

The fireman Weese stated that he was riding on the left hand side of the cab as the train rounded the curve between two and three hundred yards east of the crossing, at a speed of between sixty and sixty-five miles per hour. It was dark. The train in accordance with company rules sounded its whistle one mile from the crossing, then again at about one thousand feet from the crossing. He saw the truck at track number two when the engine rounded the curve onto the straight track. There were boxes piled up just south of the right of way to the east of the crossing. Every time he had been on this run, he had seen the boxes piled up in that area to the height shown in a photographic exhibit. The boxes obstructed his view of the crossing, hence he was able to see only the cab of the truck at first. He could tell, however, that the crossing signal was blinking when the engine was 300 feet away, although the boxes obstructed his view of the signal itself. Weese yelled to the engineer when he saw the truck. The emergency brakes were applied at about 175 feet from the crossing, but since it takes two or three seconds for them to take hold, there could have been not more than a slight reduction in momentum before the truck was hit. Weese suffered a loss of memory for a day or two after the accident, but his memory later returned and he could recall details preceding the accident.

The engineer testified that his train, consisting of an older type engine with stationary headlight, baggage cars and three coaches, was traveling at sixty-five miles per hour, that he did not see the truck at any time prior to the collision. He was 175 feet from the crossing when the firemen yelled the warning and he applied the brakes. He stated that the whistle blast for this crossing is not a mile away, but about 1,400 feet east of the crossing, that the company rules require the blowing of the whistle at this point, and that he did so; that he blew one series of whistles, not two, and that the whistle was still blowing when the collision took place. The train bell had been in automatic operation ever since the train had left Santa Clara. There was no time to give the series of short whistle blasts required by company rules when persons or motor vehicles are on the tracks.

Three former employees of Schuckl and Company were called by appellants under Section 2055, Code of Civil Procedure. Lopez who was outside the building, saw Pennington's truck when it was about 50 feet from the crossing, moving at about ten miles per hour. It came to a full stop, he said, underneath the overhead conveyor, where it remained for a few seconds. The crossing signal on the south side was not then operating. He heard no bell, saw no flashing lights. He did not see the truck start up again, but heard the collision. He heard no train whistle, although previously he had heard train whistles even when working inside the building.

Roy Lingerfelt testified that he was engaged in taking boxes off the conveyor when he paused to light a cigarette. He saw Pennington's truck drive up and stop by the south side signal. He saw the driver turn his head toward the right. The truck stopped for a couple of seconds, and started up in low gear. The crossing signal was not then in operation. He did not continue to watch the truck but a few seconds later saw the train 75 feet from the crossing. Although he had heard train whistles on prior occasions, he heard none prior to the accident, nor did he hear the train bell.

Gerald Wilson, a lift truck operator, was working about 50 feet south of the crossing. He saw Pennington's truck come to a full stop under the conveyor. The crossing signal was not then operating. He did not see the truck start up again, but heard the crash. Between the time he saw the truck and heard the crash, he heard no train whistle, although on other occasions when in this area he had heard whistles of approaching trains.

Lingerfelt and Wilson had given statements to a railroad company investigator shortly after the accident. They were in the investigator's handwriting but were signed by the above witnesses. Although they denied having read the statements before signing them, there was expert handwriting testimony to the effect that the answer "yes" to the question "Have you read the above three-page statement and is it true to the best of your knowledge and belief?" was in the witness' handwriting. Many of the statements in the investigator's report contradicted the testimony given by these witnesses at the trial. Police officer Jones also testified that Wilson on the evening of the accident told him that the signals had been working, that he heard the train approaching, and saw Pennington drive onto the track and get hit.

Jack Rissner, testifying on behalf of Schuckl and Company, said that he did not hear the train approaching, but heard the impact. He did not hear the train whistle. Although a statement signed by him declared that he had said that the crossing signals were in operation after the accident, he explained that he was then referring to the fact that they operated when a later train passed from the west that night.

The train passenger Lambert stated that he observed the crossing signals working as the train approached the crossing, that he could see the signal when 700 feet from the crossing. During the last quarter mile he heard the whistle blowing and the bell ringing.

There was testimony that for some time prior to the accident boxes were piled to a considerable height on the Schuckl property adjoining the railroad right of way. They were piled to a height of 14 feet at the time of the accident. An official of Schuckl testified that employees were ordered not to pile the boxes near the crossing signals, but he had made no objection to piling them two pallets high (or 14 feet) near the spur track.

Mrs. Pennington testified that decedent's right eye had been injured at one time, and his sight damaged in that eye. His application for a chauffeur's license stated "Right eye blind 1½ years." She said that he could see light and motion with the right eye, but not objects. The vision in his left eye was perfectly normal. The license issued in April, 1952, was unrestricted.

Appellants contend that reversible error was committed by the trial court in refusing to instruct that the railroad company's compliance with statutory regulations constituted only the minimum of care required, and did not necessarily relieve it of an obligation to take additional precautions.

The court instructed that the Public Utilities Code requires a bell of a certain type or a steam whistle to be sounded at a distance of 1,320 feet from a railroad crossing, and to be kept sounding until the train has passed the crossing, and that "the railroad may, if it so desires, go beyond the terms of the statute, and cause both the bell be rung and the whistle to be blown." The jury was also instructed that the Public Utilities Commission has the exclusive power to determine and prescribe the protection to be installed at each crossing by a railroad, and that there was no evidence that said Commission had prescribed any warning device for the Fair Oaks Avenue crossing other than the Griswold signals which were installed at said crossing at the time of the accident; that the evidence was uncontradicted that said Commission had ordered the installation of these signals. Other instructions told the jury that the absence of a flagman or guard, or the failure in operation of a mechanical warning device does not absolve a person going upon the track area from the duty of exercising ordinary care in looking and listening for the approach of a train; that the maintenance of such flagman or signaling device is, however, an invitation to rely upon its efficient operation, and if one gives attention to such device, he is not required to use the same amount of caution as if no such warning device were provided. They were told further that it was the railroad's duty to exercise reasonable care in keeping such device in good repair, but that to charge a railroad with negligence, the company must have had actual notice of the defective condition, or if it did not have such notice, such lack of notice must be due to its failure to exercise reasonable care.

Appellants herein offered several instructions in regard to a railway's compliance with statutory requirements, all of which were refused.

An instruction was given at plaintiff's request stating that whether or not a given rate of speed in the absence of a statute or otherwise, is or is not negligence, depends upon the circumstances and the place where the train is being operated, and that it was an issue for the jury whether or not the speed of the train in this case constituted negligence as a matter of fact. Respondent railway company contends that this and other instructions given sufficiently apprised the jury of the duties of the company and the standards of care applicable thereto, and that appellant cannot complain of the failure to give specific instructions if the subject matter is adequately covered by other instructions, citing Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, 245 P.2d 583.

[1, 2] We cannot agree that the instruction on speed referred to above, nor any of the other instructions reviewed by respondent, gave any indication to the jury that the standards imposed by statute are minimum standards only. It is well settled that such statutory regulations constitute only the minimum measure of care required by the railroad, and it is usually a matter for the jury to determine whether something more than the minimum was required under the evidence in the case. Peri v. Los Angeles Junction R. Co., 22 Cal.2d 111, 137 P.2d 441; Bush v. Southern Pacific Co., 106 Cal.App. 101, 106, 289 P. 190; Lloyd v. Southern Pacific Co., 111 Cal.App.2d 626, 638, 245 P.2d 583; Jensen v. Southern Pacific Co., 129 Cal.App.2d 67, 72, 276 P.2d 703. The fact that the jury was told that the railroad might use either the bell or whistle under the Public Utilities Code requirements, but need not do both, but might go beyond the terms of the statute if it wished, would give the impression that the railroad had fully performed its duty to warn in this manner if it followed the Code, and that anything beyond this was a matter of choice but not of duty. Just prior to this they had been told that the Public Utilities Commission had the exclusive right to determine crossing protection, and that respondent railway had installed the type of protection ordered. In Lloyd v. Southern Pacific Co., supra [111 Cal.App.2d 626, 245 P.2d 590] the appellant railway complained of the giving of an instruction which advised the jury that the fact that the railroad was not required by law to provide safety devices in addition to those which it had provided, did not relieve the railroad of its obligations to exercise reasonable care for the safety of travelers, "and if an ordinarily prudent person, in the exercise of ordinary care, would have supplied additional warning and safety devices over those that were present at the time, then in those circumstances Southern Pacific Company would

be required to furnish such warning and safety devices." It would see that an instruction should have been given in this case pointing out that the statutory requirements and the orders of the Public Utilities Commission were minimum requirements, for under the instructions given the jury could well have concluded that full compliance with such standards discharged the duty of reasonable care in all matters concerned with signals and crossing protection. Being informed that the Public Utilities Commission had exclusive power to determine what crossing protection was necessary, the jury would not realize that they could decide that something in addition to the prescribed protection might be required to meet the standard of reasonable care under the circumstances existing at this crossing. There was evidence from which it might be inferred that the obstructed view of the tracks from this crossing was a condition existing for such length of time that the railroad had notice thereof, or in the exercise of reasonable care should have had such notice. The jury could have considered whether the statutory signals required to be first sounded at 1,320 feet from such a crossing were sufficient in view of speeds scheduled at 65 miles per hour or approximately 95 feet per second, giving approximately 14 seconds warning, in an industrial area where slow moving trucks are making constant use of the crossing. It appears that at least one of appellants' instructions on this subject should have been given and that the denial thereof was prejudicial error.

Appellant charges that error was committed in instructing in terms of a rigid duty on the part of decedent to stop, look, listen and alight. The instructions given were B.A.J.I. 203–A and 203–B and 203–C reading as follows:

"If the view of the tracks is obstructed, then greater caution is required in approaching them.

"If the obstruction is such that one cannot obtain, without stopping, a reasonably assuring view of the tracks in both directions before entering the dangerous track area, then ordinarily it is his duty to stop, look in both directions, and listen for the approach of train, engine, or car, and if necessary, to alight from his vehicle, go forward a few steps and take advantage of the view thus afforded.

"Neither the absence of a flagman, guard or other person who might have been stationed at a railroad crossing to give warning of approaching trains, nor a failure of duty on the part of any such person, nor a failure in operation of a mechanical device placed at a crossing to signal warning, absolves a person going upon a track area, such as that involved in this case, from the duty to exercise ordinary care for his own protection, and to that end, looking and listening for the approach of a train."

Respondents maintain that when the foregoing instructions are considered together with the instruction given immediately thereafter, the second paragraph of B.A.J.I. No. 203–C, it is clear that no absolute standard of conduct was made applicable to decedent. That instruction is as follows:

"However, the maintenance by a railroad company of a flagman, warning bell, or other signaling device, at a railroad crossing is an invitation to a traveler approaching the crossing, to rely upon the efficient operation of the warning system. One who exercises ordinary care in giving attention to such a warning system, and who relies upon the operation of the same, is not required to use the same amount of caution in looking and listening for an approaching train as is required when no method of warning is provided, or when one does not exercise ordinary care in making use of the protective system that is provided."

[3] There can be no question but that the "guarded crossing" cases are in a class by themselves, and that the "stop, look and listen" rule which the older cases applied to the unguarded crossing was early held not to be necessarily the standard of care

required at the guarded crossing. See, Koch v. Southern California R. Co., 148 Cal. 677, 84 P. 176, 4 L.R.A.,N.S., 521; Gregg v. Western Pac. R. Co., 193 Cal. 212, 223 P. 553; Ogburn v. Atchison, T. & S. F. Ry. Co., 110 Cal.App. 587, 294 P. 491. It has been held that the quantum of care is somewhat less at the guarded crossing than at the unguarded, and the amount of care is that of the man of ordinary prudence under the circumstances. Peri v. Los Angeles Junction Ry. Co., 22 Cal.2d 111, 120, 137 P. 2d 441; Toschi v. Christian, 24 Cal.2d 354, 360, 149 P.2d 848. Furthermore, it now appears to be the rule that at an obstructed crossing there is no absolute duty to stop, but such duty exists only in cases where a reasonably prudent man in the exercise of ordinary care would have considered a stop to be necessary. Green v. Key System Transit Lines, 116 Cal.App.2d 512, 253 P.2d 780, an unguarded obstructed crossing case in which a hearing was denied by the Supreme Court to appellant railway company, assumed that the stricter rule of the earlier cases had been so modified. The question must therefore be left to the jury as to whether a stop would be necessary under the circumstances.

In view of the fact that the instruction on the guarded crossing followed the first two quoted instructions, and since this was without question a guarded crossing, we do not think the jury was misled as to the standard to be applied. If deceased acted in reliance upon the automatic crossing signals, then the standard of the guarded crossing was to be applied. If the driver instead of relying for protection upon the automatic signals, relied instead wholly upon his own precautions, then the standards outlined in the first two instructions would be applicable. See, Ogburn v. Atchison, T. & S. F. Ry. Co., 110 Cal.App. 587, 595, 294 P. 491. The jury was not instructed in terms of an absolute duty to stop, look, listen and alight, but were told that this standard was applicable only in cases where it was not possible to otherwise obtain an assuring view of the tracks.

[4] Appellants themselves offered an instruction which made reference to the "stop, look, listen and alight" rule, but introduced it with a statement that "It is not necessary in every case * * * that one about to cross a railroad track should stop, look and listen." It went on to point out that whether one stopped, looked and listened might have a bearing on the question of whether or not due care was exercised. This was undoubtedly a better phrased instruction in view of the later cases, but we think the instruction given, in the light of the instructions as a whole, did not mislead the jury.

There was undisputed evidence that Santford Pennington suffered from impaired vision in the right eye, although he had been issued an unrestricted chauffeur's license since the impairment. The trial court gave the following instruction of which appellants complain:

"If you find from the evidence that at the time and place of the accident in question the operator of the truck, Santford Pennington, was handicapped by the loss of sight in one eye, then in consequence, he was obligated to make such extraordinary use of his unimpaired senses as would reasonably compensate for his handicap to normal vision.

"Failure to make such extraordinary use of his unimpaired senses would constitute negligence upon the part of Santford Pennington."

[5, 6] In 65 C.J.S., Negligence, § 142, p. 783, it is said that the fact that a person has defective vision *may* make it incumbent on him to make greater use of his other senses to prevent injury, than if he were in full possession of the faculty of sight. Ordinary care, however, is all that is required of him. A case cited in support of this rule is Jones v. Bayley, 49 Cal.App.2d 647, 654, 122 P.2d 293, 297, where it was said that a handicapped person *may* be required to make a more alert use of other faculties to reach the standard of ordinary care. The correct rule stated in that case

is that a person with impaired faculties is bound to "use that care which a person of ordinary prudence with faculties so impaired would use in the same circumstances." The instruction herein flatly stated that Pennington was obligated, without making any reference to the existing circumstances, to make an extraordinary use of his other senses to compensate for his handicap. Under the circumstances of this case, an ordinary use of the sense of hearing together with normal vision in one eye might well have been sufficient use of his faculties to meet the standard of ordinary care in detecting the railroad's signals. The fireman, who no doubt had the use of two eyes, recovered against Schuckl & Co. because his view of the truck on the crossing was obstructed by the boxes on that defendant's property. A person with two eyes in Pennington's position with his view of the tracks obstructed, would not be required to make an extraordinary use of his sense of hearing and yet Pennington is thus penalized by this instruction. Whatever extra effort Pennington might be required to make under the circumstances here existing would be whatever effort would bring him to the standard of ordinary care and not necessarily to the standard of compensating for normal vision. His conduct "must be reasonable in the light of his knowledge of his infirmity." (Prosser on Torts, 2nd Ed. p. 126.)

[7] The trial court instructed on Section 670(a) of the Vehicle Code[1] concerned with the adequacy of brakes to bring a vehicle to a stop within certain distances. He then instructed that the stopping distance for a speed 10 miles per hour was 9.3 feet and for 15 miles per hour, 22.8 feet, concluding as follows: "There are other provisions in that section of the Code, but they are not relevant to the testimony in the case." There was no evidence that Pennington attempted to apply the brakes from the time he had started from the vicinity of the conveyor, proceeding at a speed estimated variously at between 58 and less than 20 miles per hour. There is no evidence in the record as to the condition of the brakes. The instruction was erroneously given. Ketchum v. Pattee, 37 Cal.App.2d 122, 129, 98 P.2d 1051. Instructions may mislead the jury when they find no support in the evidence. Rodenberger v. Frederickson, 111 Cal.App.2d 139, 142, 244 P.2d 107. It has been held that the above instruction is error, but not reversible error if it has not misled the jury to the prejudice of appellant. Nelson v. Porterville U. H. School Dist., 117 Cal.App.2d 96, 254 P.2d 945; Trelut v. Kazarian, 110 Cal.App.2d 506, 243 P.2d 104. In the present case, however, it can hardly be said, that the jury would be inclined to dismiss the instruction as inapplicable when they had been told by the trial court that the portion of the Code section which he had read was relevant to the testimony in the case and he singled out speeds within the range of decedent's estimated speed.

[8] Appellants complain of the giving of an instruction concerning the testimony of one witness worthy of belief being sufficient for the proof of any fact and justifying a verdict in accordance with such testimony, even if a number of witnesses have testified to the contrary "if from the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you should believe that there is a balance of probability pointing to the accuracy and honesty of one witness." This instruction, B.A.J.I. No. 25, is based on Code of Civil Procedure, § 1844. However, the language "and would justify a verdict in accordance with such testimony" has been criticized as faulty but held not to be prejudicial. Long v. Standard Oil Co., 92 Cal.App.2d 455, 207 P.2d 837, 841; People v. Kirkes, 39 Cal. 2d 719, 249 P.2d 1; Rideau v. Los Angeles Transit Lines, 124 Cal.App.2d 466, 470, 268 P.2d 772; Barton v. Messmore, 122 Cal.App.2d 813, 816, 265 P.2d 949, 38 A.L.R.2d 138. We do not think that the in-

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[1] Now West's Ann.Vehicle Code, § 670.05.

struction was prejudicial in view of the preceding instruction which told the jury that the final test was not in the relative number of witnesses, "but in the relative convincing force of the evidence."

[9] We do not believe that prejudicial error was committed in refusing appellant's instruction on the effect of negative evidence, although it might well have been given in a case where appellant's case against one defendant was based to a large extent upon the charge that certain signals were not given. Respondents say that the form of the instruction was erroneous because it singled out only the fireman and engineer as giving positive testimony. While the instruction refers first to the positive testimony of these two crew members as to the ringing of the bell or blowing of the whistle, the instruction then states that the negative testimony may be weighed "against the positive testimony of the train crew members and *others*." (Emphasis ours.) But under all the instructions given the jury must have understood that testimony of a witness in a position to hear, that he heard no whistle, was equivalent to evidence that no whistle was blown.

In view of the above prejudicial errors committed in instructing the jury, the judgment in favor of respendent Southern Pacific Company must be reversed.

[10] However, as to the respondent Schuckl, the evidence shows without contradiction, that while the piles of boxes obstructed the view of the tracks, they did not interfere with the railroad's crossing signals. Any structure necessary in the carrying on of the canning company's business would to some extent obstruct the view of the tracks. As respondent points out, their building on the other side of Fair Oaks Avenue also obstructs the view of the tracks. Section 371 of the Restatement of Torts states the rule as follows: "A possessor of land is subject to liability for bodily harm to others outside the land caused by an activity carried on by him thereon which he realizes or should realize as involving an unreasonable risk of bodily harm to them under the same conditions as though the activity were carried on at a neutral place." Comment (b) points out that the public interest in a possessor's free use of his land may be a factor in determining whether the risk is reasonable or unreasonable. The illustration is given of a high wall being built by the possessor of land at the intersection of two heavily traveled streets. The possessor is said not to be liable for an accident caused by the fact that the wall prevents motorists from seeing other motorists approaching the intersection along the other road. Since the evidence shows that obstruction was caused by a reasonable use of respondent's property with which the deceased was familiar, for at the time of the accident he was engaged in hauling waste material from respondents' plant, there was no violation on the part of Schuckl & Company of any duty owed to decedent. The judgment must therefore be affirmed as to respondent Schuckl & Company.

Judgment reversed as to respondent Southern Pacific Co.

Judgment affirmed as to respondent Schuckl & Company.

DRAPER, J. pro tem., concurs.

DOOLING, Acting Presiding Justice.

I concur in the judgment. I cannot concur in the approval, even tacit, of that portion of the stop, look and listen instruction which requires the plaintiff "if necessary, to alight from his vehicle, go forward a few steps and take advantage of the view thus afforded." Despite the fact that Mr. Justice Holmes by his dictum in Baltimore & O. R. Co. v. Goodman, 275 U.S. 66, 48 S.Ct. 24, 72 L.Ed. 167, gave an impetus to this doctrine which apparently carried our supreme court with it in Koster v. Southern Pac. Co., 207 Cal. 753, 762, 279 P. 788, I had thought that the repudiation of this dictum of Holmes in 1934 by a unanimous court in Pokora v. Wabash Ry. Co., 292 U.S. 98, 54 S.Ct. 580, 78 L.

Ed. 1149, had turned the tide in this state against what is a patently unrealistic and frequently ridiculous requirement. The same view of the later California decisions was taken by the United States Circuit Court in Southern Pac. Co. v. Souza, 9 Cir., 179 F.2d 691, 693; and in Green v. Key System Transit Lines, 116 Cal.App.2d 512, 516, 253 P.2d 780, 783 the other division of this court characterized the rule of the Goodman case as "the rather unrealistic doctrine of 'stop, look and listen' * * * evolved by Mr. Justice Holmes," stating that since the announcement of that doctrine "the law as to the duty of a vehicle driver * * * has undergone considerable change." Many of the later California cases are collected in the Souza and Green cases and I consider it unnecessary to do more than refer to those citations.

The absurdity of the rigid rule requiring the driver to get out of his vehicle in every case where he cannot otherwise get a clear view of the tracks was so clearly stated by Mr. Justice Cardozo in the Pokora case, 292 U.S. at pages 104–105, 54 S.Ct. at pages 582, 583 that I content myself with a quotation:

"Standards of prudent conduct are declared at times by courts, but they are taken over from the facts of life. To get out of a vehicle and reconnoitre is an uncommon precaution, as everyday experience informs us. Besides being uncommon, it is very likely to be futile, and sometimes even dangerous. If the driver leaves his vehicle when he nears a cut or curve, he will learn nothing by getting out about the perils that lurk beyond. By the time he regains his seat and sets his car in motion the hidden train may be upon him. [Citing cases.] Often the added safeguard will be dubious though the track happens to be straight, as it seems that this one was, at all events as far as the station, about five blocks to the north. A train traveling at a speed of thirty miles an hour will cover a quarter of a mile in the space of thirty seconds. It may thus emerge out of obscurity as the driver turns his back to regain the waiting car, and may then descend upon him suddenly when his car is on the track. Instead of helping himself by getting out, he might do better to press forward with all his faculties alert. So a train at a neighboring station, apparently at rest and harmless, may be transformed in a few seconds into an instrument of destruction."

The further criticism found in the note in 56 A.L.R. at page 654 is equally cogent:

"In most situations, however, the driver of a car, unaccompanied, considering the advisability of leaving his car and going to a point from which he can get an obstructed view of the track, is as likely, in the exercise of reasonable care, to decide against that course as in favor of it, for the reason that from his point of view there is as great a possibility, if he does adopt that course, that he may be struck by a train which comes in sight after he turns his back to return to his car, as there is that, if he does not adopt that course, he may be struck by a train which he would have seen if he had left his car and gone to the track. Save in exceptional situations above referred to, it would seem that the logical application of the doctrine would require the driver, as soon as he returns to his car, to go back again to the track, or to the point from which he could get an unobstructed view, and repeat the process indefinitely until assured that there would be no other trains."

I am convinced that the time is long overdue for the California courts to repudiate in express terms this ridiculous refinement of the so-called stop, look and listen rule.

146 Cal.App.2d 417

Hazel E. STOLK, Plaintiff and Appellant,

v.

Donald K. LUCAS and E. Elizabeth Lucas, his wife, Defendants and Respondents.

Donald K. LUCAS and E. Elizabeth Lucas, his wife, Cross-Complainants and Respondents,

v.

Hazel E. STOLK, Cross-Defendant and Appellant,

Neil Stolk, Seaboard Finance Company, a Delaware Corporation, Fireside Finance Company, a Corporation, and Chapin Furniture Co., a Corporation, Cross-Defendants.

No. 17006.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1956.

Action to establish title to real and personal property wherein respondents cross complained. From an adverse judgment in the Superior Court, County of San Mateo, A. R. Cotton, J., the plaintiff and cross defendant appealed. The District Court of Appeal, Agee, J. pro tem., held evidence was not sufficiently clear and convincing to establish that deed to the realty was in fact a mortgage, and that where chattel mortgage on furniture allowed a private sale but required notice thereof by registered mail to mortgagor and such notice was not given, there was no valid sale.

Judgment affirmed in part and reversed in part.

1. Appeal and Error ⟹169

Contention not made an issue at trial could not be raised on appeal.

2. Mortgages ⟹38(1)

Evidence was not sufficiently clear and convincing to establish that a deed to realty executed to a detective in payment for services was given as security and was hence a mortgage.

3. Mortgages ⟹38(2)

Evidence must be clear and convincing to justify holding that a deed which purports to convey land absolutely is in fact a mortgage.

4. Chattel Mortgages ⟹162

Where mortgagee had a right to take possession of furniture on the terms of his chattel mortgages when the payments thereunder became delinquent, the fact that it had allowed the furniture to remain on the premises instead of taking it away did not affect such right.

5. Chattel Mortgages ⟹129, 260

Where chattel mortgage was given on furniture to secure payment of price, title to furniture remained in mortgagor until there was a sale under power of sale provision contained in mortgage and where it allowed a private sale but provided for notice thereof by registered mail to mortgagors not less than five days before sale and such notice was not given, there was not a valid sale and assignees of note and chattel mortgage were entitled to possession of furniture until mortgage was satisfied or the furniture sold under proper proceedings.

Edmund J. Holl, San Francisco, for appellant.

Jack C. Small, Redwood City, for respondents.

AGEE, Justice pro tem.

This is an appeal by plaintiff and cross-defendant from a judgment decreeing that she owns one-half and defendants and cross-complainants, husband and wife, own the other half of a house and lot as tenants in common and that defendants and cross-complainants own certain household furnishings in which plaintiff and cross-defendant has no interest. The judgment ordered that the house be sold and the proceeds divided. The judgment also provided that cross-defendant Neil Stolk has no interest in any of the property involved. He has not appealed.

The main issue on this appeal is the sufficiency of the evidence to support the findings. Appellant and Neil Stolk purchased the house and lot in 1946 and began living therein. They were married in June, 1949. In March, 1951, Stolk hired respondent Lucas, who is a private detective, to keep appellant under surveillance. On May 7, 1951, appellant and Stolk separated and she left the premises. On May 8, 1951, the following events took place: Stolk commenced a divorce action in San Mateo County; he leased the premises to respondents for one year and they and their children moved in; Stolk and respondent Lucas made an oral agreement that Lucas would continue his surveillance of appellant through the month of July, 1951, and that his total charge for his services and expenses connected therewith would be $2,500; Stolk thereupon executed his promissory note payable to Lucas in the amount of $2,500; Stolk then left for Reno to accept employment there. The reason for the continued surveillance after the divorce action was filed was that Stolk desired to obtain additional proof that appellant was unfit to have custody of their minor child. (It should be noted that Lucas fully performed the services agreed upon and kept a detailed record thereof, which he produced in court. It fully supports the reasonableness of his charge.)

On May 17, 1951, Stolk asked respondent Lucas if he wanted to buy Stolk's interest in the house. Lucas answered that he did. It was thereupon agreed that Stolk would execute a quitclaim deed of such interest and Lucas would cancel the note. At that time, Lucas had performed services worth approximately $800. The note was cancelled and the deed was executed and delivered to Lucas on that same day. The house was subject to a bank loan on which there was then a balance due of approximately $6,300. The value of the real property does not appear in the record.

On May 14, 1952, appellant, as cross-complainant, obtained an uncontested divorce in the action commenced by Stolk in San Mateo County. In the decree she was awarded all of the real property involved in the instant action and all of the furniture and furnishings therein. Respondents were not made parties in the divorce action. Appellant then commenced this action against respondents on July 24, 1952, to quiet title to the said real and personal property. Respondents cross-complained for a decree declaring them to be the owners of one-half of the real property and all of the personal property.

[1] Appellant contends on this appeal that respondent Lucas was in a fiduciary relationship with Stolk and overreached his client in obtaining the deed. This was not made an issue at the trial. Appellant did not even attempt to prove the value of the interest acquired by Lucas under his deed from Stolk. There is no evidence to support appellant's contention and Lucas' account of the transaction completely answers the claim of overreaching.

[2] Another point raised for the first time is that the deed was not intended to be absolute but was given as security for the payment of Lucas' services and was therefore a mortgage. The evidence is to the contrary. Stolk, who was called by appellant as a witness, testified as follows: "Mr. Lucas came to Reno with his real estate broker and wanted to buy the house. I said that would be fine." Lucas testified:

> "Q. At the time this deed was signed, did you have a conversation with Mr. Stolk pertaining to his liability on the $2,500 note? A. Yes, I did.
>
> "Q. What was said pertaining to his liability on the note? A. I cancelled the note at that time. * * *
>
> "Q. What was your purpose and intention, Mr. Lucas, in cancelling the note and the taking of the deed? A. Mr. Stolk asked me if I wanted to buy his equity in the house and I told him yes.
>
> "Q. You knew at the time there was a divorce action pending? A. Mr. Stolk told me it wasn't community property, they weren't married when they bought the house. * * *
>
> "Q. Mr. Lucas, counsel asked you if you paid any cash at the time the deed

was executed, and I believe your testimony was that you did pay $10 in cash? A. Yes.

"Q. And I am going to ask you if at the time this deed was executed, did you at that time release Mr. Stolk from the obligation of this $2,500 promissory note? A. Yes, I did. * * *

"Q. You gave to Mr. Stolk, at the time he executed this deed, not only the $10, but you gave him the release from the obligation of this $2,500 note, is that correct? A. That is right."

[3] It is well settled that the evidence must be clear and convincing to justify holding that a deed which purports to convey land absolutely is in fact a mortgage. Sheehan v. Sullivan, 126 Cal. 189, 58 P. 543; Chapman v. Hicks, 41 Cal.App. 158, 182 P. 336; Couts v. Winston, 153 Cal. 686, 96 P. 357; Beeler v. American Trust Co., 24 Cal.2d 1, 147 P.2d 583; Stromerson v. Averill, 22 Cal.2d 808, 141 P.2d 732. Here, the testimony is clear and convincing that the deed was intended by both grantor and grantee to be an absolute conveyance and was not given as security.

The theory advanced by appellant in her complaint was that respondents and Stolk entered into a conspiracy to deprive her of her interest in the real and personal property involved. There is no evidence to support such a claim and appellant does not even mention it in her briefs on appeal.

[4] The personal property involved consists of certain household furniture which was purchased by the Stolks when they were living together and which was on the premises when respondents moved in. It was subject to a chattel mortgage executed by the Stolks on May 20, 1950, to Seaboard Finance Company. Payments became due on the mortgage. On August 2, 1951, Stolk executed a written authorization to respondent Lucas, authorizing the latter to turn over the furniture to Seaboard. Respondent Lucas had Seaboard phone appellant on several occasions about the overdue payments. In September, 1951, Seaboard sent out a truck to repossess the furniture. The furniture was not actually moved away from the premises because respondent Lucas asked to bid on it. Seaboard agreed to sell the furniture to Lucas for $680, which was the balance due on its mortgage. On September 14, 1951, Lucas obtained a loan of $623.80 from Fireside Finance Company, secured by a chattel mortgage on the furniture.[1] Seaboard received $600 from this loan and $80 from Lucas directly. Seaboard thereupon executed a written assignment of its note and chattel mortgage to Lucas. There is no question that Seaboard had a right to take possession of the furniture under the terms of its mortgage when the payments thereunder became delinquent. The mere fact that it allowed the furniture to remain on the premises instead of taking it away in the truck is of no legal significance. Seaboard's right of possession was transferred to Lucas under the assignment.

[5] However, title to the furniture remained in the mortgagors (Stolks) until there was a sale under the power of sale provision contained in the mortgage. This provision allowed a private sale but expressly provided for notice thereof by registered mail to the mortgagors not less than five days before the sale. Such notice was admittedly not given. There was therefore no valid sale. Dohrman v. Durston, 90 Cal.App.2d 236, 239, 202 P.2d 607. Respondents, as assignees of the note and mortgage, are entitled to possession of the furniture until the mortgage is satisfied or the furniture sold under proper proceedings.

That portion of the judgment decreeing that appellant owns one-half and respondents own the other one-half of the real property as tenants in common and ordering the sale thereof and division of the proceeds is affirmed; that portion of the judgment relating to the personal property is reversed and any further action with regard thereto is to be taken in accordance with this decision.

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[1] We do not purport to pass upon any rights of Fireside Finance Company, it not having appeared in the action.

In the interests of justice, respondents shall recover their costs on appeal.

PETERS, P. J., and FRED B. WOOD, J., concur.

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146 Cal.App.2d 624

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Joseph MONTALBANO, Defendant and Appellant.

No. 3192.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1956.

Defendant was convicted of burglary of first degree and, by reason of two prior convictions of burglary, was adjudged an habitual criminal. The Superior Court, County of Alameda, Charles Wade Snook, J., entered judgment, and defendant appealed from judgment and from order denying motion for new trial. The District Court of Appeal, Dooling, Acting P. J., held that where fact that building was inhabited was developed on trial by defendant's counsel, and fact was not contradicted by other evidence, instruction that jury must find defendant guilty, if at all, of first degree burglary, was proper, under statute making burglary of inhabited dwelling or building at night burglary of first degree.

Judgment and order affirmed.

1. Criminal Law ⇐795(3)

Where a crime is divided into degrees, trial court may properly instruct jury that if they find defendant guilty they must find him guilty of higher degree, in any case where under uncontradicted evidence he is guilty of higher degree if guilty at all.

2. Burglary ⇐46(1)

Where fact that building was inhabited was developed on trial by defendant's counsel, and fact was not contradicted by other evidence, instruction that jury must find defendant guilty, if at all, of first degree burglary, was proper, under statute making burglary of inhabited dwelling or building at night burglary of first degree. West's Ann.Pen.Code, §§ 460, 644(a).

Donald R. Church (appointed), Oakland, for appellant.

Edmund G. Brown, Atty. Gen. of the State of Cal., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., J. Frank Coakley, Dist. Atty. of Alameda County, Edward Merrill, Deputy Dist. Atty., Oakland, for respondent.

DOOLING, Acting Presiding Justice.

Defendant was convicted of burglary of the first degree and, by reason of two prior convictions of burglary, was adjudged an habitual criminal. He appeals from the judgment of conviction and from an order denying his motion for new trial.

Appellant raises no question of the sufficiency of the evidence to support his conviction of burglary. He complains only: (1) that the court erred in instructing the jury that if they should find appellant guilty of burglary such burglary could only be burglary of the first degree and (2) that the court erred in adjudging appellant to be an habitual criminal since such adjudication depended on his conviction of first degree burglary. Pen.Code, § 644(a).

[1] It is well settled that where a crime is divided into degrees the trial court may properly instruct the jury that if they find the defendant guilty they must find him guilty of the higher degree in any case where under the uncontradicted evidence he is guilty of the higher degree if guilty at all. The Supreme Court thus

expressed the rule in a homicide case, People v. Alcalde, 24 Cal.2d 177, 188, 148 P.2d 627, 632:

"It is proper to refuse to give an instruction as to a lesser degree, or as to an included lesser offense, if the evidence warrants only a verdict of first degree murder in the event the accused is guilty at all."

The same rule has been applied in cases of burglary. People v. Kruger, 100 Cal. 523, 35 P. 88; People v. Tolli, 93 Cal.App. 62, 268 P. 1078; People v. O'Brien, 53 Cal.App. 754, 200 P. 766; People v. Howard, 39 Cal.App. 216, 178 P. 865. Indeed appellant does not dispute this rule, his only contention being that on the evidence presented it was not established without contradiction that the building burglarized was inhabited so as to bring the case within Penal Code, § 460, which makes the burglary of "an inhabited dwelling house trailer coach as defined by the Vehicle Code, or building committed in the nighttime" burglary of the first degree.

The burglary was admittedly committed in the night-time, somewhere between midnight and 1 a. m. The record makes it clear that the claim that the building was not inhabited is an afterthought, since appellant's counsel at the trial (not the attorney now representing him, who is acting under appointment by this court) himself developed the fact on cross-examination of a witness for the prosecution, as the following excerpt from the transcript shows:

"Q. Well, Officer, isn't it a fact that there was a lady living in this particular house? A. Yes sir."

It is futile for appellant's present counsel to argue that this was a conclusion of the witness, since the answer was elicited by appellant's own counsel. Nor did appellant on the trial make any attempt to dispute the fact that the building was inhabited. Rather he confirmed the fact by the following testimony given by himself: "He brought us back to this house, and at that time the lady had been aroused from her bed, I imagine, and she stuck her head out of the window and she confronted, she saw both Gonsior and I with the three arresting Officers, and she pointed to Stanley Gonsior." (Gonsior was associated with appellant in the burglary.)

[2] Since the record shows that the fact that the building was inhabited was developed on the trial by appellant's counsel and there was no contradiction of the evidence to that effect the instruction complained of was proper, and the jury having properly found appellant guilty of burglary of the first degree he was also properly adjudicated an habitual criminal under Penal Code, § 644(a).

Judgment and order affirmed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

PEOPLE of the State of California,
Plaintiff and Appellant,
v.
ONE 1953 FORD VICTORIA, Motor B3PV
102617, Texas License EY 8613,
Defendant,

Dean and Company, Claimant and
Respondent.*
No. 16916.

District Court of Appeal, First District,
Division 1, California.
Nov. 30, 1956.

Hearing Granted Jan. 23, 1957.

Proceeding by the state for forfeiture of an automobile used in transportation of narcotics. The Superior Court, Monterey County, Stanley Lawson, J., entered judgment of forfeiture recognizing a lien of chattel mortgagee of the automobile and the state appealed. The District Court of Appeal, Agee, J. pro tem., held that where chattel mortgagee entrusted possession of an automobile to mortgagor in Texas, under a chattel mortgage which provided that mortgagor would not move the automobile from a county in Texas, mortgagee accepted the risk that the automobile would be used contrary to law, and therefore mortgagee was not entitled to have its lien recognized in a proceeding for forfeiture of the automobile after it was driven beyond the boundaries of Texas and used with the knowledge of the mortgagor for unlawful transportation of marihuana.

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* Opinion vacated 311 P.2d 480.

Judgment reversed.

1. Forfeitures ⚿**1**

The purpose of the forfeiture law is to keep automobiles out of the possession of those who might use them for the transportation of narcotics and is one method devised to aid in the prevention of nefarious narcotics traffic and to protect the state's citizens therefrom. West's Ann. Health & Safety Code, § 11612 et seq.

2. Courts ⚿**511**

Generally no state will give effect to the laws of another state on the principle of comity when the effect would be injurious to the state or its citizens, it belonging exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without, at the same time, neglecting the duty that it owes to its own citizens or subjects.

3. Courts ⚿**511**

Poisons ⚿**9**

The public policy of California is to enforce penal provisions of the narcotics law according to the statutes enacted by the California Legislature for that purpose, and such public policy is paramount to any principle of comity which would permit the civil law of Texas to have the extraterritorial effect of defeating the California penal law providing for forfeiture of an automobile used in unlawful transportation of narcotics. West's Ann.Health & Safety Code, § 11612 et seq.

4. Forfeitures ⚿**5**

Where chattel mortgagee entrusted possession of an automobile to mortgagor in Texas, under a chattel mortgage which provided that mortgagor would not move the automobile from a county in Texas, mortgagee accepted the risk that the automobile would be used contrary to law and therefore mortgagee was not entitled to have its lien recognized in a proceeding for forfeiture of the automobile after it was driven beyond the boundaries of Texas and used with the knowledge of the mortgagor for unlawful transportation of marihuana. West's Ann.Health & Safety Code, § 11612 et seq.

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Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for appellant.

Severson, Davis & Larson, James B. Werson, San Francisco, for respondent.

AGEE, Justice pro tem.

This is an appeal by the People, in a proceeding for forfeiture of an automobile used in transportation of narcotics, from that portion of the judgment which recognizes the lien thereon of respondent, Dean and Company.

On June 10, 1953, in San Antonio, Texas, one Willie Smith bought the automobile in question from Sam Henry Motors, a car dealer, and executed a note and chattel mortgage on the automobile to said dealer to secure the balance of the purchase price. The note and mortgage were assigned on the same day to respondent.

Respondent is a Texas corporation engaged in automobile financing in the state of Texas and maintains its office in the city of San Antonio. Texas did not at the time in question have an automobile forfeiture law and neither the dealer nor the finance company made any character investigation of Smith.

The mortgage provided that the mortgagor would not remove the automobile from Bexar County, in which San Antonio is located, without the written consent of the mortgagee. Contrary to this provision, Smith removed the automobile to California without the knowledge or consent of respondent. On September 23, 1954, in Monterey County, California, the automobile was used to unlawfully transport marihuana, with knowledge of such use by Smith. It was seized on said date pursuant to section 11611 of the Health and Safety Code. Smith thereafter assigned his interest as the registered owner to his attorneys.

This action was commenced on March 1, 1955, under the provisions of sections 11612 et seq., of the Health and Safety Code. Smith did not appear after proper notice and his default was entered. The attorneys filed an answer in propria persona. Judgment went against them and they have not appealed. Respondent filed an answer, setting up its mortgage. The judgment provided that the automobile be forfeited to the State of California subject to a lien of $722.84 thereon in favor of respondent, payable in accordance with section 11625 of the Health and Safety Code. The sole point on this appeal is whether it was error to recognize such lien.

Section 11610 of the Health and Safety Code provides: "A vehicle used to unlawfully transport or facilitate the unlawful transportation of any narcotic, or in which any narcotic is unlawfully kept, deposited or concealed or in which any narcotic is unlawfully possessed by an occupant thereof, shall be forfeited. * * *"

An exception is made in favor of a lien claimant who complies with the provisions of section 11620 of the Health and Safety Code, which, at the time in question, provided as follows: "The claimant of any right, title or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

It is admitted that no such investigation of Smith was made. Respondent's position is that the California forfeiture statute does not apply to or affect a lien created in a sister state which does not have any such forfeiture statute or require any investigation of the purchaser.

Respondent relies upon Mercantile Acceptance Co. v. Frank, 203 Cal. 483, 265 P. 190, 57 A.L.R. 696. In that case an automobile, subject to a valid Minnesota mortgage, was removed from that state to California, contrary to the terms of the mortgage. It was then sold in California to bona fide purchasers. The mortgagee sued in California to enforce the mortgage. The mortgage was not accompanied by the good faith affidavit then required by section 2957 of our Civil Code. Neither was it recorded in this state prior to the sale to the bona fide purchasers. Under the then California statutory law, the mortgage was void as against such purchasers. However, the Supreme Court held that, under the doctrine of comity, the validity and enforceability of the mortgage was governed by the law of Minnesota and upheld the mortgage as against the subsequent purchasers.

The Mercantile Acceptance case, supra, involved only the contract rights of private parties and the result reached did not contravene the public policy of this state. The significance of this is discussed at length by the Supreme Court in its decision, 203 Cal. at pages 488 to 491, 265 P. at pages 192 to 193, inclusive.

[1, 2] In the instant case, we are faced with the problem of whether, under the doctrine of comity, an exception should be made in the enforcement of a penal statute of this state. The narcotics problem in California has required the enactment of drastic legislation. The clear purpose of the forfeiture law is to keep automobiles out of the possession of those who might use them for the transportation of narcotics. It is one method devised to aid in the prevention of the nefarious narcotics

traffic and to protect its citizens therefrom. In such a situation the rule to be followed is well stated in 15 C.J.S., Conflict of Laws, § 4, at page 856: "It is well settled as a general principle that no state will give effect to the laws of another on the principle of comity when the effect would be injurious to the state or its citizens, it belonging exclusively to each sovereignty to determine for itself whether it can enforce a foreign law without, at the same time, neglecting the duty that it owes to its own citizens or subjects."

[3] We conclude that the public policy of this state is to enforce the penal provisions of the narcotics law according to the statutes enacted by our legislature for that purpose and that such public policy is paramount to any principle of comity which would permit the civil law of Texas to have the extraterritorial effect of defeating this penal law of California.

[4] Respondent also contends that when Smith removed the automobile from Texas, contrary to the provisions of the mortgage, he was guilty of larceny and that the decision in People v. One 1937 Plymouth 6, etc., 37 Cal.App.2d 65, 98 P.2d 750, applies and prevents a forfeiture. This is the so-called "stolen car" rule. The cited case holds that an owner is protected against a narcotics forfeiture if the automobile is taken from him without his knowledge and consent. This is sound law, and is necessary to preserve the constitutionality of the forfeiture statute under due process. But the exception has never been extended beyond the *initial taking* from the owner. People v. One 1951 Ford Sedan, 122 Cal.App.2d 680, 265 P.2d 176; People v. One 1949 Cadillac, 126 Cal.App.2d 410, 272 P.2d 873; People v. One 1941 Ford 8 Stake Truck, 26 Cal.2d 503, 159 P.2d 641. The case last cited limits the "stolen car" situation as follows, commencing 26 Cal.2d at page 506, 159 P.2d at page 642: "It is true that the Health and Safety Code does not expressly exempt from confiscation an automobile taken in the first instance without the owner's consent and used to transport narcotics but it has been construed as not authorizing forfeiture under such circumstances. The reasoning, leading to this conclusion is that a contrary determination would amount to an unconstitutional deprivation of property without due process of law (People v. One 1937 Plymouth 6, supra) [37 Cal.App.2d 65, 98 P.2d 750], and where a statute is susceptible of two interpretations, one of which would satisfy constitutional guarantees, if possible the courts will uphold the legislation. Bodinson Mfg. Co. v. California Emp. Comm., 17 Cal.2d 321, 326–337, 109 P.2d 935.

"But there are no constitutional impediments to a forfeiture where the owner entrusts his vehicle to another who uses it illegally, even though the owner does not know of or acquiesce in such use. The distinction between such a situation and the plight of an automobile owner who failed to give possession of his car or consent to its operation is based upon the means by which the one found transporting the contraband obtained the vehicle. *An owner who entrusts the possession of his vehicle to another thereby accepts the risk that it will be used contrary to law,* but, in the operation of an automobile without the owner's consent to do so in any manner or at all, there is no element of choice or volition and a complete lack of permission, express or implied, on the part of the owner." (Emphasis added.) In the case just quoted from, an employee drove his employer's truck far beyond the point where he was allowed to go. He obtained some narcotics and on his return was arrested and the truck seized. A judgment of forfeiture of the truck was affirmed. In the instant case, Smith likewise drove the automobile beyond the boundaries of Texas, in violation of the terms of the mortgage. The innocent lienholder in such a situation is in no better position than an innocent owner.

The lien should not have been recognized and the judgment is therefore reversed.

PETERS, P. J., and BRAY, J., concur.

146 Cal.App.2d 410

Louis E. WEXLER, David D. Wexler and Wexler & Wexler, Plaintiffs, Cross-Defendants and Appellants,

v.

Joseph GOLDSTEIN, Defendant, Cross-Complainant and Respondent.

No. 16992.

District Court of Appeal, First District, Division 1, California.

Nov. 30, 1956.

Action to recover for legal services rendered to defendant by plaintiffs. The Superior Court, San Mateo County, Edmund Scott, J., granted a new trial after finding for plaintiffs, and ordered the case remanded to the Municipal Court, and plaintiffs appealed. The District Court of Appeal, Agee, J. pro tem., held that even though transfer to Superior Court had been necessitated by filing of cross-complaint for amount in excess of monetary jurisdiction of Municipal Court, Superior Court was not divested of jurisdiction by dismissal of such cross-complaint at trial but had discretion either to transfer the case back to the Municipal Court or to retain jurisdiction of it.

Reversed.

1. Judgment 🔑273(1)

A nunc pro tunc order is a retroactive entry by court.

2. Judgment 🔑273(7)

A nunc pro tunc order is effective at date which court states it to be effective, rather than date it was made.

3. Judgment 🔑273(1)

A nunc pro tunc order is an exercise of inherent power of court for purpose of doing justice between parties.

4. Appeal and Error 🔑854(6)

A reviewing court is not confined to consideration of ground upon which trial court orders new trial, and will affirm such order if, upon whole record, it appears that new trial should be had and if ground upon which order is sustainable was properly specified in notice of intention to move for new trial.

5. Courts 🔑488(4)

Even though transfer to Superior Court was necessitated by filing of cross-complaint for amount in excess of monetary jurisdiction of Municipal Court, Superior Court is not divested of jurisdiction by dismissal of such cross-complaint "at trial" but has discretion either to transfer the case back to the municipal court or to retain jurisdiction of it; and granting motion to dismiss, for failure to amend after sustention of demurrer, by nunc pro tunc order effective as of first day of trial, constituted determination "at trial", for purposes of applicable statute. West's Ann.Code Civ.Proc. § 396.

See publication Words and Phrases, for other judicial constructions and definitions of "At Trial".

6. Trial 🔑395(1)

Trial court's finding that all of allegations of a pleading are true or untrue is sufficient.

7. Appeal and Error 🔑1073(1)

Where it clearly appeared from findings that trial court was denying recovery under cross-complaint, any error in not including a specific reference to cross-complaint in judgment could not have been prejudicial to defendant.

Louis E. Wexler, David D. Wexler, Wexler & Wexler, Millbrae, for appellants.

Dodd M. McRae, San Francisco, for respondent.

AGEE, Justice pro tem.

This action was originally commenced in the municipal court to recover a money judgment for legal services rendered to defendant by plaintiffs, who are attorneys. Defendant cross-complained for an amount in excess of $3,000. The municipal court thereupon properly transferred the action to the superior court. C.C.P. 396, par. 2. In due course, defendant filed a second amended cross-complaint, containing two counts. The first count sought a money judgment for $220.91. The second count was for punitive damages in the amount of $4,000. Plaintiffs' general demurrer to this second count was sustained, with ten days' leave to amend upon notice. Such notice was given on October 28, 1954. Defendant never took any action to amend his second count. Plaintiffs filed an answer to the first count of the cross-complaint. Defendant, having apparently abandoned his second count, then moved to transfer the action back to the municipal court on the ground that the issues as now framed by the pleadings were within the exclusive jurisdiction of that court. This motion was denied and the action went to trial before the superior court, sitting without a jury, on April 26, 1955. Judgment was rendered on June 16, 1955, in favor of plaintiffs for $1,584.43. Defendant moved for a new trial. On July 29, 1955, while this motion was pending, the court made a nunc pro tunc order, as of April 26, 1955, dismissing the second count of the defendant's cross-complaint for his failure to amend. On August 1, 1955, the court made an order granting a new trial and an order remanding the action to the municipal court. Plaintiffs appeal from both orders.

The trial judge in his order of August 1, 1955, granting the new trial stated the ground upon which the new trial was being granted to be as follows: "The Court is convinced that it was without jurisdiction to try the above-entitled cause, when no action had been taken after an Order had been made, sustaining the Demurrer to the second cause of action. Therefore the Motion for New Trial is granted." The next paragraph of his order recites the request of plaintiffs for an order of dismissal of the second count of the cross-complaint nunc pro tunc as of April 26, 1955, and concludes as follows: "We * * * *have* signed such an order nunc pro tunc." (Emphasis added.) Defendant contends that the trial court must have first granted the new trial on the ground stated and then ordered the nunc pro tunc dismissal. Thus, defendant argues, the error in trying the case when it was not at issue as to the second count of the cross-complaint had not been cured at the moment when the ruling on the motion for a new trial was made. We think defendant is in error for two reasons. First, the order of dismissal is dated July 29, 1955, whereas the order granting a new trial is dated August 1, 1955. Second, the order of August 1, 1955, recites that "We * * * *have* signed such an order [of dismissal] nunc pro tunc."

[1-3] A nunc pro tunc order is a retroactive entry by the court. It is effective at the date which the court states it is to be effective, not at the date it was made. It is an exercise of inherent power of the court for the purpose of doing justice between the parties. Leavitt v. Gibson, 3 Cal.2d 90, 103, 43 P.2d 1091. The order in question was made effective as of April 26, 1955, the date of the trial. The legal effect of such order was to dispose of the issues raised by the second count of the cross-complaint as of that date. Hence, the stated ground upon which the new trial was granted did not then exist.

The propriety of the nunc pro tunc order in the situation involved herein is apparent and, indeed, is not questioned by either side. The case was a simple one between two attorneys and their former client to determine how much was owed by whom. A judgment was rendered after a trial on the merits. Defendant had failed for a period of months to amend his second count and had asked the superior court to transfer the action back to the municipal court on the stated ground "that the issues framed by the pleadings in said matter are without jurisdiction of said Superior Court and exclusively within the jurisdiction of the Municipal Court." In a memorandum decision following the trial the trial court made this statement: "The record shows that the Defendant caused this matter to be transferred from the Municipal Court to Superior Court by the filing of a Cross-complaint which was not urged, even on a trial or on Defendant's brief; and we therefore conclude that the filing of said Cross-complaint was merely a maneuver to bring a

Municipal Court case into the Superior Court and, for that reason, costs will be allowed Plaintiffs." Under the circumstances, the order of July 29, 1955, dismissing said second count as of April 26, 1955, exemplifies the proper exercise of the inherent power of a court to make nunc pro tunc orders for the purpose of doing justice. The order corrected the record so as to reflect the true state of the pleadings at the time of trial and the trial court was in error in basing its order granting a new trial upon the ground stated.

[4] However, an appellate court is not confined to a consideration of the ground upon which the trial court orders a new trial. We will affirm the order if upon the whole record it appears that a new trial should be had and if the ground upon which the order is sustainable was properly specified in the notice of intention to move for a new trial. 4 Cal.Jur.2d, § 539, p. 393; Dynes v. Bekins Van & Storage Co., 175 Cal. 72, 73, 165 P. 12.

[5] One of the specifications of error in the defendant's motion for a new trial is that the trial court was without jurisdiction to hear or determine the case. This requires a consideration of whether the superior court was divested of jurisdiction by the dismissal of the defendant's second count of the cross-complaint.

The second paragraph of section 396 of the Code of Civil Procedure provides as follows: "If an action or proceeding is commenced in or transferred to a court which has jurisdiction of the subject matter thereof as determined by the complaint or petition, and it thereafter appears from the verified pleadings, or at the trial, or hearing, that the determination of the action or proceeding, or of a counterclaim, or of a cross-complaint, will necessarily involve the determination of questions not within the jurisdiction of the court, in which the action or proceeding is pending, the court, whenever such lack of jurisdiction appears, *must* suspend all further proceedings therein and transfer the action or proceeding * * * to a court having jurisdiction thereof * * *." (Emphasis added.)

The plain meaning of this paragraph, standing alone, is that if at any time, up to and *including* the trial, the court in which the action is then pending finds that its decision on the action will necessarily involve a determination of a question not within its jurisdiction, it *must* transfer the action to a court having jurisdiction.

It is this provision that made it mandatory upon the municipal court to transfer the action to the superior court upon the filing of the cross-complaint for more than $3,000. The superior court was of the opinion that it was divested of jurisdiction and likewise *required* to transfer the action back to the municipal court when the cross-complaint was reduced to $220.91. This is apparent from its order of August 1, 1955, in which, after referring to its nunc pro tunc order, it was stated: "Therefore it *now* appears, from the pleadings that the Superior Court has no jurisdiction to try this cause, and pursuant to Section 396, C.C.P., all further proceedings in Superior Court are ordered suspended and on the Court's own Motion, the matter is remanded to the Municipal Court of the Central Judicial District of San Mateo County for further proceedings." (Emphasis added.)

The superior court is not under the same disability as the municipal court. The fifth paragraph of section 396 provides: "Nothing herein shall be construed to *require* the *superior court* to transfer any action or proceeding because the judgment to be rendered, as determined at the trial or hearing, is one which might have been rendered by a municipal or justice court in the same county or city and county." (Emphasis added.) The effect of this paragraph is to qualify the second paragraph of section 396 as to superior courts only. It gives such courts the discretion either to transfer back to the municipal courts or retain jurisdiction where what otherwise would be a lack of jurisdiction is "determined at the trial or hearing." The dicta to the contrary, in Keenan v. Dean, 134 Cal.App.2d 189, at page 192, 285 P.2d 300, at page 302, is hereby disapproved.

The next question is whether the order dismissing the second count of the cross-complaint was a part of the trial within the meaning of said fifth paragraph. Up until the dismissal of the second count, defendant could have filed an amendment thereto and thus kept it alive. The determination which caused it to be no longer a pleading in the case was the nunc pro tunc order of dismissal. The legal situation then became the same as though the plaintiffs had actually moved, at the start of the trial, to have such count dismissed for failure to amend. It would thus follow that the first time it appeared that the judgment to be rendered was within the jurisdiction of the municipal court was when the superior court "determined at the trial" to dismiss the second count. This being so, the superior court had the right to either transfer the cause back to the municipal court or go ahead and complete the trial. The trial was completed and a judgment rendered upon the merits. Thus, the very object of the fifth paragraph of section 396 was achieved.

[6] The only other possible ground suggested by respondent which would support the granting of a new trial is that the trial court failed to make findings upon the issues raised by the cross-complaint and failed to render a judgment upon the cross-complaint.

The finding as to the cross-complaint was as follows: "Except as otherwise hereinabove specifically found, all of the allegations of the Amended Complaint and the Answer to the Second Amended Cross-Complaint are true, and none of the allegations of the Answer and the Second Amended Cross-Complaint are true." This is a sufficient finding. See Petersen v. Murphy, 59 Cal.App.2d 528, 533, 139 P.2d 49, and authorities therein cited. It should also be pointed out that the entire transaction involved in this litigation concerned the collection of money from one certain business concern and the amount of the fees to which plaintiffs were entitled in connection with their legal services rendered in connection therewith. Detailed findings as to the entire transaction were made in response to the issues raised by the amended complaint and the defendant's answer thereto and such detail was not required to be repeated in the findings as to the cross-complaint.

[7] Likewise there is no merit to the contention that a separate reference should have been made in the judgment as to the cross-complaint. It clearly appears from the findings that the trial court was denying a recovery under the cross-complaint and that any error in the judgment for not including a specific reference to the cross-complaint was not prejudicial to defendant. Petersen v. Murphy, supra.

We conclude that there was no proper ground for the granting of a new trial and that the order doing so should be and is hereby reversed. The judgment in favor of plaintiffs being thereby left undisturbed, there remains nothing to remand to the municipal court and the order doing so is likewise reversed.

FRED B. WOOD, J., concur.

PETERS, Presiding Justice (concurring).

I concur.

I agree that under the circumstances here involved the superior court did not lose jurisdiction of the controversy when it dismissed the second count of the cross-complaint, but had discretion, under the fifth paragraph of section 396 of the Code of Civil Procedure, to retain jurisdiction if it so desired. This discretion was exercised in favor of retaining jurisdiction at the time of trial.

In the case of Keenan v. Dean, 134 Cal.App.2d 189, at page 192, 285 P.2d 300, at page 302, which involved an entirely different question, there is a dictum to the effect that under the circumstances here involved the superior court lost jurisdiction of the controversy except to transfer it back to the municipal court. The majority opinion in the instant case disapproves of that dictum. Inasmuch as I wrote the Keenan case for this court, I think it proper to state that upon further consideration of what I said in the Keenan case on this point I am convinced that the dictum is wrong and should be overruled for the reasons and upon the grounds set forth in the majority opinion.

The conclusion of the majority is supported not only by a reasonable and proper interpretation of the pertinent provision of section 396 of the Code of Civil Procedure, but also by a consideration of what would be the effect of a contrary interpretation. Under the section, the plaintiff chooses his court when he files the complaint in the municipal court. When the defendant files a cross-complaint beyond the monetary jurisdiction of that court it is clearly provided that the cause must be transferred to the superior court. This is so whether the cross-complaint does or does not state a cause of action. The determination of that question is left to the superior court. If the superior court decides that the cross-complaint does not state a cause of action, or is sham, or the defendant dismisses his cross-complaint, at least when the judgment so declaring is entered at the time of trial, the superior court is given discretion to transfer the cause back to the municipal court or to retain jurisdiction of it. Any other rule would permit a defendant to file a cross-complaint and thus get the case transferred to the superior court, and then, when he discovered what judge was going to try the case, to dismiss the cross-complaint and get the action retransferred to the municipal court. How long such maneuvering could continue is conjectural. Certainly, the section should not be interpreted so as to permit such shopping around by a litigant for a court satisfactory to him or to require the constant shifting of a case between the two courts at the whim of the litigant. Thus, the interpretation contained in the majority opinion is not only sound but also aids the orderly administration of justice.

146 Cal.App.2d 504

Loren W. ODELL, Grace L. Odell, L. W. Odell, Jr., Eileen Odell Pirkowitsch, and Thomas H. English, Trustee for Caroline Marie Odell, doing business as Odell Construction Co., Plaintiffs and Respondents,

v.

A. Franklin FRUEH, doing business as Alkali Neutralizer Co.; Doe One to Doe Ten, Defendants.

E. R. Frueh (sued as Doe One), Appellant.

Civ. 21749.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1956.

Rehearing Denied Dec. 31, 1956.

Hearing Denied Jan. 30, 1957.

Breach of warranty action by buyers, who were the contractors, against sellers of anti-alkaloid used in construction of school by the "tilt-up" method. The Supreme Court, Los Angeles County, Jerold W. Weil, J., entered judgment for buyers, and one seller appealed. The District Court of Appeal, Moore, P. J., held that evidence was sufficient to establish that the school district, the architects, and buyers did not designate sellers' anti-alkaloid formula for purchase because of its trade-name description.

Judgment affirmed.

1. Sales ⚷261(1)

Where one seller of anti-alkaloid represented to both school district and district's architects that anti-alkaloid could be successfully employed with tilt-up construction method being used for construction of new elementary school and that anti-alkaloid would not harm any of the surfaces, such representation constituted an affirmation of fact by seller relating to the goods sold, and the natural effect thereof was to induce reliance by contractor which purchased the anti-alkaloid because of such representations, and, therefore, the anti-alkaloid was warranted not to hinder the tilt-up construction. West's Ann.Civ.Code, § 1732.

2. Sales 🔑255

Seller of goods other than foodstuffs is bound by his unadvertised warranty only to parties with whom he is contractually obligated.

3. Sales 🔑255

Fact that representation which constituted the warranty of the goods sold were not made immediately to purchasers but to agencies which directed purchasers to buy and use the material was immaterial.

4. Sales 🔑255

Warranty need not be made directly to buyer where seller intends that buyer rely upon the warranty, and a communication by indirection may be just as effective as a direct one.

5. Fraud 🔑21

A fraudulent misrepresentation is no less actionable because made to a third person who is intended to and does relay the information to the person who relies on the misrepresentation.

6. Sales 🔑273(1, 3), 284(4)

Essential requisites of an implied warranty of fitness are that seller be apprised of the intended use of the product and that buyer rely upon the skill and know how of seller in buyer's election of the product, and the warranty is breached if seller's product is not in fact suitable for the use intended by buyer.

7. Sales 🔑273(1)

Where seller of anti-alkaloid had notice that anti-alkaloid was to be applied to floor slabs of concrete upon which successive slabs would be poured and that it was imperative that the succeeding slabs not adhere, and ingredients of the anti-alkaloid were trade secret of seller, who was informed that architects and contractors were unfamiliar with use of the product in such manner and patently relied upon seller's judgment that the product was suitable, an implied warranty of fitness existed. West's Ann.Civ.Code, § 1735(1).

8. Sales 🔑427

Where sellers of anti-alkaloid were liable to buyers for breach of implied warranty of fitness, liability was not predicated upon one seller's delict but upon her contract, and, therefore, question whether one seller was actually possessed of knowledge that the anti-alkaloid would interfere with anti-bonding agents used by buyers was immaterial.

9. Sales 🔑273(5)

If requisites of an implied warranty for a particular purpose are present, fact that article sold is described by its tradename does not prevent the imposition of a warranty obligation. West's Ann.Civ.Code, § 1735(4).

10. Sales 🔑441(2)

In action for breach of warranty by buyers, who were the contractors, against sellers of anti-alkaloid used by buyers on concrete slabs in building of elementary school by the "tilt-up" construction method, evidence was sufficient to establish that school district, architects, and buyers did not designate sellers' anti-alkaloid formula for purchase because of its trade-name description.

11. Evidence 🔑150

Admission of result of controlled experiment from which facts at issue can be inferred is matter largely for trial court's discretion, and a major consideration against admission of such evidence is the excessive number of collateral issues which it may inject into the investigation.

12. Evidence 🔑150

If evidence of a controlled experiment from which facts at issue can be inferred will not lead to a plethora of extraneous issues and if circumstances of the experiment were sufficiently similar to those under consideration so that logical relevancy exists, result of the experiment should be admitted for whatever light it may shed upon the controversy.

13. Evidence 🔑150

In action for breach of warranty by buyers against sellers of anti-alkaloid used by buyers in "tilt-up" construction, evidence was sufficient to establish that conditions of controlled experiment were sufficiently similar to those prevailing at the construction so that trier of fact was able to consider result of the experiment in determining whether the anti-alkaloid had caused adhesion of the concrete slabs and was able to assign to the results of the experiment whatever weight was merited.

14. Evidence ⚷150

In regard to a controlled experiment from which facts at issue are sought to be inferred, bystander may testify to occurrences during the experiment bearing upon its result provided that an understanding of the facts which he witnessed did not require expertise which he did not possess.

15. Evidence ⚷150

In breach of warranty action by buyers against sellers of anti-alkaloid used in "tilt-up" construction of school building, fact that person primarily responsible for conducting controlled experiment to determine whether the anti-alkaloid caused adhesion of the concrete slabs was not personally present to supervise application of bond-breaker to slab treated with the anti-alkaloid would not preclude admission in evidence of results of such experiments in view of fact that this fact was testified to by another witness who was a construction inspector for a school district and well qualified to testify that a bond-breaker, rather than some other material, had been applied to the concrete.

16. Appeal and Error ⚷193(1)

Even though complaint is deficient in some material particular, if no objection has been made to its defect, and if proof is introduced without objection upon the issue not pleaded, insufficiency of the pleading may not be raised for the first time on appeal. West's Ann.Civ.Code, § 1769.

17. Appeal and Error ⚷1170(10)

It would be a perversion of justice to reverse judgment in breach of warranty action solely for purpose of having a finding made that due notice had been given to defendants for failure of their formula, in view of facts that there was no conflict in the evidence on such issue and that one defendant had testified that he had been promptly notified of the breach of warranty. West's Ann.Civ.Code, § 1769; West's Ann.Const. art. 6, § 4½.

Francis C. Jones, Los Angeles, for appellant.

Grant & Popovich, Los Angeles, for respondents. By Irvin Grant and George J. Popovich, Los Angeles.

MOORE, Presiding Justice.

Defendant appeals a judgment imposing liability for breach of warranty.

Appellant E. R. Frueh is the owner of a business conducted under the firm name of Alkali Neutralizer Co. which manufactures, sells and applies an anti-alkaloid known as the "Ashford Formula" or "Ashford Process." A. Franklin Frueh, husband of appellant, is the person actively engaged in the conduct of the business. Respondents are partners doing business under the name of Odell Construction Company.

The Glendale Unified School District was planning to construct a building for an elementary school by means of what is known as "tilt-up" construction. By such method, a slab of concrete is laid as the flooring of the building, an anti-bonding agent is applied, another slab of concrete is laid on top of the floor slab, and successive slabs are constructed in layers. After all the slabs have been poured, the top layers are "tilted up" on their ends to form the walls of the structure, leaving the floor slab upon the foundation. Having learned of the planned building activity, Mr. Frueh contacted the authorities of the school district and suggested that the "Ashford Formula" be specified for application upon the concrete floor of the proposed school in order to prevent the formation of alkali beneath floor covering material and as a cure for new concrete. Although advised that the tilt-up method was planned, Mr. Frueh assured the district's officials that the formula would not be harmful to any of the surfaces with which it might come in contact but that on the contrary the same could be used to advantage with the tilt-up technique.

When the school district informed the firm of architects retained to draw the plans and specifications of the new building that the "Ashford Formula" should be specified, a member of the firm contacted Mr. Frueh for further information. The architects had not had prior experience with the use of the process sold by appellant. When appellant's husband was again advised that the construction was to be accomplished by the tilt-up method, he stated that (1) the Ashford Formula had been successfully used by the company on previous construction projects which involved tilt-up construction; (2) the formula would in no way interfere with the action of the anti-bonding agent to be applied between the successive slabs to prevent their adhesion; (3) the formula should be applied under the strict supervision of appellant's company upon the newly laid concrete just when the concrete should begin to harden. The architects relied upon such information by specifying that the product be used.

On April 21, 1954, respondents executed a contract with the school district and the county for the construction of certain classrooms of the proposed school. A portion of the specifications included in such contract required that the "Ashford Process" as manufactured by the Alkali Neutralizer Company be purchased and applied "in strict accordance with their recommendation."

During the latter part of May or early June 1954, Mr. Frueh visited the construction site. He requested respondents' supervisor to inform him when the concrete was to be poured in order that he might direct the application of his anti-alkaloid. He told the supervisor that the formula had been successfully used on tilt-up jobs before.

On the day when the concrete was poured, Mr. Frueh and others of appellant's employees applied the process to the floors of a portion of the construction designated "Unit A." The formula was not applied to concrete poured for the flooring of "Unit B." An anti-bonding agent was applied between the layers of poured concrete on each unit. When the time came to tilt-up the slabs, those on Unit B lifted easily. However, the layer directly upon the floor slab of Unit A, to which the formula had been applied, adhered and would not tilt. All the slab was damaged in some degree, and a portion was completely destroyed. The trial court found that appellant had expressly and impliedly warranted against such an eventuality.

Finding of Express Warranty

[1] The evidence is conclusive that Mr. Frueh represented to both the school district and the architects that the Ashford Process could be successfully employed with the tilt-up construction method and would not harm any of the surfaces. This representation was an affirmation of fact by the seller relating to the goods sold; the natural effect thereof was to induce reliance by the buyer; the goods were purchased because of such representations; the process thereby was warranted not to hinder tilt-up construction. Civ.Code, § 1732.

[2–5] A seller of goods other than foodstuffs is bound by his unadvertised warranty only to parties with whom he is contractually obligated. Burr v. Sherwin Williams Co., 42 Cal.2d 682, 695, 268 P.2d 1041. Here the plaintiffs who suffered monetarily from reliance upon the representations of appellant's agent were indeed the initial purchasers and in privity of contract with appellant. The fact that the representations constituting the warranty were not made immediately to the purchasers but to the agencies which directed them to buy and use the product is immaterial. There is no rule that the warranty must be made directly to the buyer where the seller intends that he rely upon the warranty. The law has always recognized that communication by indirection may be just as effective as when direct. For example, a fraudulent misrepresentation is no less actionable because made to a third person who is intended to and does relay the information to the person who relies. See Cohen v. Citizens National Trust and Savings Bank, 143 Cal.App.2d 480, 300 P.2d 14. If appellant had induced the school district and architects to *persuade* respondents to purchase the Ashford Process and thereby authorized the district and its architects as agents to warrant the fitness of the product, there would be no question of liability. The situation is not improved from appellant's standpoint because the warranties were communicated to parties with power to *direct* the purchase of the formula by respondents.

A similar factual situation was present in United States Pipe & Foundry Co. v. City of Waco, 130 Tex. 126, 108 S.W.2d 432. However, in that case it was the public agency rather than the purchasing contractor which claimed the benefit of the warranty. The court sustained recovery on the theory that the agency which drew the specifications and the contractor who complied therewith were identical in interest. The instant matter is *a fortiori* since the plaintiffs are the parties actually in privity of contract with the vendor.

Finding of Implied Warranty

[6] "Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies upon the seller's skill or judgment * * * there is an implied warranty that the goods shall be reasonably fit for such purpose." Civ.Code, § 1735, subd. 1. The essential requisites of this "implied warranty of fitness" are that the seller be apprised of the intended use of the product and that the buyer rely upon the skill and know-how of the seller in his selection of the product. Schied v. Bodinson Manufacturing Co., 79 Cal.App.2d 134, 141, 179 P.2d 380; Drabkin v. Bigelow, 59 Cal.App.2d 68, 70, 138 P.2d 750; Starr Piano Co. v. Martin, 119 Cal.App. 642, 648–649, 7 P.2d 383; United States Credit Bureau, Inc., v. Powell, 121 Cal.App.2d Supp. 870, 873–874, 264 P.2d 229. The warranty is breached if the seller's product is not in fact suitable for the use intended by the purchaser. Tremeroli v. Austin Trailer Equipment Co., 102 Cal.App.2d 464, 475, 227 P.2d 923.

[7] Here appellant was on notice that the formula was to be applied to floor slabs of concrete upon which successive slabs would be poured; that it was imperative that the slabs not adhere. Neither respondents nor the architects who drew the specifications were familiar with the use of appellant's formula, particularly as used in conjunction with tilt-up construction. The ingredients of the formula were a trade secret of appellant, and therefore the latter would be the only person involved likely to be possessed of the knowledge that the formula would interfere with the action of anti-bonding agents. The architects and respondents repeatedly informed appellant's husband that they were unfamiliar with the use of the product on tilt-up jobs and patently relied upon his judgment that the product was suitable. The elements of implied warranty were all satisfactorily proved.

[8] Appellant introduced evidence that neither she nor her husband was aware that their product would have so dire an effect upon bond-breaking compounds used in tilt-up construction. But whether or not appellant was actually possessed of knowledge that the Ashford Formula would interfere with the anti-bonding agents used is immaterial since the liability of appellant is not predicated upon her delict but upon her contract. Mary Pickford Co. v. Bayly Bros., Inc., 12 Cal.2d 501, 520. 86 P.2d 102.

[9] However, in "the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose." Civ.Code, § 1735, subd. 4. Since the "Ashford Process" was sold under its trade name to respondents, appellant argues that the foregoing section of the code precludes the implication of a warranty of fitness for the purpose intended. This contention would misin-

terpret the code. If the requisites of an implied warranty for a particular purpose are present—the vendor's knowledge of the special purpose and the vendee's reliance upon his seller's judgment—the fact that the article sold is described by its tradename does not prevent the imposition of a warranty obligation. Bagley v. International Harvester Co., 91 Cal.App.2d 922, 925, 206 P.2d 43. For example, where a buyer was prevailed upon to purchase a gold-washing device by a seller aware of the purpose for which it was to be used and whose skill and experience was relied upon, the fact that the appliance was tradenamed did not excuse the seller where neither party gave any importance to the use of the trade name. Drumar Mining Co. v. Morris Ravine Mining Co., 33 Cal.App.2d 492, 92 P.2d 424. Subdivision 4 enacts only the truism that when a consumer purchases a branded item he is more likely to be relying upon his own judgment or the promotional efforts of the manufacturer than upon the skill and judgment of his seller.

[10] The evidence in this case refutes any contention that the school district, the architects or respondents designated appellant's formula for purchase because of its description as the "Ashford Process." All concerned notified appellant as the vendor and manufacturer of the product that they were unsure whether the formula was usable with the construction technique planned and relied upon her skill and judgment, or that of her agents, in selecting the product.

Evidence of Breach of Warranty

Two groups of classrooms were constructed by respondents, designated Unit A and Unit B. Their methods of construction were substantially identical. The floor slab of Unit A was treated with Ashford Formula and a bond-breaking agent. None of the upper-layer slabs on Unit A were treated with Ashford Formula nor were any of the slabs on Unit B. All slabs were treated with the identical bond-breaker. Absolutely none of these slabs adhered to the other to a degree sufficient to cause noticeable damage save the floor slab of Unit A and the slab poured immediately on top of it. These circumstances justify a logical inference that it was the Ashford Process which caused the adhesion. The formula was the only material variant in the construction of the units which was brought to the attention of the trial court.

Respondents introduced into evidence the result of an experiment. Two slabs of concrete had been poured at the job site under the direction of a Mr. Emme, an employee of a research laboratory. One was coated with Ashford Formula, the other with the same bond-breaker used in the construction of the elementary school. The same bond-breaker was later applied to the slab treated with the formula. Another slab was poured upon each treated slab. The slab treated with Ashford Formula adhered to the concrete poured upon it. The conditions under which the test was conducted were the same as those which prevailed upon the construction of Units A and B save that the climatic conditions were naturally not identical since some months had intervened, a slightly larger gauge reinforcing steel was used in the test slabs, two coats of Ashford Formula were applied in the test while it is not clear whether two coats were used during the actual construction. The court denied appellant's motion to strike the evidence of the results of this experiment.

[11, 12] Admission of the result of a controlled experiment from which to infer facts at issue is largely a matter for the discretion of the trial court, Grupe v. Glick, 26 Cal.2d 680, 685, 160 P.2d 832; Miller v. Dollar Steamship Lines, Inc., 19 Cal.App.2d 206, 214, 64 P.2d 1163, since a major consideration against the admission of such evidence is the excessive number of collateral issues it may inject into the investigation. (Wigmore on Evidence, rev. ed., §§ 443, 444.) If the evidence would not lead to a plethora of extraneous issues and if the circumstances of the experiment were sufficiently similar to those under consideration

to show that logical relevancy exists, the result of the experiment should be admitted for whatever light it may shed on the controversy. Ortega v. Pacific Greyhound Lines, Inc., 20 Cal.App.2d 596, 67 P.2d 702; Wigmore on Evidence, rev. ed., supra. The genius of the more thoughtful and judicious decisions of the modern day is to admit into evidence any rational proof that may have a tendency to illuminate the transaction on trial or materially aid in determining the issue but subject, of course, to the discretion of the trial court in excluding extraneous matter. (See Evidence, 18 Cal.Jur.2d § 116, p. 555.)

[13] The court below admitted evidence of the result of an experiment in the exercise of its sound discretion. Since appellant cannot complain here that the trial was over-burdened with collateral issues, she is reduced to contending that the circumstances of the experiment rendered it so logically irrelevant that it was prejudicial error for the court to admit and consider its result. But as suggested above, the conditions at the time of the experiment need not be identical with those obtaining at the time of the occurrence under dispute provided they are substantially similar. Ortega v. Pacific Greyhound Lines, Inc., supra, 20 Cal.App.2d 596, 67 P.2d 702, and see Church v. Headrick & Brown, 101 Cal. App.2d 396, 414, 225 P.2d 558; Daniels v. Johnson, 38 Cal.App.2d 619, 622, 101 P.2d 707; note 85 A.L.R. 479, 480. Exact identity of conditions is next to a scientific impossibility. The conditions surrounding the test here were sufficiently similar to those prevailing at the construction of the classroom units to enable the trier of fact to consider the result of the experiment in determining the cause of the adhesion of the concrete slabs and assign to it whatever weight was merited.

[14, 15] Appellants contend that the test should have been excluded since Mr. Emme, the person primarily responsible for conducting the experiment, was not personally present to supervise the application of bond-breaker to the slab treated with the formula. However, this fact was testified to by another witness. A bystander to an experiment may testify to occurrences during that experiment bearing upon its result provided that an understanding of the facts which he witnessed does not require expertise he does not possess. Hallawell v. Union Oil Co., 36 Cal.App. 672, 686, 173 P. 177. The witness here was the construction inspector for the Glendale Unified School District and well qualified to testify that a bond-breaker rather than some other material was applied to the concrete.

Failure to Allege or Find Notice

[16] Respondents neither alleged nor did the trial court find that notice had been given to the seller of his breach within a reasonable time after its discovery by the buyer as is required by Civil Code section 1769. The simple answer is that the complaint was never demurred to on this ground; and Mr. Frueh admitted on the stand without objection by his attorney that on the very day of the mishap he had been summoned to the construction site and informed of the damage caused by the formula. Even though a complaint is deficient in some material particular, if no objection is made to its defect and proof is introduced without objection upon the issue not pleaded, the insufficiency of the pleading may not be raised for the first time on appeal. McClure, on Behalf of Caruthers v. Donovan, 33 Cal.2d 717, 731, 205 P.2d 17; Sparks v. Sparks, 101 Cal. App.2d 129, 139, 225 P.2d 238.

[17] It would be a perversion of justice to reverse the judgment herein solely for the purpose of having a finding made that due notice had been given to appellant of the failure of the "formula" inasmuch as there was no conflict in the evidence on that issue. Mr. Frueh definitely and without contradiction testified that he was promptly notified of the breach of warranty. Const. Art. VI, § 4½.

Judgment affirmed.

FOX and ASHBURN, JJ., concur.

146 Cal.App.2d 331

Levon A. AKOPIANTZ, Petitioner, Appellant and Respondent,

v.

BOARD OF MEDICAL EXAMINERS OF The State of CALIFORNIA, Respondent, Appellant and Respondent.

No. 16962.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1956.

Proceeding to obtain reciprocity physician and surgeon certificate without examination. The Superior Court, City and County of San Francisco, Harry J. Neubarth, J., entered an order denying relief as to application for reciprocity certificate but directing state board of medical examiners to give petitioner an examination and license him as a physician and surgeon, if he passed, and petitioner appealed, and from portion of order directing an examination, respondent board appealed. The District Court of Appeal, Fred B. Wood, J., held that findings of trial court were inconsistent and that each cancelled out the other, leaving no support for any part of the order appealed from.

Order reversed and cause remanded for further proceedings not inconsistent with opinion.

1. Physicians and Surgeons 🔑5(2)

Where applicant for reciprocity physician and surgeon certificate without examination waived issuance of the statement of issues prescribed by Government Code when he petitioned state board of medical examiners for a hearing to determine that New York's medical licensing requirements were not less than those of California at time applicant was licensed to practice medicine in New York and stipulated that a hearing might be granted on the petition in lieu of formal statement of issues, the issues must be determined from the petition. West's Ann.Bus. & Prof.Code, §§ 2192, 2193, 2310, 2316, 2316.5, 2317; West's Ann. Gov.Code, § 11504.

2. Physicians and Surgeons 🔑5(2)

Where state board of medical examiners found that applicant for reciprocity physician and surgeon certificate had not shown that his resident professional instruction at foreign medical schools was equivalent to that required of applicant for such certificate and that applicant had been trained in part in schools which were unapproved by board, either such finding, unless unsupported by substantial evidence in the light of the whole record, would be sufficient to support denial of application for reciprocity certificate without examination. West's Ann.Bus. & Prof.Code, §§ 2165–2195, 2192, 2193, 2310.

3. Physicians and Surgeons 🔑5(3)

Where state board of medical examiners found that applicant for reciprocity physician and surgeon certificate had not shown that his resident, professional instruction in foreign medical schools was equivalent to that required of applicant for such certificate and that applicant was trained in part in medical schools unapproved by board, though board based denial of reciprocity certificate solely on second finding, both findings were material in subsequent judicial proceeding to obtain reciprocity certificate, since even if court were to determine that foreign schools had been approved by board, board would have no authority to issue reciprocity certificate, if court determined that finding that applicant's foreign instruction was not equivalent to state requirements was supported by the evidence. West's Ann.Bus. & Prof. Code, §§ 2165–2195, 2192, 2193, 2310.

4. Administrative Law and Procedure 🔑793

Where administrative action under review is the denial of a permit, license or certificate, as distinguished from suspension or revocation of a permit, license or certificate previously granted, the sole function of trial court is to determine, from a review of the record, whether there is sufficient evidence to sustain the ruling of administrative board and court should not reweigh the evidence.

5. Physicians and Surgeons ⚷5(3)

In proceeding to obtain reciprocity physician and surgeon certificate without examination, finding that petitioner had not established that he was qualified educationally for a reciprocity certificate was inconsistent with finding that petitioner had sufficient educational training and experience to qualify for an examination for physician and surgeon certificate, and hence each finding cancelled out the other, leaving no support for any part of order denying relief as to application for reciprocity certificate but directing state board of medical examiners to give petitioner an examination and license him as a physician and surgeon, if he passed. West's Ann.Bus. & Prof.Code, §§ 2165–2195, 2192, 2193, 2310.

6. Physicians and Surgeons ⚷5(3)

Question of petitioner's right to take examination for physician and surgeon certificate was not a matter for judicial determination in proceeding to obtain reciprocity physician and surgeon certificate without examination, in absence of showing that petitioner had applied for an examination and that such application had been rejected by state board of medical examiners. West's Ann.Bus. & Prof.Code, §§ 2165-2195, 2174, 2192, 2193, 2310.

7. Physicians and Surgeons ⚷5(3)

In proceeding to obtain reciprocity physician and surgeon certificate without examination, absence of showing that petitioner had applied for an examination for physician and surgeon certificate and that such application had been rejected by state board of medical examiners would not preclude court from referring back to board the question of petitioner's eligibility to take such examination. West's Ann.Bus. & Prof.Code, §§ 2165–2195, 2174, 2192, 2193, 2310.

8. Physicians and Surgeons ⚷5(2)

In proceeding to obtain reciprocity physician and surgeon certificate without examination, the fact that finding that petitioner had sufficient educational training and experience to qualify for examination for physician and surgeon certificate was outside the issues did not remove such finding from the record or resolve the conflict between such finding and finding that petitioner had not established that he was qualified educationally for a reciprocity certificate. West's Ann.Bus. & Prof.Code, §§ 2165–2195, 2174, 2192, 2193, 2310.

9. Physicians and Surgeons ⚷5(3)

Where state board of medical examiners denied application for reciprocity physician and surgeon certificate without examination on ground that applicant had been trained in part in schools unapproved by board, subsequent judicial proceeding to obtain reciprocity certificate could be treated as a proceeding under statute to compel the board to approve such schools or to admit applicant to examination or for other appropriate relief. West's Ann.Bus. & Prof.Code, 2165–2195, 2174, 2192, 2193, 2310

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Hutchinson & Quattrin, S. M. Saroyan, San Francisco, for petitioner Akopiantz.

Edmund G. Brown, Atty. Gen., of the State of Cal., E. G. Funke, Asst. Atty. Gen., Dan Kaufmann, Deputy Atty. Gen., for respondent Board.

FRED B. WOOD, Justice.

After the denial of his application to the respondent board of medical examiners for a reciprocity physician and surgeon certificate without examination,[1] Dr. Levon A.

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[1] He bases his claim upon the fact that on July 1, 1949 the State of New York admitted him to practice upon successful completion of an examination. He received his medical degree at the University of Lausanne, Switzerland, in June, 1941. Lausanne gave him credit for 2432 hours of training elsewhere, including 1251 hours at two schools in Scotland, St. Mungo's College Medical School (October, 1936, to June 30, 1937) and the Anderson College of Medicine (October, 1937, to June, 1938).

Our reciprocity statute applies if the

Akopiantz petitioned the board for a hearing to determine that New York's medical licensing requirements were not less than those of California on July 1, 1949, the date his New York license was issued.

Upon filing this petition Akopiantz requested a hearing on June 21, 1954, and waived the issuance of the statement of issues prescribed by section 11504 of the Government Code. Upon the hearing, which was held on the date requested, he stipulated that "a hearing may be granted on the petition in lieu of a formal statement of issues."

[1] We look, therefore, to the petition and there find, among others, certain significant issues stated in the form of the following averments: (1) Akopiantz' resident professional instruction equaled or exceeded in duration and attendance and included total and proportionate hours of study of the subjects equivalent to those stated in section 2192 of the Business and Professions Code, and were equivalent in quality, standard and excellence to the minimum requirements specified in Articles 4 and 5 (§§ 2165–2195) of Ch. 5 of Div. 2 of said code; (2) the California State Board of Medical Examiners has determined the equivalence of the requirements of the New York licensing authority, with respect to professional instruction in the schools of medicine which petitioner attended, for the purpose of issuing (and did issue) reciprocity certificates to Howard Golden and Leonard S. Lazaroff in 1945 and 1946, respectively.

These allegations, it is apparent, were designed to meet the requirements of section 2193 of the Business and Professions Code as it read on the day[2] (July 1, 1949) petitioner received his New York license: "An applicant, whose application is based on a diploma issued to him by a foreign medical school *approved* by the board, except a Canadian school, shall furnish documentary evidence, satisfactory to the board, that: (a) He has completed a resident course of professional instruction in an *approved* medical school or schools *equivalent* to that required in this article [§§ 2190–2195] for a physician and surgeon applicant." (Emphasis added.) These were basic California requirements for a foreign medical school graduate who applied for examination in this state on July 1, 1949. They were made applicable to Akopiantz' request for a reciprocity certificate (without examination) by the provisions of sections 2316, 2316.5, 2317 and 2320 of the Business and Professions Code.

The respondent medical board found: (1) "It has not been shown that said resident professional instruction described * * * in Finding * * * III[3] hereof equaled or exceeded in duration and attendance and included total and proportionate hours of study of the subjects of instruction equivalent to those stated * * in Section 2192 of the Business and Professions Code and were in all respects equivalent in quality, standard, and excellence to the minimum requirements specified in Articles 4 and 5, Chapter 5 [§§ 2165–2195], Division 2 of said Code." (Finding IV); and (2) that "credit given at St. Mungo's College Medical School and the Anderson College of Medicine hereinabove referred to in Finding III, was for work completed in extramural medical schools,

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applicant "is authorized to practice in any other State if it is a system or mode that is recognized by this chapter [Ch. 5 of Div. 2 of the Business and Professions Code, §§ 2000–2497] * * *." It declares that "[s]ubject to the provisions of sections 2320 and 2321, no examination for any reciprocity certificate shall be required." Bus. and Prof.Code, § 2310. Specific requirements are imposed by several sections of said Chapter 5, particularly including sections 2316, 2316.5, 2317, 2192 and 2193 of the code.

[2] See section 2193 as amended by Stats. 1941, ch. 751, p. 2287. The 1949 amendment of this section (Stats.1949, ch. 530, p. 930) did not take effect until October 1 of that year.

[3] In Finding III the board found that New York admitted applicant to its examination upon proof of completion of four resident courses aggregating in excess of 4000 hours (etc.) from the University of Lausanne and that he was admitted to advanced standing at Lau-

which are schools unapproved by the Board of Medical Examiners of the State of California. Extramural schools were expressly disapproved by the Board of Medical Examiners of the State of California as of the date of October 1, 1939." (Finding VII.)

[2] Thus, it happens that the board found against Akopiantz upon the two major issues. Either finding, unless unsupported by substantial evidence in the light of the whole record, would support the denial of his request for a reciprocity certificate without examination. The board used only one of them. In its "determination of the issues" it said merely that the "application for a reciprocity certificate should be denied on the basis that he is a foreign graduate, trained in part in an unapproved school pursuant to the provisions of Section 2193 of the Business and Professions Code * * *" Then followed the "order", expressly denying the application for a reciprocity certificate without specifying the reason or reasons for the denial.

The conclusion seems inescapable that the board denied the application solely upon the ground that the St. Mungo's and Anderson schools were "unapproved," not upon the ground that the resident instruction received at the foreign medical schools was not the "equivalent" of that required by sections 2190–2195 of our code.

[3, 4] However, both findings are material to the inquiry in this proceeding. Even if the court were to determine that the foreign schools have been approved by the board, the board would have no authority to issue the requested reciprocity certificate if the court determines that the evidence supports the board's finding that the foreign instruction was not the "equivalent" of California requirements.[4]

The trial court made two findings:

(1) That the applicant "has not established that he is qualified educationally for a reciprocity certificate, under section 2310 of the Business and Professions Code"; and

(2) That the "petitioner has sufficient educational training and experience to qualify for an examination under" section 2193. Upon the basis of finding No. 2, the court directed the board to give Akopiantz an examination under section 2193 of the code and, if he passes, to license him as a physician and surgeon in this state.

These findings seem inconsistent; irreconcilably so. One says the applicant has not shown he is "qualified educationally" for a reciprocity certificate; the other, that he has sufficient "educational training and experience to qualify" for the examination. In either case the educational requirement (resident instruction "equivalent" to California requirements) is identical, the only difference being that if Akopiantz were applying to take the examination he need not show that his foreign schools were "approved" by the board.[5]

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sanne upon a showing of attendance at resident courses at the following medical schools for the periods indicated:

University of Cambridge 10/1/38 to 6/30/39; St. Mungo's College Medical School 10/1/36 to 6/30/37; Anderson College of Medicine 10/1/37 to 6/30/38; Western Infirmary April to June, 1938.

[4] When, as in this case, the administrative action under review is the denial of a permit, license or certificate (as distinguished from the suspension or revocation of a permit, license or certificate previously granted), "the trial court should not reweigh the evidence, and its sole function is, to determine from a review of the record, whether there is sufficient evidence to sustain the ruling of the board." Southern California Jockey Club v. California Horse Racing Bd., 36 Cal.2d 167, 175, 223 P.2d 1, 6. See also McDonough v. Goodcell, 13 Cal. 2d 741, 746–749, 91 P.2d 1035, 123 A. L.R. 1205.

[5] Section 2193, which specifically applies to a foreign school graduate seeking a California examination, was amended in 1949, effective October 1, 1949, Stats. 1949, ch. 530, p. 930, to delete the former requirement that the school or schools be "approved," but to retain the requirement that the applicant "furnish documentary evidence, satisfactory to the board, that: (a) He has completed in a medical school or schools a resident course of professional instruction

[5] Each of these findings should be read in the light of the only type and quality of education that was involved, a "resident course of professional instruction" at a "medical school",—a course "equivalent to that required" by our statute "for a physician and surgeon applicant", § 2193. As thus read, one finding says that the applicant's foreign school instruction was equivalent; the other, that it was not. Both can not stand. Each cancels the other out, leaving no support for the order appealed from or any part of it.

[6–8] The board, which has appealed from that part of the order which directs that an examination be given (Akopiantz has appealed from the whole of the order) would have us interpret finding No. 2 as determining that Akopiantz' training and experience in residence at certain hospitals in this country after graduation at Lausanne, when added to his foreign school instruction, measure up to the requirements of section 2193. We do not find a satisfactory basis for such an interpretation. Under any theory the possibility remains that the second finding deals with the same type of instruction as the first and thus leaves the findings in such a state of uncertainty as to furnish inadequate support for the order or any part of it.[6]

If this case is again tried, the present difficulty can be avoided if the trial court will couch its findings in specific terms; e. g., by declaring as to each significant finding of the board (clearly identified by subject matter or paragraph number) that it is, or is not, supported by substantial evidence in the light of the whole record.

[9] We do not undertake to further define the issues upon a new trial but do state that, as concerns the review of the board's disapproval of the medical schools Akopiantz attended, this may be treated as a proceeding under section 2174 of the Business and Professions Code. See Mann v. Board of Medical Examiners, 31 Cal.2d 30, 41–42, 187 P.2d 1.

The order is reversed and the cause remanded for such further proceedings as may not be inconsistent with the views herein expressed, each party to bear his own costs of appeal.

PETERS, P. J., and BRAY, J., concur.

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equivalent to that required in this article for a physician and surgeon applicant."

The Legislature gave emphasis to this requirement by inserting this clause toward the end of the section: "Nothing contained in this section shall prohibit the board from disapproving any foreign medical school nor from denying the application if, in the opinion of the board, the instruction received by the applicant or the courses were not equivalent to that required in this article for a physician and surgeon applicant."

[6] The question of Akopiantz' right to take the examination does not appear to be a matter for judicial determination in this proceeding.

It would become such under section 2174, Business and Professions Code, only if he had applied for an examination and the board had rejected it. It does not appear that the board has as yet rejected such an application.

In his petition to the board Akopiantz specifically sought a reciprocity certificate without examination.

The prayer of the petition asked for that and, though it also asked for "such other relief as may be meet and proper," our examination of the transcript of the hearing before the board does not indicate that at the hearing Akopiantz expressed a desire for an examination. These facts and the silence of the board's decision on this subject indicate that the board was unaware of the possibility that the petition might embrace a request for an examination.

This would not prevent the court from referring back to the board the question of Akopiantz' eligibility to take the examination should it appear upon a new trial meet and proper to do so.

The fact that the court's finding No. 2 was outside the issues does not, of course, remove that finding from the record nor resolve the conflict between it and finding No. 1.

146 Cal.App.2d 534

Matter of the ESTATE of Myrtle F. WELCH, Deceased.

Le Roy THOMAS, Petitioner-Respondent,
v.
Arthur A. FAIRCHILD, Executor-Appellant.
Civ. 21804.

District Court of Appeal, Second District, Division 3, California.
Dec. 3, 1956.

Rehearing Denied Dec. 27, 1956.
Hearing Denied Jan. 30, 1957.

Proceeding for allowance of attorney's fees. The Superior Court, Los Angeles County, Clyde C. Triplett, J., entered an order allowing fees for extraordinary services to an attorney for services for the executor and the executor appealed. The attorney, without making a formal motion, suggested that the court was without jurisdiction of the appeal. The District Court of Appeal, Vallée, J., held that where an appeal was not taken by executor within sixty days from the entry of order allowing attorney's fees, and filing of a motion for a new trial did not operate to extend time for filing notice of appeal since a motion for new trial did not lie to secure the re-examination of the order allowing the attorney's fees, the appeal was not timely, and District Court of Appeal was without jurisdiction to consider the case on the merits, and the appeal would be dismissed.

Appeal dismissed.

1. Executors and Administrators 🔑253

A proceeding for allowance of attorney's fees for extraordinary services claimed to be performed for an executor is not a proceeding in which a motion for a new trial may be made, and the procedure provided for motions for a new trial in civil actions may not be applied to such a proceeding. West's Ann.Prob.Code, § 1231.

2. Appeal and Error 🔑356

Statutory requirement as to time for taking an appeal is mandatory, and a reviewing court is without jurisdiction to consider an appeal which has been taken after the expiration of such statutory period. West's Ann.Rules on Appeal, rules 2(a, b), 3(a).

3. Executors and Administrators 🔑256(5)

Where an appeal was not taken by executor within sixty days from the entry of order allowing attorney's fees, and filing of a motion for a new trial did not operate to extend time for filing notice of appeal since a motion for new trial did not lie to secure the re-examination of the order allowing the attorney's fees, the appeal was not timely, and District Court of Appeal was without jurisdiction to consider the case on the merits, and the appeal would be dismissed. West's Ann.Rules on Appeal, rules 2(a, b), 3(a); West's Ann.Prob.Code, §§ 1221, 1231.

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Kenneth M. Liskum, Huntington Park, for appellant.

Le Roy Thomas, in pro. per.

VALLÉE, Justice.

Appeal by Arthur A. Fairchild, executor of the will of Myrtle F. Welch, from an order allowing Le Roy Thomas fees for extraordinary services as attorney for the executor.

Without making a formal motion, respondent suggests that this court is without jurisdiction of the appeal and that it must be dismissed. We agree.

On October 31, 1955, the probate court signed and filed an order reading:

> "It is hereby ordered by the Court that the sum of $750.00 is allowed to said Le Roy Thomas, one of the attorney's for Arthur A. Fairchild, the sole beneficiary of the estate herein, for services rendered to said estate in the contest of the Will herein; and Arthur A. Fairchild, the executor herein, is ordered and directed to pay forthwith the said sum of $750.00 to Le Roy Thomas out of the funds of said estate in his hands, in the due course of administration thereof."

The contest was before probate. Notice of the signing and filing of the order was served on appellant on November 9, 1955.

On November 18, 1955, appellant filed a notice of intention to move for a new trial. On January 11, 1956, the motion was denied. Notice of appeal from the order of October 31, 1955, was filed on January 31, 1956.

[1] A motion for a new trial did not lie from the order of October 31, 1955. Probate Code, section 1231, specifies the probate proceedings in which a motion for a new trial may be made. It reads:

> "A motion for a new trial in probate proceedings can be made only in cases of contests of wills, either before or after probate, in proceedings to determine heirship and interests in estates, and in those cases where the issues of fact, of which a new trial is sought, were of such character as to entitle the parties to have them tried by a jury, whether or not they were so tried."

A proceeding for the allowance of attorney's fees for extraordinary services claimed to be performed for an executor is not one of the proceedings specified. See In re Estate of Bell, 58 Cal.App.2d 333, 338, 136 P.2d 804. The procedure allowed by the Code of Civil Procedure on motion for a new trial in civil actions may not be applied to such a proceeding. In In re Estate of England, 214 Cal. 298, at page 299, 5 P.2d 428, the court stated:

> "The sole question is whether or not the procedure allowed on motion for new trial in civil actions may properly be applied to a judgment or order for the settlement of the final account of an administrator where an heir at law has presented an issue, by written objections solely to certain items of attorneys' fees claimed by the administrator for ordinary and extraordinary services of his attorney."

The court ruled that the procedure allowed on motion for new trial in civil actions could not be applied to that order and continued, 214 Cal. at page 300, 5 P.2d at page 429:

> "This case arises from the following facts: In the above-entitled estate, the administrator, as public administrator, on January 23, 1923, presented to the court his second and final account and supplement thereto and his petition for distribution containing a number of items, including an item for regular attorneys' fees of $739 and several items for extra-ordinary services aggregating $3,500, and he prayed for allowance of these items. Thereafter one James N. Elkins, an heir at law of said decedent, contested said items of said account largely upon the ground that, under the charter of Los Angeles county, the county counsel should act as attorney for the public administrator and collect the fees allowed by law for such services and turn them into the county treasury. The court on the hearing disallowed all said items of attorneys' fees, settled the account and ordered the estate distributed accordingly. No appeal was taken from this order. On January 27, 1930, the public administrator filed what was termed a notice of intention to move for a new trial on all the ordinary grounds mentioned in section 657 of the Code of Civil Procedure. Motion for a new trial followed, which on the fourth day of March, 1930 the court purported to grant upon the ground that the evidence did not support the judgment. This was followed by another final settlement of the account and distribution, which order allowed the items of attorneys' fees above referred to whereupon said heir at law filed in this court this petition for writ of review. The writ issued. A return thereto was made, setting out substantially the facts above disclosed.
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> "Manifestly, if the procedure in civil cases on motion for new trial is inapplicable, both the purported order granting the new trial and the additional order allowing the items theretofore rejected are beyond the jurisdiction of the court. Diamond v. Superi-

> or Court, 189 Cal. 732, 740, 210 P. 36; Stanton v. Superior Court, 202 Cal. 478, 261 P. 1001."
>
> "It follows that said orders granting the motion for new trial and the order which followed it are annulled."

Also see In re Estate of Smead, 12 Cal.2d 20, 24–25, 82 P.2d 182; In re Estate of Van Deusen, 30 Cal.2d 285, 290–292, 182 P.2d 565. Thus the court was without jurisdiction to entertain the motion for a new trial. Apparently the probate judge was of that mind, for the executor has also appealed from an order which he says reads: "Objections to Motion for New Trial—Objections Sustained."

[2] An appeal from an order such as that at bar must be taken by filing a notice of appeal within 60 days from the date of entry of the order. Rules on Appeal, Rules 2(a) and (b). The filing of a signed order in a probate proceeding is equivalent to an entry at length in the minute book of the court. Prob.Code, § 1221; In re Estate of Hanley, 23 Cal.2d 120, 122, 142 P.2d 423, 149 A.L.R. 1250; In re Estate of Tierney, 63 Cal.App.2d 295, 301, 146 P.2d 700. It is only when a *valid* notice of intention to move for a new trial is served and filed within 60 days after entry of the order that the time for filing the notice of appeal from the order is extended until 30 days after either entry of the order denying the motion or denial thereof by operation of law. Rules on Appeal, Rule 3(a). The requirement as to the time for taking an appeal is mandatory, and a reviewing court is without jurisdiction to consider an appeal which has been taken after the expiration of the statutory period. In re Estate of Hanley, 23 Cal.2d 120, 122–123, 142 P.2d 423, 149 A.L.R. 1250.

[3] Appellant's notice of intention to move for a new trial was not a "valid" one. The filing of the notice did not operate to extend the time for filing the notice of appeal since a motion for a new trial does not lie to secure a re-examination of an order allowing respondent attorney's fees. In re Estate of Raahauge, 91 Cal.App.2d 615, 617, 205 P.2d 1122; Lynch v. Watson, 69 Cal.App.2d 51, 52–53, 158 P.2d 250.

The order appealed from was entered October 31, 1955. The notice of appeal was filed January 31, 1956, 92 days after entry of the order. Since the appeal was not taken within 60 days from the entry of the order it was not timely; this court is without jurisdiction to consider the case on the merits and the appeal must be dismissed. In re Estate of Tierney, 63 Cal.App.2d 295, 301, 146 P.2d 700.

Appeal dismissed.

SHINN, P. J., and PARKER WOOD, J., concur.

146 Cal.App.2d 463

LAGUNA BEACH UNIFIED SCHOOL DISTRICT OF ORANGE COUNTY, California, a Body Politic, Plaintiff and Respondent,

v.

Matilda R. LEWIS, Defendant and Appellant.

Civ. 5045.

District Court of Appeal, Fourth District, California.

Nov. 30, 1956.

Hearing Denied Jan. 23, 1957.

School district brought proceeding against dismissed teacher under the Education Code for determination by Superior Court whether charges, for which teacher was dismissed, were true, and, if true, whether they constituted grounds for dismissal. The Superior Court of Orange County, Raymond Thompson, J., entered judgment overruling a demurrer to the complaint, and the teacher appealed. The District Court of Appeal, Griffin, J., held that complaint alleging that teacher was guilty of unprofessional conduct in that on certain date at certain place teacher distributed outside classroom pamphlet, which was entitled "Time to Resist" and which was attached to the complaint, and in that she falsely denied before governing board of school district that she distributed the pamphlet, and that she refused to answer questions of Subcommittee of the Committee on Un-American Activities of the House of Representatives of the United States stated a cause of action.

Judgment affirmed.

1. Pleading ⚷193(6)

In proceeding by school district against dismissed teacher under Education Code for determination by court whether charges, for which teacher was dismissed, were true, and, if true, whether they constituted grounds for dismissal, complaint alleging that teacher was guilty of unprofessional conduct in that she distributed a pamphlet entitled "Time to Resist," and in that she falsely denied before governing board that she distributed pamphlet, and that she refused to answer questions of Subcommittee of Committee on Un-American Activities of House of Representatives, was not demurrable on ground that several causes of action were improperly joined or not separately stated. West's Ann.Education Code, §§ 12100, 12600 et seq., 12603, 12604, 13521, 13529, 13532; West's Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

2. Pleading ⚷192(2)

In proceeding by school district against dismissed teacher under the Education Code for determination by court whether charges, for which teacher was dismissed, were true, and, if true, whether they constituted grounds for dismissal, complaint alleging that teacher was guilty of unprofessional conduct in that on certain date and at certain place teacher distributed a pamphlet entitled "Time to Resist" was not demurrable as uncertain because it did not give names of persons to whom teacher allegedly distributed pamphlets. West's Ann.Education Code, §§ 12100, 12600 et seq., 12603, 12604, 13521, 13529, 13532; West's Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

3. Pleading ⚷192(2)

In proceeding by school district against dismissed teacher under the Education Code for determination by court whether charges, for which teacher was dismissed, were true, and, if true, whether they constituted grounds for dismissal, complaint alleging that teacher was guilty of unprofessional conduct in that on certain date and at certain place teacher distributed a pamphlet, which was entitled "Time to Resist" and which was attached to the complaint, was not demurrable as uncertain because of lack of direct allegation that pamphlets were subversive or improper in character. West's Ann.Education Code, §§ 12100, 12600 et seq., 12603, 12604, 13521, 13529, 13532; West's Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

4. Pleading ⚷204(3)

In proceeding by school district against dismissed teacher under the Education Code for determination by court whether charges, for which teacher was dismissed, were true, and, if true, whether they constituted grounds for dismissal, general demurrer to complaint was properly overruled if any one of the charges or all of the charges, considered together, alleged facts sufficient to constitute grounds for dismissal of teacher. West's Ann.Education Code, §§ 12100, 12603, 12604, 13521, 13529, 13532; West's Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

5. Schools and School Districts ⚷141(4)

Violation by a teacher of oath under the Education Code to support the Constitution of the United States and California and its laws constitutes "unprofessional conduct" and is ground for dismissal. West's Ann.Education Code, §§ 12100, 12603, 12604, 13521, 13529, 13532; West's

Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

See publication Words and Phrases, for other judicial constructions and definitions of "Unprofessional Conduct".

6. Schools and School Districts ⚷141(4)

If teacher outside classroom distributed pamphlets which condemned United Nations troops who fought in Korea as murderers, urged the youth of the United States to resist military service by choosing prison, extolled achievements of Communist rule in North Korea, held up American way of life to ridicule and contempt, and condemned and belittled the action of the United Nations in Korea, she was guilty of "unprofessional conduct" justifying her dismissal. West's Ann.Education Code, §§ 12100, 12600 et seq., 12603, 12604, 13521, 13529, 13532; West's Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

7. Schools and School Districts ⚷141(1)

Board of trustees of school district was justified in questioning teacher to determine whether she had distributed pamphlets of a pro-Communist nature. West's Ann.Education Code, §§ 12100, 12600 et seq., 12603, 12604, 13521, 13529, 13532; West's Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

8. States ⚷53

A state or its agencies may constitutionally require disclosure of facts relating to any employee's loyalty as a condition of continued public employment.

9. Schools and School Districts ⚷141(4)

If teacher knowingly and falsely denied before board of trustees of school district that she distributed pamphlets of a pro-Communist nature, and if she in fact had distributed such pamphlets, her conduct could be classified as dishonest, hostile to the welfare of the general public, and contrary to good morals, and she could be dismissed. West's Ann.Education Code, §§ 12100, 12600 et seq., 12603, 12604, 13521, 13529, 13532; West's Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

10. Pleading ⚷214(2)

Where dismissed teacher chose not to answer and deny facts alleged in complaint in proceeding by school district against teacher under the Education Code for determination by court whether charges, for which teacher was dismissed, were true, and, if true, whether they constituted grounds for dismissal, court was required, in construing the complaint and demurrer thereto, to assume, as true and admitted, all facts well pleaded and legally provable. West's Ann.Education Code, §§ 12100, 12603, 12604, 13521, 13529, 13532; West's Ann.Code Civ.Proc., §§ 427, 636; West's Ann.Gov.Code, §§ 1028.1, 3060 et seq.

Kenny & Morris, Los Angeles, for appellant.

Joel E. Ogle, County Counsel, George F. Holden and Stephen K. Tamura, Deputies, County Counsel, Santa Ana, for respondent.

GRIFFIN, Justice.

Plaintiff and respondent Laguna Beach Unified School District of Orange County, a body politic, brought this proceeding under section 13529 of the Education Code against defendant and appellant, a permanent teacher employed by it, setting forth the charges for which appellant was dismissed as well as the preliminary proceedings taken by said school board and a request that the court inquire into the charges and determine whether or not they are true and, if true, whether or not they constitute grounds for her dismissal. Board of Education of City of Los Angeles v. Ballou, 21 Cal.App.2d 52, 55, 68 P.2d 389; Fresno City High School Dist. v. De Caristo, 33 Cal.App.2d 666, 92 P.2d 668.

A statement of charges referred to as an exhibit in the complaint is as follows: (1) That on August 15, 1953, at Woods Cove, near Diamond Street, in Laguna Beach, "you were guilty of unprofessional conduct in this: that at said time and place you, then and there being an employee of the Laguna Beach Unified School District, did wilfully and wrongfully distribute to persons a certain pamphlet entitled 'Time to Resist', a copy of which is attached hereto" in violation of subsection (a) of section 13521 of the Education Code. (2) That on January 25th, 1954, at the Administration Office of the High School Building "you were guilty of unprofessional conduct in violation of subsection (a) of section 13521 of the Education Code of the State of California, in this: that at said time and place you, * * * having been duly ordered by the Governing Board * * to appear before said Governing Board and answer a question or questions * * * pertaining to any of the matters specified in Section 12604 of the Education Code, * * * did wilfully and unlawfully, after having been shown and having read the pamphlet 'Time to Resist', * * * falsely testify" that she had not seen, read or distributed copies to any person since September 10, 1948. (3) It is then charged that these answers were false and untrue and were known by her to be false and untrue when in fact, since September, 1948, she had seen and did knowingly distribute copies of said pamphlets to persons at the time and place indicated, and that by reason thereof she was guilty of immoral conduct and dishonesty, in violation of subsections (a) and (c) of section 13521 of the Education Code. It is then alleged that on April 13, 1953, she was guilty of unprofessional conduct in this, that she was then subpoenaed to appear before a Subcommittee of the Committee on Un-American Activities of the House of Representatives of the United States to testify concerning matters being investigated by said Sub-committee; that she so appeared but did wrongfully fail to cooperate with said Sub-committee by refusing to answer questions relating to her membership in the Communist Party. The questions and answers are then set forth and will be hereinafter described. In effect she refused to answer any questions as to membership in the Communist Party between the years 1935 and 1940, and certain other questions propounded to her pertaining to her possible present membership in that party. The Board of Trustees found that by reason of her conduct set forth in the charges there existed cause for her dismissal as a permanent employee of the district. The pamphlets attached to the complaint as exhibits had various titles, including "Resistance Pamphlet No. 3, by Hugh Hardyman". They were to the effect that the verses following were not for a certain class but for "those who hold that blood and breath can serve to free mankind from fear and want" and for "those who are not frightened by a list" and those "who know the time has come to organize and to resist"; that no help comes from colleges and schools and that the young man still has a choice of what to be and if he "revolts against all killing" and chooses prison, he can still be free. It in effect condemns the United Nations troops who fought in Korea as murderers and urges the youth of this country to resist military service by choosing prison. It extols the achievements of Communist rule in North Korea, holds up our way of life to ridicule and contempt and condemns and belittles the United Nations' action in Korea. It repeats spurious Communist accusations charging the United Nations' forces with murdering civilians with napalm, Encephalitis, plague and boldly proclaims that the pamphlet is for those who "know the time has come to organize and to resist".

Appellant demurred to the complaint on the grounds (1) That several causes of action were not separately stated; (2) That the complaint was uncertain, ambiguous and unintelligible; and (3) That it did not state a cause of action, citing such authority as Bowman v. Wohlke, 166 Cal. 121, 135 P. 37. The demurrer was overruled and appellant declined to answer the complaint. It was stipulated that respondent might proceed under section 636 of the Code of Civil Procedure and obtain a judgment as by default. Appellant appealed from the judgment.

As to the first ground, appellant relies upon the general rule stated in 21 Cal.Jur. p. 100, sec. 65, construing section 430, subd. 5 of the Code of Civil Procedure allowing a demurrer upon the ground that different causes of action must be separately stated. She argues that the complaint, although in the nature of a special proceeding, must be tested under the rules prescribed by the Code of Civil Procedure, citing section 13532 of the Education Code.

Here the written accusation set forth in the complaint by reference specifically and separately stated the alleged grounds of the ultimate claim for her dismissal. A somewhat similar situation was presented in In re Shepard, 161 Cal. 171, 118 P. 513. It was an accusation for removal of a public official under section 758 of the Penal Code, now 3060 of the Government Code. The accusation contained 13 specifications of misconduct. It was there held that it is permissible to join more than one specification of misconduct, and the rule restricting indictments to a single charge, as held in the case of Matter of Burleigh, 145 Cal. 35, 78 P. 242, did not apply. The former applicable provisions of the Penal Code to such an accusation are now found in the Government Code, section 3060 et seq., pertaining to public officers and employees in general and their removal from office. Section 1028.1 of the Government Code pertains to refusal of public employees to testify pertaining to knowing present or past membership in the Communist Party. This change from Section 758 of the Penal Code to Section 3060 of the Government Code would not necessarily change the rule of procedure set forth in the Shepard case pertaining to the removal of public officers and employees in general. The complaint and accusation in the instant case fully set forth three separate specifications wherein the grounds of claimed misconduct and dishonesty were quite fully related. The Legislature has not attempted to catalogue or define all the acts which constitute misconduct or dishonesty but did classify certain acts as constituting misconduct, or which would constitute a cause for dismissal. Sec. 1028.1, 3060 et seq., Government Code; Secs. 12603 and 12604, 13521, Education Code; Board of Education of City of Los Angeles v. Wilkinson, 125 Cal.App.2d 100, 270 P.2d 82; Reid v. Superior Court, 44 Cal.App. 349, 186 P. 634; 21 Cal.Jur. p. 987, sec. 151.

Section 427 of the Code of Civil Procedure gives a plaintiff the right to unite certain prescribed causes of action in the same complaint. The charges herein made are not mentioned in that section as causes of action that may be joined. 1 Cal.Jur. 2d p. 645, sec. 42. The statutes, § 3072, Government Code, Secs. 12603–4, Education Code, and Sec. 1028.1, Government Code, describing certain actions as grounds for dismissal, fix but one penalty, i. e., that of dismissal.

It was definitely held in Loveland v. Garner, 71 Cal. 541, at page 544, 12 P. 616, at page 618, which was an action brought by a stockholder against directors of a corporation to recover a penalty for several separate breaches of duty in reference to their office, that since the statute in terms provides for but a single penalty, no other or greater sum may be recovered, although violations of the statute may have been frequent, and said:

> "But it does not follow from this that the plaintiff may not join together in one count several of such alleged violations, and prove any one of them in his power, as they constitute separately or together but one cause of action."

See also Board of Education of City of Los Angeles v. Wilkinson, 125 Cal.App.2d 100, 270 P.2d 82, where unprofessional conduct was charged and more than one cause for dismissing was set forth in the same count. Board of Education of City of Los Angeles v. Ballou, 21 Cal.App.2d 52, 68 P.2d 389; Board of Education of City of Los Angeles v. Swan, 41 Cal.2d 546, 261 P.2d 261.

[1] Here, the charges were made in simple language and were broad enough to fairly advise the employee of their nature so she could properly prepare a de-

fense thereto. The complaint incorporates those charges and also sets them forth in detail, in separate and distinct specifications, and also sets forth the testimony taken before the Board in support of the charges. We conclude that only one cause of action is stated. The demurrer to the complaint on the claimed ground that several causes of action were improperly joined or not separately stated was properly overruled.

[2, 3] It is next claimed that the complaint is uncertain because it is not indicated therein the name of the person or persons to whom it is alleged she wrongfully distributed the pamphlets at Woods' Cove, citing such authority as Money v. Anderson, 93 U.S.App.D.C. 130, 208 F.2d 34, 37; and United States v. Potter, C.C., 56 F. 83, 89. It is further argued that there is no direct allegation that the pamphlet is subversive or improper in character. The complaint sufficiently described the act charged. It does not appear that the respondent had any greater knowledge of the name of such person or persons than did the appellant. The pamphlet is set out in full in the complaint and it might well appear therefrom its true character and that appellant was guilty of unprofessional conduct in distributing it. The complaint was not uncertain.

[4] As to the failure of the complaint to state a cause of action, at the time here noted, if any one of the charges or all of the charges considered together alleged facts sufficient to constitute grounds for dismissal, the general demurrer was properly overruled. Gipner v. State Civil Service Commission, 13 Cal.App.2d 100, 107, 56 P.2d 535; Shewbridge v. Police Commission of City and County of San Francisco, 64 Cal.App.2d 787, 149 P.2d 429. We will therefore consider the charges alleged.

[5, 6] As to the distribution of the pamphlets, appellant concededly had taken an oath under section 12100 of the Education Code to support the Constitution of the United States of America and of California, and its laws and would "by precept and example, promote respect for the Flag and the statutes of the United States and of the State of California, reverence for law and order, and undivided allegiance to the Government of the United States of America." A violation of that oath constitutes unprofessional conduct and is a ground for dismissal. Board of Education of City of Eureka v. Jewett, 21 Cal.App.2d 64, 68 P.2d 404. A teacher who distributes pamphlets of the character here indicated in the very community in which she is employed to teach could hardly be said to be promoting "by example" respect for the flag and the statutes of the United States, reverence for law and order, and undivided allegiance to the United States, nor can she be said to possess the qualifications necessary for the performance of the duties imposed upon her by section 13230 of the Education Code. Board of Education of City of Los Angeles v. Wilkinson, 125 Cal.App.2d 100, 270 P.2d 82, supra; Faxon v. School Committee of Boston, 1954, 331 Mass. 531, 120 N.E.2d 772, 774, 44 A.L.R.2d 781. She argues that such conduct outside of classrooms cannot form the basis for dismissal, and that the specification does not allege whether the pamphlets were distributed to classroom pupils or interested parties.

In Board of Education of City of Los Angeles v. Swan, 1953, 41 Cal.2d 546, 552, 261 P.2d 261, it was held that derogatory utterances concerning the school board made by a teacher outside of classrooms constituted sufficient grounds for dismissal, and rejected the same argument which appellant here makes. It cited Goldsmith v. Board of Education, 66 Cal.App. 157, 225 P. 783, describing the term "unprofessional conduct" as that which violates the rules or ethical code of the profession, or such conduct which is unbecoming a member of the profession in good standing, such as violation of a teacher's oath as prescribed by the School Code, and said the calling (of a teacher) is so intimate, its duty so delicate, the things in which a teacher might prove unworthy or would fail are so numerous that they are incapable of enumeration in any legislative enactment; that the teacher is entrusted with the custody of children and their high preparation for useful lives. Her habits, speech, good name, cleanliness, and the wisdom and propriety of her unofficial utterances and associations are all involved; that no one has a natural or inherent right to teach in a public school and the legislature, for reasons of public policy, may make the right to teach in any particular school subject to a broad discretion in the school authorities to dismiss for causes which come within certain designations. If a teacher may be dismissed for unprofessional conduct as in the Swan case, for disloyal utterances outside of classrooms respecting her employer, than, *a fortiori*, she may be dismissed for disloyal utterances against her country. We conclude that a ground for dismissal in this respect was sufficiently sustained.

It is then contended that no sufficient grounds were pleaded or shown which would constitute unprofessional, immoral or dishonest conduct by her at the time she appeared before the Board of Trustees. In this connection it is argued that there is no pleading indicating that her testimony relating to the pamphlet was material, and the subject of inquiry was beyond the jurisdiction of the Board and not within the authorized scope of inquiry under Section 12604 of the Education Code.

[7] Section 12605 of the Education Code makes it the duty of the employee of a school district who is ordered before the governing board, to answer, under oath, questions relating to any of the matters specified in section 12604, supra. The inquiry relating to the distribution of the pamphlet was relevant and material, either to show personal advocacy of the forceful or violent overthrow of the government, Sec. 12604(a), or present knowing membership in the Communist Party, Sec. 12604(e). Usually, membership or allegiance to the party can only be established by circumstantial evidence. Congress, in enacting the Communist Control Act of 1954, P.L. 637, 83rd Cong., 2d Sess., 50 U.S.C.A. § 841 et seq. listed in Section 5 thereof various acts or conduct which a jury may consider in "determining membership or participation in the Communist Party" and among them are:

> "(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;
>
> "(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization * * *."

In Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 385, 96 L.Ed. 517, it was said:

> "That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty."

[8, 9] It is now settled that a state or its agencies may constitutionally require disclosures of facts relating to any employee's loyalty as a condition of continued public employment. Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267; Adler v. Board of Education, supra. Appellant's knowing false denial before the respondent board of seeing the pamphlets described and her false denial of participating in the distribution of them, if established as true, may be classified as being dishonest, hostile to the welfare of the general public, and contrary to good morals. Orloff v. Los Angeles Turf Club, 36 Cal.2d 734, 740, 227 P.2d 449; Midway School District of Kern County v. Griffeath, 29 Cal.2d 13, 18, 172 P.2d 857; Board of Education of City of Los Angeles v. Swan, supra.

The last claim is that appellant had a right to refuse to testify before the House Un-American Activities Committee relating to her claimed membership in the Communist Party prior to September 10, 1948, the date referred to in the Dilworth Act (Stats.1953, chap. 1632, p. 3341). Education Code, § 12600 et seq.

It was held in Pockman v. Leonard, 39 Cal.2d 676, 249 P.2d 267 (quoting from the syllabus):

> "Portion of oath prescribed by Gov. Code, § 3103, requiring affiant to list any organizations, to which he has belonged in the five years preceding taking of the oath, that advocated overthrow of the government by force or violence or other unlawful means, calls for a statement of past loyalty which is relevant to present and future loyalty, and is not inconsistent with the spirit or intent of the oath prescribed by" the Constitution.

Assuming appellant had a right to refuse to answer the question insofar as it related to any membership in the party prior to that date, there were other questions which she refused to answer which bore directly on the question as to her present or past knowing membership in the Communist Party since that time. She was asked if she was acquainted with Leroy Herndon. She replied: "I will not answer any questions pertaining to my former husband or pertaining to the time I was married to him. I therefore refuse to answer any question for the reasons previously stated". (Cannot be compelled to give evidence against myself.) A statement was then made to her: "Mr. Herndon testified under oath before this committee, during the recent hearings, he was a member of the Communist Party and a member of a teachers' unit in Los Angeles County. During the course of his testimony he stated that Matilda Lewis was also a member of this group. Is Mr. Herndon's testimony correct?" She declined to answer for the reasons stated. She was then asked if she was acquainted with Anne Kinney and she refused to answer on the same grounds. The statement was made that "She (Anne Kinney) testified in an executive statement on December 22, 1952, that she was also a member of the Communist Party and also assigned to the teachers' unit, the same group as Mr. Herndon, and she has testified under oath you were also a member of that group. Is that correct?" She declined to answer this for the reasons stated. She also declined, for like reasons, to answer as to whether or not she was a member of the Communist Party between the years 1935 and 1940. Whether she knew or had been associated with these individuals since September 10, 1948, was material, in reference to the inquiry pertaining to her membership therein since that date, as a circumstance bearing directly on her present loyalty.

It was held in Pockman v. Leonard, 39 Cal.2d 676 (syllabus 13), 249 P.2d 267, that:

> "A person's associates, as well as his conduct, are relevant factors in determining fitness and loyalty, and the state, under its police power, may properly limit a person's freedom of choice between membership in organizations advocating overthrow of the government by force and employment in the school system"; and in syllabus 16:

> "Assuming that a permanent employee of a state college, with teacher's tenure, has a contract right to his position, an implied condition of the agreement is that he will be loyal to the government and that he will not advocate its overthrow by force, and the state under its police power may, as a means of implementing the implied condition, require such employee to make a declaration of loyalty and furnish relevant information."

[10] Since appellant has chosen not to answer and deny the facts alleged in the charges set forth in the complaint, but elects to stand upon her demurrer, we must, under the law, in construing the complaint and demurrer thereto, assume, as true and admitted, all facts well pleaded which are legally provable. (21 Cal.Jur. p. 96, sec.

62.) We conclude that the demurrer was properly overruled.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

Hearing denied; CARTER, J., dissenting.

146 Cal.App.2d 290

In re ESTATE of Charles W. NEUMEISTER, Deceased.

Herbert BROWNELL, Jr., Attorney General of the United States, Contestant and Appellant,

v.

George SEEGER, Konrad Neumeister, Gustav Neumeister, Minna Johanna Wollmar, Beneficiaries and Respondents,

Security-First National Bank of Los Angeles, Petitioner and Respondent.

Civ. 21686.

District Court of Appeal, Second District, Division 3, California.

Nov. 27, 1956.

Rehearing Denied Dec. 26, 1956.

Hearing Denied Jan. 23, 1957.

Proceeding on petition of testamentary trustee for instructions concerning trust. The Superior Court of Los Angeles County, Roy L. Herndon, J., entered decree, and Attorney General of the United States appealed. The District Court of Appeal, Vallée, J., held that where decree of distribution provided that if at any time within term of testamentary trust for benefit of primary beneficiaries, second beneficiaries shall not be prohibited by law from becoming beneficiaries, trustee shall distribute specified amounts to each of such persons, and all conditions imposed by testator on gift to secondary beneficiaries had been fulfilled, Attorney General, as successor to their interests as Alien Property Custodian, was entitled to distribution of trust assets; and fact that interests did not become distributable until after termination of war did not present bar to payment to Attorney General.

Order reversed with directions.

1. War and National Defense 🔑12

Under 1946 decree of distribution establishing testamentary trust for maximum period of ten years for benefit of United States nationals subject to change of beneficiaries in favor of German Nationals whenever latter were not prohibited by law from becoming beneficiaries, interests of secondary beneficiaries were from date of death of testator contingent property interests, which vested in Alien Property Custodian at time he issued his vesting order. Executive Order No. 9788, 50 U.S.C.A.Appendix, § 6 note; Trading With the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c).

2. Trusts 🔑271½

Where 1946 order adjudicated that Alien Property Custodian had succeeded under Vesting Order to interests of German Nationals as secondary beneficiaries, and had become owner of funds distributable to them, thereby causing failure on part of secondary beneficiaries to be legally eligible to receive personally distribution under testamentary trust, order became final and was res judicata with respect to those questions in 1954 proceeding by trustee for instructions concerning trust. Executive Order No. 9788, 50 U.S.C.A.Appendix, § 6 note; Trading With the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c).

3. War and National Defense 🔑12

The Trading with the Enemy Act must be given a liberal construction. Executive Order No. 9788, 50 U.S.C.A.Appendix, § 6 note; Trading With the Enemy Act, §§ 5 (b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c).

4. Executors and Administrators 🔑315(5)

Under decree of distribution providing that if at any time within term of testamentary trust for benefit of primary beneficiaries, secondary beneficiaries shall not be prohibited by law from becoming beneficiaries, trustee shall distribute specified amounts to each of such persons, secondary beneficiaries had contingent interest in trust estate, though enjoyment of gift was postponed. Executive Order No. 9788, 50 U.S.C.A.Appendix, § 6 note; Trading With the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c).

5. War and National Defense ⚷12

Where decree of distribution provided that if at any time within term of testamentary trust for benefit of primary beneficiaries, secondary beneficiaries shall not be prohibited by law from becoming beneficiaries, trustee shall distribute specified amounts to each of such persons, and all conditions imposed by testator on gift to secondary beneficiaries had been fulfilled, United States Attorney General, as successor to their interest as Alien Property Custodian, was entitled to distribution of trust assets, and fact that interests did not become distributable until after termination of war did not present bar to payment to Attorney General. Executive Order No. 9788, 50 U.S.C.A.Appendix, § 6 note; Trading With the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c).

Dallas S. Townsend, Asst. Atty. Gen., of the United States, Director, Office of Alien Property, Laughlin E. Waters, U. S. Atty., Arline Martin, Asst. U. S. Atty., Southern Dist. of California, Los Angeles, Mary Eschweiler, Atty., Office of Alien Property, San Francisco, James D. Hill, George B. Searls and Irwin A. Seibel, Attys., Dept. of Justice, Washington, D. C., for appellant.

H. A. Gebhardt, Los Angeles, for respondents.

VALLÉE, Justice.

Appeal by the Attorney General of the United States from parts of an order directing the trustees of a testamentary trust with respect to the disposition of the balance of the trust funds.

Charles W. Neumeister died testate November 17, 1944, a resident of the County of Los Angeles. On January 24, 1946, by decree of distribution, half of the estate was distributed to named legatees, and half to Security-First National Bank in trust with directions in subparagraph (a) to pay $300 every year to named persons (United States nationals) designated as "primary beneficiaries." The decree provided that the trust should continue as to them for the period of their lives and the lives of their descendants and heirs living at the death of the testator, or a period of ten years from the death of the testator, whichever period is the shorter, except as it might otherwise be terminated as provided in the decree.

In subparagraph (b) the decree provided that if at any time within the term of the trust for the benefit of the "primary beneficiaries" persons named as "secondary beneficiaries" (German nationals) "shall not be prohibited by the laws of the United States of America and the laws of the State of California from becoming beneficiaries under said will and under the trust intended to be created herein," the trustee was directed to pay each of them $225 quarterly, or $75 monthly. The trustee was empowered to withhold payment to a "secondary beneficiary" if it appeared to its satisfaction that because of political or other conditions in the country in which such beneficiary resided he would not have the benefit, use or control of the funds; and if and when the conditions had been removed to pay the amount withheld and resume payment of the installments. It was provided that the provision for withholding should not continue beyond the time elsewhere specified as fixing the duration of the trust. The trustee was directed to continue distribution to the "secondary beneficiaries" until each had received an equal amount and the trust estate had been completely exhausted; provided, however, that in no event should the trust continue longer than 20 years from the date of death of the testator, nor beyond the continuance of the lives of the "primary" and "secondary beneficiaries" and their descendants or heirs living at the testator's death, whichever period is shorter.

The decree further provided that when the "secondary beneficiaries" should be legally eligible to receive distribution of trust funds, all payments to the "primary beneficiaries" should cease and:

> "(h) If the trust as to the secondary beneficiaries shall continue for the period of twenty years from the date of decedent's death, then, upon the expiration of said period of twenty years from the date of decedent's death the trust shall thereupon terminate and the trust estate then remaining shall be distributed, paid and delivered to the said secondary beneficiaries, to the exclusion of any of the primary beneficiaries, unless all of said secondary beneficiaries shall at that time be dead, in which event the trust estate then remaining shall be distributed, paid and delivered to said primary beneficiaries."

The material parts of the decree of distribution are set out in the margin.[1]

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[1] "(a) the trustee shall, as of the date of the decree of distribution of said estate, and every successive year thereafter, distribute and pay to the persons hereinafter designated as 'primary beneficiaries' the sum of $300.00 to be divided equally share and share alike between them. The persons designated as such primary beneficiaries are the following to-wit: Barbara Siebrecht, sister, John Vollmer, brother-in-law, Johanna Vollmer, sister-in-law, and the survivors or survivor of them, and in case all three of them shall die, then the three children of said Barbara Siebrecht—Mamie Farrell, Tessy Siebrecht, and Henry Siebrecht, equally, share and share alike, and their lawful issue per stirpes of any of them deceased. This trust as to them shall continue for the period during the continuance of the lives of said primary beneficiaries and their descendants and heirs living at the time of decedent's death or a period of ten years from the date of decedent's death, whichever period is the shorter, except as it may be otherwise terminated as hereinafter provided.

"(b) If at any time within the term of the aforesaid trust for the benefit of said primary beneficiaries, the persons hereinafter designated as 'secondary beneficiaries' shall not be prohibited by the laws of the United States of America and the laws of the State of California from becoming beneficiaries under said will and under the trust intended to be created herein, then from the time that such prohibition no longer exists the trustee shall distribute and pay out of the trust estate then remaining, in its discretion either in quarter annual installments in the sum of $225.00 or in monthly installments of the sum of $75.00, to each of the persons hereinafter designated as secondary beneficiaries or in equal shares to the lawful children and grandchildren per stirpes from time to time living of any of said secondary beneficiaries who have heretofore died or who may die either during decedent's lifetime or thereafter, the remittance of said sums to be made by the trustee in such medium of exchange and in such manner and form as in the discretion of the trustee may be deemed for the best interests of said secondary beneficiaries individually and collectively.

"(c) If at any time during the continuance of the trust it shall appear to the satisfaction of the trustee that due to political or other conditions existing in Germany or any other country in which any of said secondary beneficiaries may be resident, any of such beneficiaries would not have the benefit, use or control of funds distributed from this trust to him or her, in such event, notwithstanding any other provisions of this trust, during any period when such conditions shall exist, all distribution of funds from this trust as to such particular beneficiary or beneficiaries shall be withheld and shall be retained in the trust. If and when the conditions above referred to shall no longer exist or have been removed, distribution to such beneficiary or beneficiaries as to whom distribution of funds has been withheld, shall be made of all sums which, under the terms hereof shall have become payable up to that time, and the trustee shall thereafter resume distribution of trust funds to such secondary beneficiary or beneficiaries entitled thereto according to the terms of the trust. If and when any of said secondary beneficiaries shall become a resident of the United States of America or some other country where the conditions above referred to do not exist, then as to such beneficiary or beneficiaries, distribution shall be made by the

On January 31, 1946 the Alien Property Custodian of the United States executed Vesting Order No. 5769 whereby he vested in himself "all right, title, interest and claim of any kind or character whatsoever" of the secondary beneficiaries "and each of them, in and to the Trust created under the Will" of the deceased.[2]

On May 8, 1946 the trustee filed a petition requesting the court to "construe the last Will and Testament of said decedent, and the Decree of Distribution of this Court and instruct your Trustee whether to pay said trust money for the secondary beneficiaries over to the Alien Property Custodian under one interpretation of the provisions of the Will of the decedent, or whether such trust moneys should be paid by the Trustee herein to the primary beneficiaries in the United States, under the provisions of said trust, on the grounds that the rights of the secondary beneficiaries are dependent on their being in position to actually receive payment and if they are not, then to adopt the alternate course in making payments to the primary beneficiaries herein,

trustee of all sums which, under the terms hereof, shall have become payable to such beneficiary or beneficiaries up to the time of such change of residence, and the trustee shall thereafter resume distribution of trust funds to such secondary beneficiary or beneficiaries entitled thereto according to the terms of the trust.

"(d) The foregoing provisions for withholding distribution shall not continue beyond the time or event elsewhere herein specified as fixing the maximum duration of this trust.

"(e) The trustee shall continue distribution of trust funds in said installments to said secondary beneficiaries until each of said secondary beneficiaries shall have received an equal amount and said trust estate shall be completely exhausted; provided, however that in no event shall said trust continue for a period longer than twenty years from the date of decedent's death, nor beyond the period of the continuance of the lives of the primary beneficiaries and secondary beneficiaries herein named, and of their descendants and heirs living at the time of decedent's death, whichever period is the shorter.

"(f) If and when the contingencies mentioned sub-paragraph (b) of this trust shall occur, and said named secondary beneficiaries shall be legally eligible to receive distribution of trust funds, all payments of trust funds to said primary beneficiaries shall cease, notwithstanding any hereinabove provisions to the contrary, except as hereinafter provided.

"(g) In case said trust for the benefit of said primary beneficiaries shall continue for the full period of ten years from the date of decedent's death, and upon the expiration of said period the contingencies mentioned in sub-paragraph (b) contained in this Article X. of said will have not occurred and said named secondary beneficiaries are not legally eligible to receive distribution of trust funds, then the trust as to all beneficiaries shall terminate and the trust estate then remaining shall be distributed, paid and delivered to the said primary beneficiaries, and to any of the secondary beneficiaries who at said time may have become residents of the United States of America or of any country the residents whereof are legally eligible to distribution of trust funds under the laws then existing of the United States of America and of the State of California, and if none of the said secondary beneficiaries at said time come within said category or description only the said primary beneficiaries shall receive the trust estate then remaining.

"(h) If the trust as to the secondary beneficiaries shall continue for the period of twenty years from the date of decedent's death, then, upon the expiration of said period of twenty years from the date of decedent's death the trust shall thereupon terminate and the trust estate then remaining shall be distributed, paid and delivered to the said secondary beneficiaries, to the exclusion of any of the primary beneficiaries, unless all of said secondary beneficiaries shall at that time be dead, in which event the trust estate then remaining shall be distributed, paid and delivered to said primary beneficiaries."

[2] By Executive Order No. 9788, 50 U.S.C.A.Appendix, § 6 note all property and interests vested in, transferred to, or seized by the Alien Property Custodian, and all authority, rights, privileges, powers, duties and functions vested in said Custodian, or in the Office of Alien Property Custodian, were transferred to the Attorney General effective as of October 15, 1946.

all of whom are in the United States." On December 20, 1946 the court instructed the trustee as follows:

> "That due to the fact that the Alien Property Custodian issued its vesting order No. 5769 thereby vesting all the right, title and interest of the four (4) secondary beneficiaries, being residents and nationals of a designated enemy country—Germany—and that the Alien Property Custodian by reason of the Vesting Order stands in place of the said secondary beneficiaries, and becomes the owner of said funds, thereby causing a failure on the part of said secondary beneficiaries to be legally eligible to personally receive distribution of said trust funds amounting to the sum of Eight Thousand Four Hundred Ninety-eight Dollars and eighty-seven cents ($8,498.87[)], distribution and payment of the amounts provided for in sub-Paragraph (a) of the Decree of Distribution shall be made to the primary beneficiaries, share and share alike, being the beneficiaries in the United States."

The trustee then began paying the "primary beneficiaries" and continued to do so through November 1954.

On December 2, 1954 the trustee filed a petition for instructions, praying "[t]hat the Court declare said Trust Estate terminated as of November 17, 1954," the date when the 10-year period prescribed in the decree for the payment to the "primary beneficiaries" expired. The Attorney General appeared in response to the petition and an appearance was made on behalf of the German "secondary beneficiaries" in their individual capacities. Evidence was introduced establishing the existence of reciprocity under German law as of November 1954. The court found: 1. It was the intent of the testator that the "secondary beneficiaries" take nothing unless they shall be legally eligible to receive distribution of the trust funds and personally receive distribution. 2. On December 26, 1946 said "secondary beneficiaries" were not eligible to personally receive distribution of the trust funds, and the United States Government took nothing by its Vesting Order No. 5769 issued January 31, 1946. 3. On November 7, 1954 (10 years after the death of the decedent) the "secondary beneficiaries" were entitled to personally receive the benefit of the trust funds. The court then ordered: 1. The "secondary beneficiaries" are entitled to receive the net distributable balance of the funds on hand with the trustee. 2. The payments shall be made to the "secondary beneficiaries" pursuant to the will, the decree, and this order; the first payments to be made as of February 17, 1955 and subsequent payments quarterly thereafter. 3. This trust does not terminate at this time. Since payments are to be paid to the "secondary beneficiaries," the trust is to continue until the funds are exhausted, but not later than November 17, 1964. 4. The Attorney General, as successor to the Alien Property Custodian, is not entitled to any of the payments from the trust which commence as to the "secondary beneficiaries" on February 17, 1955. The Attorney General appeals from the parts of the order to which reference has been made.

Paragraphs (a) and (b) established a trust for a maximum period of 10 years for the benefit of the United States nationals subject to change of beneficiaries in favor of the German nationals whenever the latter were not "prohibited by the laws of the United States of America and the laws of the State of California from becoming beneficiaries under" the trust. At such time as no prohibition was thus placed on the "secondary beneficiaries," the trust assets became payable to them. It is agreed that in November 1954 neither state nor federal law imposed any prohibition on the German nationals "from becoming beneficiaries under" the trust. It is also agreed that the fact the "secondary beneficiaries" were enemy nationals at the time of the death of the testator did not deprive them of the right to take under the will.

[1] The question is whether the Alien Property Custodian took anything by his Vesting Order. The answer depends on whether under the decree of distribution

the "secondary beneficiaries" took nothing unless they should be legally eligible to receive distribution of the trust fund at the date of death of the testator. The Attorney General says the interests of the "secondary beneficiaries" were contingent interests. The "secondary beneficiaries" say they had nothing until they were eligible to distribution. The trial judge was of the view "that the vesting of any rights in the secondary beneficiaries was conditional and was subject to a condition-precedent—the condition-precedent being the existence of a legal situation in which the secondary beneficiaries could have and receive the benefits of the property involved," but that the Attorney General could not reach such interests until the condition was fulfilled. We have concluded the interests of the "secondary beneficiaries" were from the date of death of the testator property interests which vested in the Alien Property Custodian at the time of the Vesting Order.

[2] First, the order of December 20, 1946 adjudicated that the Alien Property Custodian had succeeded under his Vesting Order to the interests of the "secondary beneficiaries" and had become "the owner of said funds, thereby causing a failure on the part of said secondary beneficiaries to be legally eligible to personally receive distribution." That order became final and is res judicata with respect to those questions.

In re Estate of Schneider, 140 Cal.App.2d 710, 296 P.2d 45, 47, is conclusive that from the death of the testator the "secondary beneficiaries" had contingent property interests in the trust and that such interests vested in the Alien Property Custodian by his Vesting Order. In Schneider the gift was to German nationals "If * * * alien residents of Germany shall become legally entitled under the laws of the United States and the State of California to take and inherit under my will * * *." In an opinion authored by Mr. Presiding Justice Moore it is stated, 140 Cal.App.2d at page 717, 296 P.2d at page 50:

> "Immediately, upon the death of Mrs. Schneider all legacies bequeathed by her, including the beneficial interests in the trust which had failed, vested in the designated donees, Prob.Code, secs. 300, 28; [In re] Estate of Laurence, 84 Cal.App.2d 500, 504, 191 P.2d 109; Burns v. McGraw, 75 Cal.App.2d 481, 488, 171 P.2d 148, subject only to the possession of the executrix for the purpose of administration. Prob.Code, sec. 142; Civil Code, sec. 694. However, their delayed possession did not affect the fact that each legatee and each beneficiary was at decedent's death, vested with right of ownership of his bequest or beneficial interest. Such vesting occurred in 1945 when the testatrix departed this life. Hence, at the time, in 1946, when the Alien Property Custodian made the vesting order vesting ownership thereof in himself these beneficial interests were then the properties of the several persons named in (A) 3 of Eleventh and the Custodian was authorized by the Trading with the Enemy Act to seize them.
>
> "[140 Cal.App.2d at page 718, 296 P.2d at page 51.] Conceding that the interests thus created were contingent, they were nevertheless property interests capable of transfer or of inheritance. Civ.Code, secs. 669, 688, 693, 699; Sinclair v. Crabtree, 211 Cal. 524, 528, 296 P. 79. Since they were interests capable of transfer, they became property of the German beneficiaries promptly on the death of Mrs. Schneider in 1945.
>
> "The conclusion is, therefore, unavoidable that at the time of the vesting order, in 1946, the estate of each legatee and the beneficial interest of each beneficiary of the trust was subject to seizure under the Trading with the Enemy Act, as amended."

Also see Matter of Bendheim's Estate, 124 Misc. 424, 209 N.Y.S. 141, affirmed 214 App. Div. 716, 209 N.Y.S. 794; Matter of Littman's Estate, 176 Misc. 679, 28 N.Y.S.2d 458; Matter of Carrington's Estate, 195 Misc. 442, 90 N.Y.S.2d 757; Matter of Sandhagen's Estate, 200 Misc. 847, 107 N.Y.S.2d 73; In re Estate of Kuhirt, Sur., 132

N.Y.S.2d 97; Central Hanover Bank & Trust Co. v. Markham, D.C., 68 F.Supp. 829, 830.

[3] The Trading with the Enemy Act must be given a liberal construction. Cities Service Co. v. McGrath, 342 U.S. 330, 333–334, 72 S.Ct. 334, 96 L.Ed. 359; United States v. Chemical Foundation, 272 U.S. 1, 9–10, 47 S.Ct. 1, 71 L.Ed. 131. The seizure power conferred by sections 5(b) and 7(c) of the Trading with the Enemy Act as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c), is all-embracing in its terms. The power extends to "any property or interest" of a foreign national, 50 U.S.C.A.Appendix, § 5(b) including, but not limited to, "choses in action and rights and claims of every character and description." 50 U.S.C.A.Appendix, § 7(c). The language of these provisions is "most comprehensive." Application of Miller, 2d Cir., 288 F. 760, 766. The terms "are so general and all-inclusive that" the Act "permits the seizure under proper circumstances of almost any character of interest in property. Any other ruling * * * would be to frustrate the purpose of the Act." Central Hanover Bank & Trust Co. v. Markham, D.C., 68 F. Supp. 829, 830.

[4, 5] The wording of the decree of distribution at bar is: "If at any time within the term of the aforesaid trust for the benefit of said primary beneficiaries, the persons hereinafter designated as 'secondary beneficiaries' shall not be prohibited by the laws of the United States of America and the laws of the State of California from becoming beneficiaries under said will and under the trust intended to be created herein, then from the time that such prohibition no longer exists the trustees shall distribute and pay out of the trust estate then remaining" specified amounts to each of such persons. The "secondary beneficiaries" thus had contingent interests in the trust estate. The wording quoted merely postponed enjoyment of a gift already made. In re Heye's Will, 195 Misc. 1026, 91 N.Y.S.2d 266; In re Estate of Reiner, Sur., 44 N.Y.S. 2d 282. Cf. In re Estate of Schaefer, Sur., 121 N.Y.S.2d 233. All conditions imposed by the testator on the gift to the "secondary beneficiaries" have been fulfilled and the Attorney General, as successor to their interest, is now entitled to distribution of the trust assets. Sinclair v. Crabtree, 211 Cal. 524, 296 P. 79; In re Estate of Schneider, 140 Cal.App.2d 710, 296 P.2d 45. The fact that the interests did not become distributable until after termination of the war presents no bar to payment to the Attorney General. Application of Miller, 288 F. 760, 768; Hess v. Miller, D.C., 6 F.2d 388; Matter of Bendheim, 124 Misc. 424, 209 N.Y.S. 141, affirmed 214 App.Div. 716, 209 N.Y.S. 794; In re Bendit's Will, 214 App.Div. 446, 212 N.Y.S. 526; Todeva v. Oliver Iron Mining Co., 232 Minn. 422, 45 N.W.2d 782, 789.

The parts of the order appealed from are reversed with directions to the superior court to make findings and render an order consonant with this opinion.

SHINN, P. J., and PARKER WOOD, J., concur.

146 Cal.App.2d 485

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Patrick Lee MAHONEY, Robert Edward Creswell and Stuart Orville Singer, Defendants.

Patrick Lee Mahoney and Robert Edward Creswell, Defendants and Appellants.

Cr. 5642.

District Court of Appeal, Second District, Division 1, California.

Dec. 3, 1956.

Hearing Denied Jan. 2, 1957.

Defendants were charged with robbery while armed with a deadly weapon. Judgments of conviction in Superior Court of Los Angeles County, Beach Vasey, J., and from the judgments and order denying a motion for a new trial certain defendants appealed. The District Court of Appeal, White, P. J., held that the evidence established that the confession of defendants was made freely and voluntarily so as to be admissible; that defendants were not entitled to complain of failure of the court to instruct as to the voluntary nature of the confession, and that the evidence sustained the conviction.

Judgment affirmed.

1. Criminal Law 🔑531(3)

In robbery prosecution, evidence did not justify exclusion of defendants' confession on ground that defendants were not in physical or mental condition to make a free and voluntary confession, where there was no force or violence used on the defendants and no promises of immunity from punishment and the defendants spoke voluntarily. U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 1, § 13.

2. Criminal Law 🔑736(2)

While court passes preliminarily on the question of the voluntary nature of the confession and its admissibility, and although the court may determine that confession is voluntary and admissible, its ruling is not binding upon the jury, and it is for the jury to determine whether the confession is freely and voluntarily made.

3. Criminal Law 🔑1038(3)

In robbery prosecution, failure of the court to submit to jury under proper instructions the question whether under all the circumstances the confessions of defendants were made freely and voluntarily was not ground for complaint by defendants, where they did not request any instructions on the subject, and especially where jury was instructed that they were the judges of evidence and of credibility of the witnesses and that they were to consider all the circumstances connected with making of statements.

4. Robbery 🔑24(3)

In prosecution for robbery while armed with a deadly weapon, evidence of the identity of the defendants was sufficient to sustain conviction.

5. Criminal Law 🔑566

In order to sustain a conviction it is not necessary that identification of accused as perpetrator of the crime be made positively or in a manner free from all inconsistencies.

6. Criminal Law 🔑741(2)

Function of jury is to pass upon the strength or weaknesses of the identification of defendants as perpetrators of the crime and the uncertainties of the witnesses in giving their testimony.

7. Criminal Law 🔑339, 741(2)

In prosecution for robbery while armed with a deadly weapon, evidence admitted as to identification of defendants was competent and weight thereof was for the jury.

◆

Morris Lavine, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendants Mahoney and Creswell were charged in Count I with the crime of robbery, committed upon William Heald; Count II charged them with robbery committed upon Robert Perry; and Count III charged robbery committed upon Earl Cutburth. It was further alleged that at the time of the commission of each robbery so charged, the named defendants were armed with a deadly weapon. In Count IV defendants Creswell and Singer were accused of the crime of robbery committed upon Katherine and Clyde Yount, and that at such time they were armed with a deadly weapon. It was further charged that defendant Mahoney had been previously convicted of the crime of robbery, a felony. The motion of defendants Mahoney and Creswell to dismiss the information under Penal Code, § 995 was denied, and defendant Singer's motion for a separate trial was granted, so that this appeal concerns only defendants

Mahoney and Creswell. The former pleaded not guilty as to Counts I, II, and III, and the latter pleaded not guilty as to Counts I, II, III, and IV. Each denied the allegation that he was armed with a deadly weapon as set forth in the information. Prior to commencement of the trial, defendant Mahoney admitted the prior felony conviction alleged against him.

Trial by jury resulted in verdicts finding defendant Mahoney guilty as charged in Counts I, II, and III, and defendant Creswell guilty on Counts I, II, III, and IV. The jury found that each offense was robbery of the first degree, and that both defendants were armed with a deadly weapon at the time of the commission of such offenses. The motion of defendant Mahoney for a new trial was denied and both defendants sentenced to state prison. They prosecute this appeal from the judgment of conviction, while defendant Mahoney also appeals from the order denying his motion for a new trial.

In presenting the factual background surrounding this prosecution no mention is required of Count IV, because at the trial defendant Creswell admitted the offense therein charged and does not seek a reversal of the judgment on that count. Defendant Mahoney was not accused of the crime charged in Count IV.

As to the remaining Counts I, II, and III, the record reflects that on June 21, 1955, Mr. Heald (the victim in Count I) was on duty as a clerk in Thompson's Liquor and Sporting Goods Store at 1182 Wardlow Road, Signal Hill, Los Angeles County. That evening about 10 o'clock, while two customers, Robert Perry (the victim in Count II) and Earl Cutburth (the victim in Count III), were in the store, Mr. Heald walked to the back room of the store where he saw a man "duck" down behind the cases. Mr. Heald asked him what he was doing there. Another man, who had a woman's stocking over his face and chin, and whom Mr. Heald believed to be the defendant Creswell, as his build and size resembled the man's, stepped around the corner carrying a lever action rifle which was cocked and ready to fire. He said, "This is a hold-up. Don't make any noise and don't move." Mr. Heald turned and started to walk away. The man said, "Don't go any further, that is far enough." Mr. Heald returned. The man who had "ducked" behind the cases came out, walked Mr. Heald between two cases, told him to lie face down, and taped his wrists behind his back.

The man with the rifle went to the front of the store and said to the two customers there, "You two guys in the back room." They got up and went into the back room where the man with the rifle, who looked like the defendant Creswell to Mr. Cutburth, told them to go into the same aisle that Mr. Heald was in, lie down, and put their hands behind their backs. They did so. The man tied Mr. Cutburth's hands, but did not tie Mr. Perry's.

One of the men took from Mr. Heald his wallet containing a dollar bill; took from Mr. Perry an Englin watch and his wallet containing a dollar, a driver's license, Social Security Card and Navy discharge card; and took from Mr. Cutburth his wrist watch and wallet containing a dollar. After they left, Mr. Perry cut the tape off the wrists of the other two.

Mr. Heald immediately discovered that there were missing from the store about 38 hand guns of different types, money from the cash register, a pair of binoculars, a double barreled Stevens shotgun, and assorted ammunition. An inventory was made by Mr. Thompson, the owner of the store, and a list of the descriptions and serial numbers of the missing articles was made. Included in the list was a Colt Cobra .38 Special No. 25367; a 380 Colt automatic No. 58487; a Smith and Wesson .38 Special No. 178652; a 3222 Smith and Wesson No. 2310; and a Stevens shotgun, 12 gauge.

Patrolman Overton, of the Signal Hill Police Department, arrived at the store in answer to a report of a robbery. There he found a lady's silk stocking and a silk handkerchief behind the counter from which the guns were missing.

About 7:30 a. m. on June 22, 1955, Jose Sanchez Acosta, a uniformed police officer of the City of Tijuana, Mexico, was on duty. He heard four or five shots, and started to go in the direction of the shooting. As he went, he heard more shots. When he got to the scene of the shooting he saw a uniformed policeman and a uniformed traffic officer lying wounded in the street, a man lying in the gutter, and another lying on the sidewalk shooting at other officers who were shooting at him. He saw two guns in the possession of the two men. He also saw a 1946 Pontiac about two meters from the man who was on the sidewalk shooting, and about a meter and a half from the one on the street. A fellow officer picked up the guns. Officer Acosta assisted in putting the man who had been lying on the sidewalk into the ambulance which arrived. He was unconscious.

Officer Acosta and his companion took the guns, which the latter had picked up, to the police station. His companion opened the gun which had been taken from the man on the sidewalk, and he said that there were no more shells in it.

Ignacio Perez Lara, a state police officer of Baja California, arrived at the scene of the shooting. He saw the two wounded Mexican officers there, and also two Americans. He took the officers to the hospital in his car. Five or ten minutes after he reached the scene of the shooting, he saw at the hospital, the two men who had been shot, and they were the defendants.

Lieutenant Commander Blanco of the United States Navy, liaison officer for military between Mexico and the United States to investigate matters that affected service personnel, went, on June 22, to the scene of the shooting in Tijuana and saw the defendants there. He saw them put into the ambulance, and followed the ambulance to the hospital.

At the hospital they were taken to a ward, where they were separated by an archway. Defendant Mahoney was injured and bleeding from his arm and hips, and he was unconscious. Defendant Creswell had been shot in the shoulder and was bleeding from several other places. He was lying on a wheeled table. He had not, as far as Commander Blanco knew, had any sedative or anything of that type administered.

About five minutes after defendant Creswell arrived at the hospital, Commander Blanco had a conversation with him. He was in pain, but he answered the commander and the commander could understand what he was saying. His statements were freely and voluntarily made. Commander Blanco called him "Perry." He had in his possession an I.D. card which the doctor had given him with "Robert Perry" on it. Creswell said, "My name isn't Perry. My name is Creswell." "Get me a doctor", he added. Commander Blanco said, "O.K., just as soon as they get through with the other two patients they'll wheel you into the operating room." Then he said to Creswell, "Now I want to know where you got them guns, where you fellows got them guns." Creswell asked him for a doctor the second time, and the commander said, "They'll take care of you; just wait a while until they get through, but I want to know where you fellows got them guns." Defendant Creswell finally told him, "We held up a sporting goods store in Long Beach." That was the end of the conversation.

About four hours after the shooting, Lieutenant Lara and a superior officer opened the back of the 1946 Pontiac with a crowbar and found therein a box containing 15 guns. An official list of the guns was made by the superior officer.

Chief of Police Murphy and Sergeant Morrow, of the City of Signal Hill, went to Tijuana on June 22, 1955. On June 23 they entered a room in which the defendants were. Mahoney was lying on a bed parallel to, about four feet from, and slightly higher than the cot on which Creswell lay, with his head in the same direction. Creswell had a bandage on his right shoulder and a blanket over him, and Sergeant Morrow could see a bandage on one of Mahoney's thumbs and a sheet over his body.

Sergeant Gayton of the San Diego Police Department who had accompanied them into the room, introduced them to Creswell. Chief Murphy, who bent down over Creswell, said that he was from Signal Hill and that he wanted to talk to him about the sporting goods store. He asked Creswell, "Was it just the two of you—just you two on the job, or someone else?" He replied, "Just us two." The chief asked, "Did you carry the gun, or did someone else?" and he replied, "I carried the gun." Chief Murphy asked, "Whose car did you use?" and he replied, "We used my car." The chief said, "The guns that were used down here in Mexico, were they some of the guns that came out of the Signal Hill job?" and he replied, "Yes, I had a 380 automatic and Pat had a snubnose." "I'm worried," he continued, "I don't know what's going to happen to those Mexican officers. Do you know how they are? Do you think they are going to die?" Chief Murphy said that he didn't know anything about the condition of the officers. "Who started it down here?" the chief asked, and Creswell replied, "We did." Chief Murphy asked, "The guns in the car, was that all of the guns that came out of the store in Signal Hill?" and he replied, "No, we left half of them there and just brought half of them down here." The chief asked where the ones were that they didn't bring down, and he replied that he wanted to talk to "him" or "my friend" or something like that. Creswell had spoken in a lower than normal voice, and slowly at times, but his responses had been coherent.

Chief Murphy then walked around defendant Mahoney's bed, introduced himself and Morrow, and said that they were from Signal Hill, and that they wanted to talk to him about the store up there. He asked Mahoney, "Were there more than two on the job up there, or just you two?" Mahoney replied, "Just us two." The chief asked, "Whose car did you use?" and he replied, "His car." Chief Murphy asked, "Who carried the gun?" and Mahoney closed his eyes without answering the question.

While Chief Murphy was in the room, defendant Creswell was being given something in the vein of his arm, and was given an injection during the conversation.

Sergeant Morrow also had conversations with the defendants after Chief Murphy talked to them. No force or violence or threats of any kind were used against either of them, and their statements were made freely and voluntarily. He asked Creswell how he felt, and he said, in the "low voice of a sick man," "I'm really in a jam this time." Sergeant Morrow asked him who carried the rifle in the hold-up in Signal Hill, and he said he carried it himself. Sergeant Morrow then talked to defendant Mahoney. He asked him if there was anyone else present in Signal Hill at the liquor store when it was held up besides him and Creswell, and Mahoney nodded toward Creswell and said, "Just us two." Sergeant Morrow asked Creswell if he wanted to tell them where the rest of the firearms were. He replied that he would have to discuss it with Mahoney first.

The officers left the room, and a few minutes later returned and talked to Creswell. Chief Murphy asked him about the guns again, and he said that they were in a car "parked in front of Pat's house."

After Chief Murphy and Sergeant Morrow left the hospital where Mahoney and Creswell were, they went to the police department in Tijuana and talked to persons there. They checked some firearms that were there and made a list of them. There were 15 guns at the police station, and two additional ones which had been taken into the possession of the Tijuana police. They had a list with them, and compared the numbers on the guns against that list. They were identical.

Later that evening they returned to Signal Hill, where they found a message that the father of defendant Creswell wanted Sergeant Morrow to call him. Sergeant Morrow called him and had a conversation with him over the telephone. He went out to Mr. Creswell, Sr.'s, house in Lakewood and had a further conversation with him.

Sergeant Morrow and Mr. Creswell, Sr., went to an address in Compton, where there was a 1940 Ford, that they had been informed belonged to the defendant Creswell, parked in front of defendant Mahoney's residence. At the request of Mr. Creswell, he got a key man to open the car. In the turtle back of the car there were 12 revolvers and pistols, a pair of binoculars and some small arms ammunition. Sergeant Morrow had a list of missing guns and binoculars which he checked against the contents of the Ford, and they "checked out."

On June 28 Sergeant Morrow and Chief Murphy went to the home of defendant Mahoney's father. The latter took them to the garage in the rear of his residence, went inside, reached up over on a shelf above the garage door, took down a shotgun and rifle, and gave them to the officers.

About 1:00 p. m. on November 2, Acting Chief of Police Heier of Signal Hill, had a conversation with Creswell at the Long Beach City Jail. The officer had with him at that time a silk stocking, a red handkerchief and a supply of adhesive tape. No force or violence or threats of any kind were used against Creswell; no promises of immunity or other reward were extended to him to get him to talk; and his statements were free and voluntary.

Chief Heier asked Creswell if he recalled the robbery at the Thompson's sporting goods store at Signal Hill at Wardlow and Orange. He said that he did. The chief asked him if he carried a 30-30 rifle in the back door and he said that he did. When the chief asked him who was with him, he said that it was another guy. "Was it Pat Mahoney?" asked the chief, and he replied, "I would rather not say."

Chief Heier asked, "What did you do with the rifle?" and Creswell answered, "I went into the store and pointed it at the owner." The chief asked him if he meant the owner or the clerk, and he answered, "Yes." When he asked him what he told the clerk, he replied, "I told him 'Come on back here.'" He said that he came back and they had him sit on the floor in the storeroom, and the other fellow taped his hands. He said he went out in the store again and told the two men there to come back, pointing the rifle at them also. He agreed, in answer to questions, that the two men were also made to sit on the floor and that their hands were taped; that the tape which the chief had, appeared to be similar to the tape used to tape the victims' hands; that he had seen the red silk handkerchief and stocking before, and that they had them over their forehead and eyes; that he wore the red handkerchief, and could see through it; and that the man with him had the stocking over his head. Creswell stated that they gathered up the guns and ammunition and went to Pat Mahoney's house where they divided them and put them into two wooden boxes; that they put the ones that they wanted to keep in a box and put it in the trunk compartment of his car and locked it, and put the ones they wanted to sell in Pat's car. He said that they then drove to Tijuana, Mexico, in Mahoney's car and spent the bigger part of the night in a bar until about 7:00 a. m.; that they went to a service station where Creswell took a "fix," and almost took too much because he passed out for three or four minutes; that they left the service station and contacted a cab driver to whom they offered a gun for sale; that the cab driver hailed a passing police car and told the officers something in Spanish; that the officers stopped the car, got out and approached them, and asked them if they had guns; that they replied, "Yes," and each drew his gun and started to fire at the officers.

On behalf of defendant Mahoney, his mother, Kathleen Mahoney, testified that on June 21 (the night of the robbery charged in Counts I, II, and III) the Mahoney family, consisting of defendant Mahoney, the witness, her little granddaughter age two and one-half years, and the husband and mother of the witness, were all at home. The alibi testimony was that defendant Mahoney was in his room typing and listening to his radio. During the evening his mother fixed him something to eat. Mr. Mahoney, Sr., retired about 9:30 p. m., and shortly thereafter, about 10:00 o'clock, Mrs. Mahoney went to Pat's door and said, "Good night, Pat." At the time, he was typing. About 10:30 Mrs. Mahoney's mother, Mrs. Blacker, pushed Pat's (defendant Mahoney) door back a little bit and said, "Good night, Pat." He answered, "Good night, Grandma." She went to bed. About 12:00 o'clock, Pat was talking to someone, and it awakened his mother. She started to go to the door of his room and tell him to be quiet and not awaken his father. She heard them talking, and believed that it was the defendant Creswell's voice.

The mothers of both defendants testified to seeing their sons on the morning of June 23 at the hospital in Tijuana, Mexico; that in the case of defendant Creswell his voice was weak. His mother talked with him for three or four minutes, saw him receive an injection with a needle; thereafter his replies to her questions were weaker, and finally he did not respond at all. Later in the morning his voice was weaker than normal, but she did not have any difficulty in communicating with him at that time.

Mrs. Mahoney visited her son about 9:00 a. m. on June 23. He was in a hospital room with defendant Creswell. She believed that her son knew her. Creswell testified that between 11:15 and 11:30 on the night of June 21, 1955, he met, without appointment, two boys whom he had met in reform school prior to his departing from it on June 1, 1954, at the L. J. Drive-in on Atlantic Avenue. They were 19 or 20 years old. They talked for a while and then they told him they had some stolen guns. Creswell saw them in two boxes in the boys' car. There was a billfold lying on top of one of the boxes. Creswell was told to deliver the guns to a man named "Wedo" in front of the Macambo bar in Tijuana. The boxes of guns were put in Creswell's car. He was to receive one and a half ounces of heroin from "Wedo", and was to return with it. A rifle and a shotgun were also turned over to him. He put them into the back of his car.

Defendant Creswell further testified that at 12:00 or 12:15 he went to Mahoney's home in Compton, took the rifle and shotgun into the house and asked if he would like to go to Tijuana with him. He put the rifle and shotgun in the closet and put one box of guns into Mahoney's car and left the other in his car. They proceeded to Tijuana, arriving about 3:30 in the morning. They went to the Macambo where, in the street outside of the bar, they inquired for "Wedo" of a taxicab driver, as he had information that the taxicab driver would know where he was. The driver said that he was not around. Creswell went into the Macambo where he remained until 6:50 in the morning, and then went out and was approached by the taxicab driver, who told him that he knew that he had guns, and that he would like to buy them. Creswell said that he would sell him one. At that time they were approached by two men in khaki pants and leather jackets. The men told them to hand over the guns. Defendant Creswell started to go to the car with defendant Mahoney. Their backs were to the two men. Creswell heard shots. He stopped and turned around. Mahoney was lying on the ground. The two men were shooting, one of them at Creswell. Mahoney was not shooting, but Creswell shot three times. While Creswell was shooting, both of the men went down. Creswell was hit in his chest and his left leg. He went down by the car. Other men joined in the shooting after the first two were down, and shot at Mahoney. Creswell became unconscious for a while. The next thing he knew he was being kicked. He was thrown on the back of a truck. He did not remember getting to the hospital. He woke up in the hospital on a cot. He did not know how long he had been there. He was in pain. He was naked, and there was a sheet over him. He asked for a doctor. No doctor came until the next day. He gave him a "shot". He remembered Chief Murphy, but no other men. He did not remember talking to Chief Murphy.

Creswell testified further that he talked with Deputy Sheriff LaBas at the Norwalk

Police Station in November about the incident in Tijuana, but not about the robbery of the liquor store in Signal Hill on June 21, 1955. He talked about the robbery of the Younts (Count IV); that the testimony of Mr. and Mrs. Yount was true—that he (Creswell) robbed the store operated by the Younts on October 30, 1955.

He testified that at a conversation with Mr. Heier he was shown a stocking and piece of cloth and asked if those were the ones that he used in the robbery, and he answered, "No"; that he told Mr. Heier that he "didn't pull any robbery."

As a first ground for reversal, appellants contend that "The confessions which were obtained in the Tijuana Hospital from the defendants, and each of them, were in violation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States, and Article I, Section 13, of the Constitution of California. They were obtained under conditions that were not, and could not be, free and voluntary. No proper foundation was laid for their use or admission."

[1] Appellants' claim that under the circumstances here present they "were not in a physical or mental condition to make a free and voluntary confession" cannot be sustained. The evidence discloses that there was no force or violence used on appellants and that there were no promises of immunity from punishment, and that they spoke voluntarily. The *prima facie* showing that the confessions were voluntary was not disputed. As was said in People v. Amaya, 40 Cal.2d 70, 77, 251 P.2d 324, 327, "Any evidence tending to show that appellant may have been in pain when he gave the statements at the hospital did not affect their admissibility but only the jury's consideration of the weight and effect to be given them [citing cases]. His possible pain at the time was in no wise shown to reflect on his competency." See also People v. Harrison, 41 Cal.2d 216, 218, 258 P.2d 1016; People v. Cobb, 45 Cal.2d 158, 162, 287 P.2d 752. That appellant Creswell was mentally alert is evidenced by the fact that when Commander Blanco called him "Perry," as appellant's name appeared on an identification card that had been given to the witness, appellant Creswell replied that his name was not "Perry," that it was "Creswell." When Chief Murphy and Sergeant Morrow interviewed him at the hospital, Creswell was asked "Was it just the two of you—just you two on the job?" The answer was "Just us two." When the Chief inquired, "Did you carry the gun or did someone else?" Creswell replied, "I carried the gun." In answer to the question, "Whose car did you use?" the answer was, "We used my car." When questioned as to whether "the guns that were used down there in Mexico, were they the same guns that came out of the Signal Hill job?", appellant Creswell answered, "Yes, I had a 380 automatic and Pat (appellant Mahoney) had a snub-nose." Appellant Creswell inquired as to the condition of the wounded Mexican police officers, and asked "Do you think they are going to die?" Appellant Creswell then stated, with reference to the guns in the automobile, that "We left half of them there and just brought half of them down here." When queried as to where the guns were that they left "there", appellant Creswell answered that he wanted to talk to "him" or "my friend," or "something like that."

When Chief Murphy and Sergeant Morrow talked with appellant Mahoney, the Chief stated they were from Signal Hill and wanted to talk to him "about the store up there." Chief Murphy asked appellant Mahoney "Were there more than two on the job up there, or just you two?" Mahoney replied, "Just us two." The Chief asked, "Whose car did you use?" and he replied, "His car." Chief Murphy asked, "Who carried the gun?" and Mahoney closed his eyes without answering the question. In a subsequent conversation with appellant Mahoney, Sergeant Morrow inquired if there was anyone else present in Signal Hill at the liquor store when it was held up besides him and Creswell, and Mahoney nodded toward Creswell and said, "Just us two." Sergeant Morrow asked Creswell if he wanted to tell them where the rest of the fireams were. He replied that he would have to discuss it with Mahoney first.

We are satisfied that the foregoing reasonably justifies the conclusion that while appellants may have been in pain and weakened as a result of their injuries, they certainly were conscious of the meaning of the interrogatories propounded to them and answered them with a conscious knowledge of their import, and a realization of what was being said in answer thereto. There was therefore no error committed by the trial court in admitting the conversations into evidence.

[2, 3] Appellants' next claim is that the court committed prejudicial error in failing to instruct the jury properly on the law of confessions and in failing to submit to the jury the issue of whether or not confessions given by the former were free and voluntary. In the instant case, at the time the confessions were offered in evidence the prosecution laid the foundation for their introduction by preliminary proof showing that they were freely and voluntarily made. Appellants were accorded the opportunity for *voir dire* examination as requested by them to overcome the *prima facie* showing. The court, as was its duty in the first instance, in the exercise of its discretion determined that the confessions were freely and voluntarily made and permitted them to be read to the jury. However, appellants' complaint is that the court failed to perform its required duty to submit to the jury, under proper instructions, for its determination, the question whether under all the circumstances the confessions were made freely and voluntarily. It must be conceded, as contended by appellants, that while the court passes preliminarily on the question of the voluntary nature of the confession and its admissibility, and although the court may determine that the confession is voluntary and admissible, its ruling is not binding on the jury, and it is for that body "'to determine in the last analysis whether a confession is freely and voluntarily made.'" People v. Gonzales, 24 Cal.2d 870, 876, 877, 151 P.2d 251, 254. We are satisfied that in the case at bar appellants were not prejudiced. In the case now engaging our attention, insofar as the instructions were concerned, the matter of the free and voluntary aspect of the confessions was certainly left open for the jury's consideration. There was no instruction explicitly directing them that they could not consider the question. It could be held that a complete answer to appellants' complaint, assuming that the statements were confessions, is that they did not request any instruction on the subject. If they were relying on such reconsideration by the jury and desired an explicit direction to that body that it had the power to redetermine the same and reject the statements of appellants as evidence, if from the testimony on that subject they believed that the statements were not freely or voluntarily made by reason of appellants' physical and mental condition, they should have asked an instruction to that effect. We are impressed that this case comes within the purview of those decisions holding where, in similar cases, such an instruction is not asked, the accused cannot assign the mere failure of the court on its own motion to give the same as error sufficiently prejudicial for reversal. People v. Meichtry, 37 Cal.2d 385, 390, 231 P.2d 847; People v. Collins, 48 Cal. 277, 278; People v. Gray, 66 Cal. 271, 276, 5 P. 240; People v. Northey, 77 Cal. 618, 631, 19 P. 865, 20 P. 129; People v. Marks, 72 Cal. 46, 47; People v. Flynn, 73 Cal. 511, 514, 15 P. 102; People v. McLean, 84 Cal. 480, 482, 24 P. 32; People v. Appleton, 120 Cal. 250, 252, 52 P. 582. We find no ground upon which to distinguish the case at bar from the foregoing decisions, and we think the same rule applies.

As a further reason why appellants suffered no prejudice in the instant case, we are impelled to point out that the jury was instructed that they were the judges of the value and effect of evidence and of the credibility of the witnesses. They were also admonished that "Evidence has been received in this case tending to show that on an occasion (occasions) other than this trial a defendant himself made a statement (statements) tending to prove his guilt of the alleged crimes for which he is on trial.

"(A statement thus made by a defendant may be either a confession or an admission.)

"A confession is a statement that was made by one who is a defendant in a criminal trial, at a time when he was not testifying in that trial, by which he acknowledged certain conduct of his own that constituted a crime for which he is on trial, a statement which, if true, discloses his guilt of that crime and excludes the possibility of a reasonable inference to the contrary.

"If under my instructions you find that a voluntary confession was made, you are the exclusive judges as to whether or not the confession was true; and in deciding that question you should consider all the circumstances connected with the making of the statement, as shown by the evidence." (Emphasis added.)

We conclude that in the absence of a request that the court instruct the jury as to their right to reconsider the question of whether or not the so-called confessions were freely and voluntarily given, coupled with the instructions given as to the right of the jury to consider "all the circumstances connected with the making of the statement," no constitutional rights of appellants were violated or infringed upon.

[4–7] Finally, appellants assert that the evidence was insufficient to support the verdicts, in that none of the three victims could sufficiently identify appellants as the robbers. This contention is unavailing. We shall not here repeat the testimony concerning identification. Suffice it to say that in order to sustain a conviction it is not necessary that the identification of the accused as the perpetrator of the crime be made positively or in a manner free from all inconsistencies. It is the function of the jury to pass upon the strength or weakness of the identification and the uncertainties of the witnesses in giving their testimony. The evidence admitted as to identification was competent; the weight to be given to it was a problem for the jury. People v. Rolfe, 61 Cal. 540, 543; People v. Flood, 41 Cal.App. 373, 377, 182 P. 766; People v. Baker, 94 Cal.App. 628, 633, 271 P. 765. There was also evidence of the possession by appellants of recently stolen property and other inculpatory circumstances supporting a finding of participation in the robbery; and added to this is the admission of appellants that they committed the robberies charged against them.

For the foregoing reasons, the judgments of conviction as to each defendant are, and each is, affirmed, as is the order denying defendant Mahoney's motion for a new trial.

DORAN and FOURT, JJ., concur.

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146 Cal.App.2d 566

William C. HAMILTON and Bettie H. Hamilton, his wife, et al., Plaintiffs and Appellants,

v.

M. H. HARKINS, Manuel Souza, Frank Souza and Antonio Souza, partners, d/b/a under the firm name and style of Oakland Sewer Construction Company, et al., Defendants and Respondents.

Civ. 16997.

District Court of Appeal, First District,
Division 1, California.

Dec. 4, 1956.

Rehearing Denied Jan. 3, 1957.

Hearing Denied Jan. 30, 1957.

Action against general contractors and municipality for damage to plaintiffs' home properties caused by landslide allegedly resulting from improper installation of sewers planned by municipality and installed by contractors. The Superior Court, County of Alameda, Thomas J. Ledwich, J., granted defendant contractors' motions for non-suit, and plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that contractor may be liable for injury resulting from performance of public work where he performed negligently, or where plans and specifications prepared by public agency were inherently dangerous and contractor knew or should have known that this was so; but if plans and specifications were inherently dangerous because of facts which contractor did not know and with knowledge of which he is not chargeable, and contractor performed work, pursuant to plans and specifications, without negligence, contractor is not liable.

Affirmed.

1. Municipal Corporations ⚷400

Contractor may be liable for injury resulting from performance of public work where he performed negligently, or where plans and specifications prepared by public agency were inherently dangerous and contractor knew or should have known that this was so; but if plans and specifications were inherently dangerous because of facts which contractor did not know and with knowledge of which he is not chargeable, and contractor performed work, pursuant to plans and specifications, without negligence, contractor is not liable.

2. Municipal Corporations ⚷400

In absence of proof that contractors knew or were chargeable with knowledge of fact that plans and specifications furnished by municipality were defective because they should have called for compacting of backfill in ditch crossing between plaintiffs' properties, there could be no recovery from contractors for damage to properties caused by landslide resulting from improper installation of sewers planned by municipality and installed by contractors.

3. Trial ⚷163

In action against general contractors and municipality for damage to plaintiffs' home properties caused by landslide allegedly resulting from improper installation of sewers planned by municipality and installed by contractors, contractors met burden of particularity required in connection with motion when they stated that there was no evidence of knowledge on part of contractors or facts making them chargeable with knowledge and that, without such proof, non-suit should be granted.

◆

Houlihan & Brown, Oakland, for appellants.

Mullally & Wines, by Lawrence E. Mullally, Oakland, for respondents.

PETERS, Presiding Justice.

Eight property owners, the appellants, brought this action against respondents, who are general contractors, and the City of Oakland to recover damages for injuries to their respective home properties caused by a landslide which it is alleged was caused by the improper installation of sewers planned by the City and installed by respondents. The trial court, at the conclusion of plaintiffs' case, granted the defendant contractors' motions for a nonsuit. From the judgment based thereon plaintiffs appeal. The City of Oakland is not involved on this appeal.

The case proceeded to trial on the issues framed by the fourth amended complaint and the answer thereto. The fourth amended complaint alleges that the defendant City in planning the construction and location of the sewers adopted plans that were inherently dangerous to the property of plaintiffs, because the land in the area had numerous springs and watercourses and was subject to landslides; that the sewer trenches were so designed "as to remove from plaintiffs' land the lateral and subjacent support" existing prior to the construction; that the defendant City knew or should have known of these facts; that the plans for the sewer were "prepared incompetently and contrary to good engineering practices"; and that the defendant contractors "did install the said public sewers in conformity with the plans and specifications" prepared by the City. Defendant contractors admitted that they performed the work according to the plans and specifications, and denied liability.

Under the issues thus framed it is admitted that defendant contractors installed the sewers in conformity to the plans and specifications without negligence. It should also be noted that there is no averment that the contractors knew or should have known that the plans drafted by the City were inherently dangerous. After plaintiffs' opening statement, the defendant contractors moved for a nonsuit on the ground that under such circumstances no liability existed. The motion was denied upon plaintiffs moving to amend their fourth amended complaint in the following respect: "That the defendants, and each of them, knew, or in the exercise of reasonable care and diligence, should have known that said plans and specifications were inherently dangerous to the property of the plaintiffs, and each of them, and would cause damage to said property, as hereinafter alleged, if said public sewers were installed in conformity therewith."

Over defendant contractors' objections the motion to amend was granted. The case then proceeded to trial on the issues thus framed. At the conclusion of plaintiffs' case the contractors again moved for a nonsuit. This time the motion was granted, and judgment directed to be entered for defendant contractors. From this judgment plaintiffs appeal.

On such an appeal, of course, all the evidence and all reasonable inferences from such evidence must be indulged in favor of appellants. Tested by this standard, the evidence shows the following:

The appellants own eight houses in a hilly portion of Oakland, which, prior to 1949, were serviced by septic tanks. The area is a natural drainage area. The City, acting pursuant to the provisions of the Street Improvement Act of 1911, Streets and Highways Code § 5000 et seq., proceeded to have a public sewer system installed in the area. This improvement was planned to be installed partially in the public streets and partially in an easement extending across the area between appellants' houses which were located four on one street and four on another, the houses being back-to-back to each other. The general area, prior to the sewer installation, had leaking septic tanks, and possibly some springs. These facts were known to the City employee who prepared the plans for this work, who also knew that the area was a general drainage area, and that, in the past, several slides had occurred nearby. The respondents, who are general contractors, secured the contract to install, and did install the sewers. Admittedly, they did so without negligence, and in precise accordance with the plans and specifications. The job was completed in January of 1950. The slide occurred in February of 1952 during a winter of extraordinary heavy rainfall. All eight houses were destroyed or seriously damaged by the slide.

The employee of the City who prepared the plans and specifications testified that he knew that prior slides had occurred in the general area; that he did not provide for any special protection in the area where the sewer ditch crossed private property; that in accordance with usual custom he provided for the compacting of the backfill of the ditches by power equipment only where the ditches were cut in the streets; that the specifications did not require the contractor to compact the soil in other than the street areas; that power compacting was required in the street areas to prevent the walls of the ditch from caving in and to prevent the settling of the backfill due to the anticipated heavy loads in the street area; that, although he saw wet spots in the area while a survey of it was being made, the City engineer's office treated the installation as a "dry" one and not a "wet" one; that no consideration was given to these wet areas, and no study of the wetness of the soil was made, nor were any borings or soil tests made.

The appropriate City officials also testified that respondents constructed the sewer in conformity with the plans and specifications to the satisfaction of the City, and that the City accepted the work, certified its completion and paid the respondents the contract price.

Respondents are not engineers but general contractors engaged primarily in sewer work. The respondent who carried on negotiations with the City testified that he had no knowledge of, nor had anyone told him about, the prior slides in the area; that in bidding on the work he did not read all the specifications but read only those portions calling for special work, that is, work different from that involved in prior contracts with the City; that, prior to bidding, several of the partners visited the general area simply to see how much of the digging could be done by machines, rather than by hand, and how much street work was involved; that his firm made no tests or inquiries about the stability or content of the soil; that he asked the City engineer's office if there was anything special about the job or different from prior plans and specifications furnished by the City on prior jobs and was told that there was not; that he made no inquiry about the water table, soil conditions, land stability or surface water conditions in the area.

Experts called by appellants testified that, had the backfill in the sewer trench been power compacted, the slide would have been prevented, and that if the planner of the project knew of the prior slides the plans and specifications were defective in design.

It is a reasonable inference from this evidence that the plans and specifications were defective, and that the damage was caused by the failure of the City to provide plans and specifications that would have protected appellants from a danger known to the City. But there is no evidence that respondents knew or reasonably should have known that the plans were defective or that their execution would result in appellants' damage. The plans did not show on their face that they were defective. Under such circumstances, are the contractors liable? That is the question presented.

[1,2] Appellants argue that when the plans are defective, the contractors are liable as joint tort feasors with the public agency for all damages resulting from the execution of the defective plans regardless of whether the contractors have knowledge of the defects or not. There is no merit in this argument. Although the language used in some of the cases has not always been consistent, we think the proper rule is that on public work a contractor is liable to the damaged property owners only where he is negligent in the performance of the contract (admittedly not here present), or, where the plans are defective, the contractor knows or should have known that the defect existed and that if the contract were performed as specified damage might ensue. But the contractor is not liable where the plans and specifications prepared by a public agency are defective but the contractor has no knowledge, express or implied, of the defect.

The appellants, to establish their claim of liability on the part of the contractor for mere execution of defective plans regardless of knowledge on the part of the contractor, rely mainly on three cases: Kaufman v. Tomich, 208 Cal. 19, 280 P. 130; Perkins v. Blauth, 163 Cal. 782, 127 P. 50; De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 39 P. 610. Although there is some ambiguous language in each of these cases which seems to support the rule contended for by appellant, properly analyzed none of the cases establishes such a rule. In Kaufman v. Tomich, 208 Cal. 19, 280 P. 130, both the City and the contractor were sued by a property owner for injury to her property caused by the installation of a sewer. The plaintiff recovered judgment against both defendants. This was affirmed. The Supreme Court recites that the theory of the plaintiff was that the damage "resulted from the joint negligence of the city, in improperly planning and locating the sewer line, and of the contractor, in undertaking to install the sewer as so improperly planned and aligned. There are also allegations of the contractor's negligent performance of the work." 208 Cal. at page 21, 280 P. at page 131. The Supreme Court adopted the dissenting opinion of a District Court of Appeal Justice, approving his statement "that if the act commanded by the municipality was inherently wrong, then both the municipality and the agent performing the work would be answerable in damages to any one injured thereby, even in the absence of negligence in its performance. This declaration finds support in Perkins v. Blauth." 208 Cal. at page 21, 280 P. at page 131. The facts of the Kaufman case were that the sewer was constructed so close to plaintiff's property that the property collapsed into the sewer ditch during construction. The trial court found that the sewer was located in obvious dangerous proximity to plaintiff's land, and that both the City and the contractor should have known this fact. While the language of the court is confusing, it is apparent that this was a case where the plans drawn by the City were wrong and the contractor should have known that this was so. Moreover, there are several statements in the opinion to the effect that the contractor negligently performed the work involved. Thus, the case actually stands for the proposition that either where the contractor is negligent, or performs a contract when he knows or should know the construction is dangerous to adjoining property owners, he is liable for ensuing damages. Certainly, the case cannot be distorted into a holding that the contractor is liable where he is not negligent, and where he does not or should not know that the work is inherently dangerous.

The Perkins v. Blauth case, 163 Cal. 782, 127 P. 50, is clearly not in point on the question under discussion. There plaintiff's property was flooded because the trustees of a reclamation district authorized a contractor to cut a ditch through the bank of the Sacramento River and the contractor failed to protect the area with a suitable dam. As to the contractor, a nonsuit was granted, and a judgment rendered against the trustees of the district. The trustees appealed, and their liability was the sole question discussed. The question of the liability, if any, of the contractor, was not involved or discussed. Insofar as the case discusses the possible liability of the contractor, it predicates such liability on his active negligence in the performance of the work.

The last case relied upon by appellants is De Baker v. Southern Cal. Ry. Co., 106 Cal. 257, 39 P. 610. In that case defendant's predecessors were granted certain lands along the Los Angeles River upon condition that the grantee construct and maintain a certain levee along designated portions of the river bed for the benefit of the city of Los Angeles. The levee, as actually constructed, did not stop at the point designated by the City but continued for about a mile into and nearly across the river bed. Two years later an unusual flood occurred and the water, being prevented by the additional and unauthorized portion of the levee from following its natural course, overflowed onto plaintiff's lands. "[B]ut for this unauthorized addition to the levee as planned by the city the damage to plaintiff's lands would not have occurred." 106 Cal. at page 281, 39 P. at page 615. The court, in reversing on a procedural point, indicated certain "views" regarding other "questions likely to arise in the future progress of the litigation" 106 Cal. at page 282, 39 P. at page 615, as follows: "Conceding that the negligence complained of consisted solely in the faulty plan and location of the work, and not at all in the manner in which it was executed by the defendant, it seems to be settled by the decisions of this court that if the damage was actionable the city and the defendant would be jointly and severally liable. To place an unlawful obstruction in the bed of a stream by which the current is directed into a new channel across another's land, makes a case clearly within the principle recently applied in Green v. Berge, [105 Cal. 52] 38 P. 539, and in the cases therein cited. If the work was such as to make the city liable, it made the defendant liable also, and the plaintiff could maintain her action against either or both. Of course, if the city exercised such care and skill in creating the plan and fixing the location of the work as to exempt it from any liability to the plaintiff, and the damage was wholly caused by such location and plan,—no negligence being attributed to the defendant in the construction of the work, nor any departure from the plan,—the defendant would be no more liable than the city. But if the work was inherently and according to its plan and location, a dangerous obstruction to the river, such as ordinary prudence should have guarded against, not only the author of the plan to obstruct the stream, but the person placing the obstruction, was severally liable for the entire damage."

This language, which was dicta when separated from the facts, might be interpreted to mean that the contractor who carries out defective plans is liable regardless of knowledge, but, under the facts of the case, it is quite clear that the contractors who constructed the levee out in the river bed were chargeable with knowledge that the levee so constructed was potentially dangerous to plaintiff. This is made clear because the court stated that it was imposing liability upon the "principle recently applied in Green v. Berge, [105 Cal. 52] 38 P. 539, and in the cases therein cited." At page 282 of 106 Cal. at page 615 of 39 P. In the Green case the contractor performed the public work without negligence, but the excavation caused plaintiff's land to collapse. The Supreme Court reversed a directed verdict in favor of the contractor. In so holding, the court did state that all who unite in removing the lateral support from another's land are responsible in damages. But the basis of the contractor's liability was placed upon his knowledge of the dangerous character of the act he was performing. At page 58 of 105 Cal., at page 541 of 38 P., in referring to the contractor, the court stated: "Respondent knew, or should have known, that to make the excavation without supplying the support was unlawful. Having participated in it, he cannot avoid responsibility by pleading that he did the work under a contract." Knowledge or responsibility for knowledge was the basis of the contractor's liability. This was equally true in the De Baker case.

The most that can be spelled out of these cases cited by appellants is that where plans and specifications drawn by a public agency are inherently dangerous the contractor may be liable if he knows or should have known that the work might result in damage to the property owner. But none of the cited cases stands for the broad proposition that the contractor is responsible when he performs the work without negligence and is not chargeable with knowledge that the plans are inherently dangerous.

Respondents rely upon the rule stated in Northwestern Pac. R. Co. v. Currie, 100 Cal.App. 173, at page 175, 279 P. 1057, at page 1058, where the court, in speaking of a situation where the contractor had no knowledge, express or implied, of the dangerous condition, stated: "Where a county contracts for the doing of construction work according to plans and specifications theretofore adopted, and the contractor performs the work with proper care and skill and in conformity with the plans and specifications, but the work thus planned and specified results in an injury to adjacent property, the liability if any there is, for the payment of damages, is upon the county under its obligation to compensate the damages resulting from the exercise of its governmental power." This rule has been frequently stated in other cases where the contractor was not chargeable with knowledge. Marin Municipal Water Dist. v. Peninsula Paving Co., 34 Cal.App.2d 647, 94 P.2d 404; Veterans' Welfare Bd. v. City of Oakland, 74 Cal.App.2d 818, 169 P.2d 1000; Anderson v. Fay Improvement Co., 134 Cal.App.2d 738, 286 P.2d 513; Gay v. Engebretson, 158 Cal. 21, 109 P. 876; Heimann v. City of Los Angeles, 30 Cal.2d 746, 185 P.2d 597.

From an analysis of the cases the rules to be derived are that the contractor may be liable for injury resulting from the performance of public work either where he performs the work negligently, or where the plans and specifications prepared by the public agency are inherently dangerous and the contractor knows or should have known that this was so. But if the plans and specifications are inherently dangerous because of facts the contractor does not know and of which he is not chargeable, and the contractor performs the work pursuant to the plans and specifications without negligence, then the contractor is not liable. That is this case. As already pointed out, the evidence would support a finding that the plans and specifications drawn by the City were defective because they should have called for the compacting of the backfill in the ditch crossing between appellants' properties. But such compacting was only required because the City engineers knew that the area was a slide area and was also a drainage area. Unless those facts existed, the construction of the ditch did not call for the compacting of the refill. There is not one word of evidence that the contractors knew that these facts existed. There is no evidence that the contractors were chargeable with knowledge of these facts. The contractors were not engineers. They were legally entitled to rely on the engineers employed by the City to determine the nature of the construction required. Thus, under the circumstances, there was a failure of proof so far as the contractors are concerned, and the nonsuit was properly granted in their favor.

[3] Appellants also argue that the respondents failed to state, with sufficient particularity, the grounds upon which the motion for a nonsuit was predicated. We have read the engrossed statement and the partial reporter's transcript dealing with this subject. The respondents clearly stated that there was no evidence of knowledge on the part of the contractors or of facts making them chargeable with knowledge, and that without such proof the nonsuit should be granted. The respondents met the burden of particularity required. Jacob v. Watson, 113 Cal.App. 299, 298 P. 64.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

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146 Cal.App.2d 667

Joseph GERACE, a minor, by and through his guardian ad litem, Tally Gerace, and Tally Gerace, Plaintiffs and Respondents,

v.

KEY SYSTEM TRANSIT LINES, a corporation; C. F. Peterson, Defendants and Appellants

Civ. 16875.

District Court of Appeal, First District, Division 2, California.

Dec. 7, 1956.

Action for personal injuries to minor arising when automobile in which he was a passenger was struck from rear by defendants' electric interurban train. The Superior Court, County of Alameda, A. J. Woolsey, J., entered judgment in favor of plaintiffs and defendants appealed. The District Court of Appeal, Dooling, Acting P. J., held that evidence was sufficient to show the negligence of motorman who was operating train which struck rear of automobile which was stopped at intersection preparatory to making a left hand turn.

Affirmed.

1. Street Railroads ⚷114(9)

In action for personal injuries to minor who was passenger in automobile which was struck by electric interurban railroad train, evidence supported verdict as to railroad's negligence in striking rear of automobile which stopped at intersection preparatory to making a left hand turn.

2. Street Railroads ⚷85(3)

Street railroads have no exclusive right to travel on portion of street occupied by their tracks, and operators of other vehicles are required to yield right of way over such tracks.

3. Street Railroads ⚷118(2, 3)

In action for personal injuries to minor passenger in automobile which was struck from rear by electric interurban train, there was no error in instruction to effect that duty of motorman operating electric train on a public street was to be vigilant at all times, keeping a reasonable look-out for possible dangers, on ground that instruction should have been limited to probable dangers.

4. Street Railroads ⚿117(11)

In action for personal injuries to minor passenger in automobile which was struck from rear by electric interurban train, evidence presented jury question as to whether train was following automobile more closely than a person of ordinary prudence would have done.

5. Street Railroads ⚿118(4)

In action for personal injuries to minor passenger in automobile struck from rear by electric interurban train, instruction to jury that they could find operator of train negligent if motorman knew automobile was preceding train and thereafter in exercise of ordinary care could have avoided collision, was not error on ground that word "preceding" was ambiguous and might mislead jury to believe that before automobile was turned onto track a duty was cast on motorman to anticipate it so doing.

6. Appeal and Error ⚿762

Ordinarily, District Court of Appeal is justified in refusing to consider points raised for first time in closing briefs.

7. Appeal and Error ⚿201(1)

In action for personal injuries to minor passenger in automobile which was struck by electric interurban train, no error could be predicated on alleged misconduct during trial to which no objection was raised at time of trial.

8. Appeal and Error ⚿201(1)

Objections to claimed misconduct must be voiced at the trial unless the misconduct is of such a flagrant character that its effect could not be cured by appropriate action of the trial judge.

9. Damages ⚿131(4)

Award of $250 to minor who sustained headaches, nausea and loss of appetite following accident as well as some nervousness continuing to time of trial, was sustained by evidence.

Donahue, Richards, Rowell & Gallagher, Oakland, for appellants.

Bernard Allard, Oakland, Leon G. Seyranian, Oakland, of counsel, for respondents.

DOOLING, Acting Presiding Justice.

This is an appeal from a judgment entered pursuant to a jury verdict in favor of plaintiffs Joseph Gerace, a minor, by and through his guardian ad litem, Tally Gerace, and Tally Gerace in a personal injury action. The minor plaintiff recovered the sum of $250 while plaintiff Tally Gerace recovered the sum of $5,000. Defendants are Key System Transit Lines, a corporation (hereinafter called Key System), and one C. F. Peterson, an employee of Key System.

Respondents' injuries arose out of an interurban electric train-automobile accident which occurred on December 9, 1953, at about 5 p. m. At the time of the accident respondents were passengers in an automobile driven by Alfred Gerace, husband and father respectively of respondents Tally and Joseph Gerace. The automobile in which respondents were riding was struck from the rear by a train of appellant Key System operated by appellant Peterson.

The accident occurred on Twelfth Street between Broadway and Washington Street very close to the intersection of Washington and Twelfth Street in downtown Oakland. At the time of the accident both the train and the car in which respondents were riding were proceeding in a westerly direction on Twelfth Street. Alfred Gerace testified that he had driven south on Broadway until he came to Twelfth Street. At the intersection of Broadway and Twelfth Street he turned right and went west along Twelfth Street. He was then alongside of the train and he noticed that the train's doors had just closed and that it was starting forward. He was traveling at a speed of about ten to fifteen miles per hour. He intended to make a left turn at the next intersection, Washington and Twelfth Street. He looked behind in his rear view mirror and saw appellants' train about 150 feet behind him. He then looked ahead and saw that the traffic signal at the intersection he was approaching was green for traffic on Twelfth Street. After hand-signaling his intention to do so, Mr. Gerace then entered the extreme left lane preparatory to making his intended left turn. At this time he estimated that he was about 100 feet east of the Washington and Twelfth Street intersection. When he was about 50 feet from the intersection the traffic signal turned amber for Twelfth Street traffic. He then brought his automobile to a stop just east of the pedestrian cross-walk. He noted that a police officer located in the intersection was signaling for someone to go through the intersection but at that time there were pedestrians in the cross-walk. Mr. Gerace next heard the sound of a horn and felt an impact from the rear which shoved his automobile into the middle of the intersection.

The only warning from the train heard by Alfred Gerace was almost instantaneous with the impact and respondent Tally Gerace did not hear a signal until the time of the accident.

James McPartland, the police officer on duty at the Washington and Twelfth Street intersection testified that he saw the accident happen. At the time of the accident the automobile in which respondents were riding was stopped in the automobile lane nearest to the center of the street. When he first observed the train it was about 51 feet behind the Gerace automobile. Traffic control signals were in operation at the intersection where the accident occurred. Those signals applied to both trains and automobiles traveling on the roadway. When the officer realized that an accident was imminent he held back the traffic on Washington Street and directed the driver of the Gerace automobile to come ahead. He did not know if the automobile had started to move before the impact occurred.

Officer McPartland further testified that he had observed the Key System's trains on many occasions. He had also observed them when they applied their brakes and had heard the sounds of braking of the train. In this case he did not hear any sounds of braking before the accident and he did not see the train slacken its speed in any appreciable amount before the accident. He was familiar with what happens when a train goes into "heavy braking"—when gravel is thrown onto the rails and the brakes are applied. Neither before the accident nor at the time of the impact did he note that such a procedure for stopping the train was utilized. He did not hear any bell or whistle given by the train before the impact.

[1] The above recital of testimony given makes it obvious that the evidence is ample to support the verdict. Taking the evidence most favorable to respondents and disregarding conflicts, when the slowly moving train was 150 feet behind him the driver of the automobile moved on to the track in front of the train intending to make a left turn at the next intersection. At that time the signal light was in his favor. When he saw the light turn to amber he slowed his automobile and brought it to a stop at the intersection. The signal light was then red. Without any warning, until almost the moment of impact, the train struck his automobile in the rear and drove it into the intersection. Although the train had no mechanical difficulty the emergency brakes were at no time applied.

The driver of the automobile cannot be said to have been guilty of negligence as a matter of law in turning onto the track 150 feet ahead of a slowly moving train to make a left turn at the next intersection. The driver of an automobile is not negligent as a matter of law in driving on that part of a street occupied by the tracks of a street railway and whether or not it was negligence under the circumstances disclosed by the evidence for the driver to turn onto the track 150 feet in front of the slowly moving train was for the jury to decide. Berguin v. Pacific Elec. R. Co., 203 Cal. 116, 263 P. 220; Arens v. United Railroads, 25 Cal.App. 714, 145 P. 163. The appellants' negligence might be found by the jury in the failure to keep the train under such control as to stop it before striking the automobile in plain view in front of it, in the failure to sound any warning and in the failure to apply the emergency brakes. Indeed it is not clear from the briefs whether appellants' present counsel are arguing the insufficiency of the evidence to support the verdict. The argument on these points in the opening brief was based on a misconception of the evidence. The closing brief was filed by different counsel, substituted after the opening brief was filed, and the closing brief after acknowledging the misstatements of fact in the opening brief makes no further point of the sufficiency of the evidence.

[2] Complaint is made of several instructions. The first instruction singled out informed the jury that the fact that appellants' tracks occupied a portion of Twelfth Street did not give the defendant corporation an exclusive right to travel over that portion of the street and concluded: "Plaintiffs were entitled as a matter of right to use the street subject only to the limitation that they were obliged to use that degree of care * * * as would a reasonably prudent person similarly situated." The court also instructed that "inasmuch as the movement of the train is restricted by its tracks * * * the operators of other vehicles are required to yield the right of way" over such tracks. These two instructions, taken together were at least as favorable to appellants as the law justifies. Our courts have repeatedly stated that street railroads have no exclusive right to travel on the portion of the street occupied by their tracks. "Other vehicles have a right to travel over the entire street, including the space between the tracks." O'Connor v. United Railroads, 168 Cal. 43, 48, 141 P. 809, 811; Berguin v. Pacific Elec. R. Co., supra, 203 Cal. at page 122, 263 P. 220; Adamson v. City and County of San Francisco, 66 Cal.App. 256, 259, 225 P. 875. In the O'Connor case the court, 168 Cal. at page 48, 141 P. at page 811, adds the qualification that this right is subject to the limitation that "a traveler may not unnecessarily interfere with or obstruct a car in its movement thereon" and the traveler must yield the right of way when necessary to the streetcar's free and unobstructed passage. The second instruction above referred to adequately covered this qualification.

[3] Appellants' criticism of the following instruction is hypertechnical:

> "It is the duty of a motorman operating an electric train on a public street to be vigilant at all times, keeping a reasonable look-out for possible dangers * * * and to keep the electric train under such control that to avoid a collision he can stop as quickly as might be required of him by eventualities that would be anticipated by an ordinarily prudent person in like position."

Appellants complain of the words *"possible* dangers," saying the instruction should be limited to "probable dangers." The instruction taken as a whole clearly limits liability to the failure to anticipate "eventualities that would be anticipated by an ordinarily prudent person," i. e. want of ordinary care, and could not be understood to require more.

[4] The instruction: "If you find * * * that the motorman * * * was following the plaintiff's automobile more closely than an ordinarily reasonable and prudent person * * * would have done * * * I instruct you that the motorman * * * was negligent," is unimpeachable as a matter of law, and since the train struck the automobile from the rear very shortly after it came to a stop was proper under the facts. The motorman testified that he applied his emergency brakes as soon as he saw the automobile stop. If the jury believed this testimony they might rationally conclude that the train was following the automobile more closely than a person of ordinary prudence would have done, particularly in view of the fact that the motorman knew that the traffic signal might change from green to red, making a stop behind the automobile necessary.

The last instruction complained of reads: "If you find * * * that the motorman * * * knew that plaintiff's automobile was preceding the electric train and thereafter in the exercise of ordinary care * * * could have avoided a collision * * * I instruct you that the operator of the electric train was negligent."

[5] Objection is made that since the automobile was in advance of the train but not on the track for a period of time the words "*preceding* the electric train" were ambiguous and might erroneously lead the jury to believe that while the automobile was in this position and before it turned onto the track a duty to anticipate its doing so was cast on the motorman. The instruction required only the exercise of ordinary care and we find no substance in appellants' criticism of it. The jury in our judgment could not have been misled into believing that "preceding" meant other than being ahead of the train on its track, since there was obviously no danger of collision prior to that time.

[6] Appellants raise two questions for the first time in their closing brief. Under settled practice we would be justified in disregarding these points. Utz v. Aureguy, 109 Cal.App.2d 803, 241 P.2d 639; 4 Cal. Jur.2d 324. More cogently, if considered, we should give them little weight, since they are claims of misconduct on the part of the court and opposing counsel, and the attorneys who were in the best position to determine whether the appellants suffered any prejudice from them were appellants' counsel at the trial. Appellants' trial counsel saw no such prejudice since they wrote the opening brief on appeal and did not even mention either of these questions.

The first involved appellant Peterson's testimony that he saw the automobile "ahead of him." A juror asked concerning this testimony: "Is that ahead of, alongside of, or ahead of and directly in front of?" The judge replied: "I should think it would mean directly in front."

[7, 8] Respondents' counsel then said: "I think, your Honor, that that can be cleared up in our argument. In our discussion later." Counsel for appellants made no objection and passed on to another matter. If counsel had any objection to the judge's statement he should have voiced it at the time. No rule is better settled than the one requiring objections to claimed misconduct to be voiced at the trial unless the misconduct is of such a flagrant character that its effect could not be cured by appropriate action of the trial judge.

In his argument to the jury counsel for respondents made a reference to the appellants' "home office in St. Louis." Appellants' counsel said: "I am going to object to this line of argument, your Honor. I assign it as prejudicial misconduct."

The court said: "Well, there is nothing in the record to that effect."

Counsel for appellants asked for no further action by the trial court and was apparently satisfied with the court's comment. If counsel desired something more of the trial judge the time to ask for it was then, when it could have been granted, not now when it cannot be.

[9] The claim advanced in the opening brief that there is no evidence of damage to the minor plaintiff is answered by the testimony of his mother showing headaches, nausea and loss of appetite following the accident and some nervousness continuing to the time of trial.

Judgment affirmed.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

146 Cal.App.2d 650

Macie I. MONTGOMERY, Plaintiff, Cross-Defendant and Respondent,

v.

E. E. GERLINGER, Gerlinger Foundry and Machine Works, a California Corporation, et al., Defendants,

E. E. Gerlinger, Fred W. Gerlinger, Jr., Fred W. Gerlinger, Sr., and Frank T. Gerlinger, Cross-Complainants and Appellants.

Civ. 8912.

District Court of Appeal, Third District, California.

Dec. 6, 1956.

Action to quiet title by holder of a United States patent to certain lands sold as a part of the public domain. Owners of three unpatented mining claims initiated by location answered and cross-complained setting up their location title to the mining claims. The Superior Court, Shasta County, Richard B. Eaton, J., entered judgment adverse to mining claim owners and they appealed. The District Court of Appeal, Van Dyke, P. J., held that where mining claim owners held certain land under valid mining locations known to contain gold, such land was not part of the public domain and was not authorized to be sold by the government under statute authorizing the Secretary of Interior to sell public domain, and therefore a government patent issued for a tract of land covering an area in which such claims were located did not transfer title to the mining locations.

Judgment reversed in part with directions.

1. Constitutional Law ⚷254
Eminent Domain ⚷2(1)

The contract of purchase made with the government by a valid mining location is a contract within the protection of the federal Constitution.

2. Mines and Minerals ⚷29(3)

Land covered by valid mining location is held in trust by the general government for the benefit of the locator, if, as, and when he shall become entitled to a patent, and such trust continues until either he has abandoned his rights or through his failure to do the assessment work another has, during such failure, located the land

3. Public Lands ⚷29

Where mining claim owners held certain land under valid mining locations known to contain gold, such land was not part of the public domain and was not authorized to be sold by the government under statute authorizing the Secretary of Interior to sell public domain, and therefore a government patent issued for a tract of land covering an area in which such claims were located did not transfer title to the mining locations. 43 U.S.C.A. § 1171.

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Chas. L. Gilmore, Sacramento, for appellants.

Frank W. Shuman, Redding, for respondent

VAN DYKE, Presiding Justice.

Appellants are the owners of three unpatented mining claims initiated by location in 1920 and 1928. Respondent claims title to the lands within the claims by virtue of a patent issued to her by the United States Government in 1954, after her purchase of a larger tract of land containing the claims as a preference right bidder pursuant to 43 United States Code Annotated, Section 1171, which authorizes the sale of certain portions of the "public domain". Respondent brought an action to quiet title and appellants, by answer and cross-complaint, set up their location title to the mining claims.

The court made the following findings: Appellants have been, ever since the respective dates of location, the owners in possession and entitled to the possession of the placer mining claims. Appellants and their predecessors have maintained possession of the claims at all times and have performed all the required annual labor to maintain their locations. The locations and each of them were based upon a discovery of a valuable mineral in each event, to wit, gold, and the claims are valid mining claims valuable for mineral content. On January 12, 1954, patent was issued to respondent subject only to the reservation of fissionable materials. At no time has the United States instituted any proceedings against appellants questioning the validity of their mining locations.

The court gave judgment quieting the title of respondent to all of the land which she had purchased from the government except the mining claims. As to the mining claims it was adjudged as follows: Appellants have only a possessory interest in said mines and mining claims including the right to the exclusive possession of the surface thereof and the right to mine the same. These rights are subject to compliance by appellants with the mining laws of Congress providing for the performance of annual labor, failing in which said mining claims shall revert. Appellants have the right to acquire the title to the claims by further compliance with and the purchase of the land as provided by the laws of Congress, but respondent is the owner of the freehold and appellants are forever enjoined from asserting any right or title thereto. Appellants have appealed from that part of the judgment affecting their interest in the mining claims.

We think the wrong conclusions have been drawn from the facts found and that the legal issues here in controversy are all settled by the opinion rendered in Brown v. Luddy, 121 Cal.App. 494, 9 P.2d 326, in which case a hearing was denied by the Supreme Court. In the cited case Luddy had obtained a patent based on application for a stock-raising homestead and the lines of the land described in the patent overlapped a mining claim located on the public domain by Brown's predecessor in interest long before Luddy applied for his patent. All requirements of law in respect to mining locations had been fulfilled, but no patent had issued. Answering the contention that Brown's quiet title action constituted a collateral attack upon the patent which was not permissible the court said that it conceded the conclusive effect of a patent issued by the land department in a case where it had power or authority to act, but that the question before the court was whether the mining claim was property of such character that the control of the exclusive right to its possession and enjoyment had passed out of the hands of the government and whether, in view of the mining laws and the rights guaranteed under them to locators of mining claims on the public domain, the land department had any authority to convey to an applicant for a stock-raising homestead the surface rights previously vouchsafed to the locator under a valid location made and kept good in compliance with such laws. These questions were answered in favor of Brown. In arriving at the decision the court referred to numerous decisions of both the federal courts and the California courts. Treating of the nature of valid mining locations it said, 121 Cal. App. at page 499, 9 P.2d at page 329:

> "* * * It has frequently been held that a valid location of mineral lands made and kept up in accordance with the statute has the effect of a grant by the United States of the right of present and exclusive possession of the lands located."

Quoting from Watterson v. Cruse, 179 Cal. 379, 382, 176 P. 870, the court said:

> " 'While the paramount fee remains in the government until it has issued its patent, yet as to every one else—"the estate acquired by a perfected mining location possesses all of the attributes of a title in fee, and so long as the requirements of the law with reference to continued development are satisfied, the character of the tenure remains that of a fee." ' "

The court quoted the following from Clipper Mining Co. v. Eli Mining & Land

Co., 194 U.S. 220, 24 S.Ct. 632, 48 L.Ed. 944:

> " 'In St. Louis Min. & Mill. Co. v. Montana Min. Co., 171 U.S. 650, 655, 19 S.Ct. 61, 63, 43 L.Ed. 320, 322, the present Chief Justice declared that "where there is a valid location of a mining claim, the area becomes segregated from the public domain, and the property of the locator." Nor is this "exclusive right of possession and enjoyment" limited to the surface, nor even to the single vein whose discovery antedates and is the basis of the location. It extends (so reads the section) to "all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically." In other words, *the entire body of ground,* together with all veins and lodes whose apexes are within that body of ground becomes subject to an exclusive right of possession and enjoyment by the locator. And this exclusive right of possession and enjoyment continues during the entire life of the location, or, in the words of Chief Justice Waite * * *, just quoted, while there is "a valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States." There is no provision for, no suggestion of, a prior termination thereof.' " (Italics ours.)

Referring to Van Ness v. Rooney, 160 Cal. 131, 116 P. 392, the court said, 121 Cal.App. at page 502, 9 P.2d at page 330:

> "* * * Its decision was not based upon the construction of the reservation in the patent alone, however, but also upon the broader grounds that known mining claims do not pass by a subsequent patent of the land covered thereby, and that the government has no power to convey property that has already passed to others."

In Brown v. Luddy, supra, the character of the land in dispute, as to being land known to be valuable for its mineral deposits, was an issue in the case. But in this case the finding of the court is that the locations were based upon discoveries of valuable minerals and the claims were valid mining claims, which, of course, means also that the locators had duly recorded their locations, thus giving constructive notice to the world that the lands involved were claimed as mining locations. The following was said, 121 Cal.App. pages 504–505, 9 P.2d at page 331:

> "* * * [T]he courts have held that there is another point of time at which the character of known mineral lands can be fixed so as to prevent the government exercising any effective authority to deprive mining claimants of rights duly initiated and maintained under the mining laws. The United States Supreme Court in Noyes v. Mantle, 127 U.S. 348, 8 S. Ct. 1132, 1135, 32 L.Ed. 168, in considering the effect of a patent for a placer claim upon a previously located quartz claim in conflict therewith, said: 'Where a location of a vein or lode has been made under the law, and its boundaries have been specifically marked on the surface, so as to be readily traced, and notice of the location is recorded in the usual books of record within the district, we think it may safely be said that the vein or lode is known to exist, although personal knowledge of the fact may not be possessed by the applicant for a patent of a placer claim. The information which the law requires the locator to give to the public must be deemed sufficient to acquaint the applicant with the existence of the vein or lode. A copy of the patent is not in the record, so we cannot speak positively as to its contents; but it will be presumed to contain reservations of all veins or lodes known to exist, pursuant to the statute. *At any rate, as already stated, it could not convey property which had already passed to others. A patent of the government cannot, any more*

than a deed of an individual, transfer what the grantor does not possess.'" (Italics ours.)

Although in Noyes v. Mantle, 127 U.S. 348, 8 S.Ct. 1132, 32 L.Ed. 168, the court was discussing the location of a vein or lode what is said applies, perhaps with even greater force, to a placer mining location which is required, where practical, to follow the public surveys, which the locations here in question did. In further support of its holding that the general government was without power to patent to others land held under valid mining locations and known to contain minerals, the court said, 121 Cal.App. at pages 506–507 9 P.2d at page 331:

> "* * * [T]he mining statutes are, in effect, an offer by the government to sell the public mineral lands to the locator, who, by making a valid location thereon, accepts the offer and thereby closes the contract of purchase, and on compliance with its terms becomes entitled to a conveyance. * * It is not necessary for us to construe the patent to Luddy, as we base our conclusion that it is ineffective to convey any surface title to him as to the 1.96 acres in dispute upon the statutes which gave such surface rights to plaintiffs' predecessors and the rule which declares *that the government has no power to grant that which it has already by virtue of its laws and a compliance therewith assured to another with all of the force and effect of a grant.*" (Italics ours.)

In addition to what has been said the following observations are pertinent: Respondent obtained her patent pursuant to the provisions of 43 United States Code Annotated, Section 1171, which section states that:

> "* * * [I]t shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the *public domain* * * *." (Italics ours.)

[1–3] While no exception was made in the patent for the mining locations in issue here, nevertheless under the authorities we have referred to those parcels were not part of the public domain and were not thus authorized to be sold by said section 1171. As was said in Brown v. Luddy, supra, the contract of purchase made with the government by a valid location is a contract within the protection of the federal Constitution. See also Lynch v. United States, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434, 1441, declaring that rights against the United States arising out of a contract with it are protected by the Fifth Amendment. Among the rights given to the locators are the following: The right, upon compliance with the terms of the statute, to obtain a patent. The right to apply to the general government for such patent and the right to have that patent issued by the general government if, upon such application, it is shown that the applicant was entitled thereto. To hold that in some manner the fee-simple title passed out of the United States and into the hands of a stranger to the contract to whom an application would now have to be made for a conveyance would defeat in part the rights vested in the locators. In this connection it has been said that the land covered by a valid mining location is held in trust by the general government for the benefit of the locator if, as and when he shall become entitled to a patent, Van Ness v. Rooney, supra, and that the trust continues until either he has abandoned his rights or through his failure to do the assessment work another has, during such failure, located the land. It is not to be assumed that the federal government ever intended by its patent to transfer the title it held in trust to a stranger to the locator holding adversely to him.

That portion of the judgment which treats of the interests of the appellants in the four mining claims is reversed with instructions to the trial court to enter a decree as against respondent that she has no right, title or interest in said mining claims, and that she be hereafter enjoined from asserting any interest therein.

PEEK and SCHOTTKY, JJ., concur.

146 Cal.App.2d 476

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Dale O. REMLING, Defendant and Appellant.

Cr. 1128.

District Court of Appeal, Fourth District, California.

Nov. 30, 1956.

Defendant was convicted of forgery and sentenced to state prison. From an order of the Superior Court of San Bernardino County, Carl B. Hilliard, J., denying defendant's motion to set aside the judgment imposing sentence, he appealed. The District Court of Appeal, Coughlin, J. pro tem., held that defendant's dissatisfaction with judgment because of sentence to state prison, instead of county jail, after his attorney's withdrawal of his plea of guilty, on which probation officer recommended jail sentence, and entry of plea of guilty against his will and request for jury trial, was not a matter for consideration on such motion.

Order affirmed.

1. Criminal Law ⇨998

On motion to set aside judgment, sentencing defendant to state prison after jury's verdict convicting him of forgery, on ground that he and his attorney appeared in trial court, not for sentence on his plea of guilty, as he desired, after probation officer's recommendation of county jail sentence, but to change plea to not guilty against his will and asked for jury trial, his dissatisfaction with judgment because of sentence to state prison, instead of county jail, was not a matter for consideration.

2. Criminal Law ⇨998

A motion to set aside and vacate judgment is in nature of writ of error coram nobis, which is available, where no other remedy exists, to secure relief from judgment rendered while some fact existed, which would have prevented its rendition, but was unknown to court without negligence or fault of defendant.

3. Criminal Law ⇨998

A charge that complaint filed in justice court was result of coercion and perjury is not a subject for review on defendant's motion to set aside judgment sentencing him to state penitentiary on conviction of forgery.

4. Criminal Law ⇨997(5)

Defendant's lack of effective aid of counsel, his misrepresentation thereby, or counsel's failure to perform his duty is not basis for relief, under writ of error coram nobis, from judgment sentencing defendant to state prison on verdict of conviction.

5. Criminal Law ⇨998

Defendant's complaint, not presented to trial court on motion for new trial, that he was denied right to subpeona witnesses, is not valid ground for vacation of judgment sentencing him to state prison on verdict of conviction.

6. Criminal Law ⇨998

A contention that judgment sentencing defendant to state prison on verdict of conviction should be set aside as founded on known perjured testimony is not subject for consideration on motion to vacate judgment.

7. Witnesses ⇨9

Defendant's request, before hearing on his motion to vacate judgment sentencing him to state prison on jury's verdict convicting him of forgery, for order directing issuance of subpoena to secure attendance of witnesses who he claims would establish his lack of intent to commit such offense, was properly denied, as fact issues once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial.

8. Criminal Law ⚷998

Absence of any allegation showing defendant's exercise of due diligence to discover facts, relied on in his written motion to set aside judgment sentencing him to state prison on jury's verdict convicting him of forgery, before filing of such motion, was sufficient reason for denial thereof.

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A. M. Sessions and Dale O. Remling, in pro. per.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

COUGHLIN, Justice pro tem.

This is an appeal from an order denying defendant's motion to set aside a judgment directing his imprisonment in the State Penitentiary for the offense of forgery.

The information in this matter, which was filed April 9, 1954, charged the defendant with the crime of forgery and alleged a prior conviction. On the same day, the defendant was duly arraigned; waived the services of counsel and time to plead; entered a plea of guilty; and admitted the allegations of a prior conviction. Thereupon, he was arraigned preliminary to pronouncement of judgment and the matter was referred to the probation officer for a pre-sentence investigation. Subsequently the probation officer prepared a report, recommending a county jail sentence, which was not accepted by the court but referred for further investigation, and "the favorable report in defendant's behalf" was withdrawn. On June 4, 1954, the defendant, appearing with an attorney appointed by the court to represent him, which he says was against his wishes, withdrew his plea of guilty, by leave of court, and entered a plea of not guilty. Thereafter, following a trial by jury, the defendant was found guilty as charged and sentenced to the State Prison. No motion for a new trial was made. No appeal was taken. The defendant was delivered to the California Institution for Men at Chino; transferred to the prison at Soledad; and, subsequently, placed in the prison at Folsom.

On April 27, 1956, 22 months after pronouncement of judgment, the defendant filed a written motion to annul, vacate and set aside the judgment in question, upon the ground that the complaining witness "was coerced into signing a criminal complaint falsely"; that the district attorney and a "court appointed public defender", conspired to suppress evidence favorable to the defendant; that he was denied the right to subpoena witnesses; that his conviction "was based upon the wilful and knowing use of perjured testimony by the prosecutor"; that "no intent to commit perjury was proved"; and, that he was not accorded counsel as guaranteed by the Constitution, because the attorney appointed to defend him was incompetent.

After a hearing upon the motion in question the court made its order denying the same, which the defendant contends was error.

[1] The defendant, in his written motion to set aside the judgment, states that he entered a plea of guilty to the charge contained in the information and, subsequently, he and his attorney "appeared in the Superior Court * * * not for sentence *as the defendant desired,* but to and did change his plea from guilty to not guilty, *against defendant's will,* and asked for a jury trial".

It is apparent to this court that the defendant has no valid complaint about the proceedings which resulted in his conviction. His dissatisfaction is with a judgment of imprisonment in the State Prison instead of in the County Jail. This is understandable, but not a matter for consideration upon a motion to vacate such a judgment.

Only the conscientious concern for the rights of the individual which is shown by the courts justifies any further consideration of defendant's contentions on this appeal.

[2] A motion to set aside and vacate a judgment is in the nature of a writ of error coram nobis which is available "to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court". People v. Adamson, 34 Cal.2d 320, 326, 210 P.2d 13, 15.

[3] The defendant's charge that the complaint filed in the Justice Court was the result of coercion and perjury is not a subject for review in this proceeding. In re Rogers, 91 Cal.App.2d 394, 400, 205 P.2d 667; People v. James, 99 Cal.App.2d 476, 484, 222 P.2d 117; People v. Dutton, 27 Cal.App.2d 364, 365, 80 P.2d 1003.

[4] The allegations of a conspiracy between the district attorney and defendant's counsel, and of the latter's incompetency, with resultant inadequate representation, are not supported by any evidence, other than the bare accusation by the defendant. Furthermore, the lack of effective aid of counsel, his misrepresentation of defendant, or failure to perform his duty are not a basis for relief under a writ of error coram nobis. People v. Cox, 141 Cal.App.2d 158, 296 P.2d 72; People v. James, 99 Cal.App.2d 476, 479, 222 P.2d 117; People v. Krout, 90 Cal.App.2d 205, 208, 202 P.2d 635.

[5] The defendant's accusation that he was denied the right to subpoena witnesses finds no support in the record other than his mere statement of the charge. Moreover, such a complaint could have been presented to the trial court on a motion for a new trial and is not a valid ground for vacating the judgment. People v. Cox, 141 Cal.App.2d 158, 296 P.2d 72.

[6] The contention that the judgment should be set aside because it was founded on known perjured testimony is not a subject for consideration in this type of proceeding, People v. Mooney, 178 Cal. 525, 530, 174 P. 325; People v. Adamson, 34 Cal.2d 320, 327, 210 P.2d 13, and is without basis of fact in this case.

[7] Before the hearing of the motion under consideration in this case, the defendant asked the trial court for an order directing the issuance of a subpoena to secure the attendance of witnesses at that hearing who, he claims, would establish a lack of intent to commit the offense of which he was convicted. This request was properly denied, as "issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial". People v. Tuthill, 32 Cal.2d 819, 822, 198 P.2d 505, 506.

[8] The defendant's written motion to set aside the judgment contained no showing that the facts upon which he relied "were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion * * ". People v. Adamson, 34 Cal.2d 320, 327, 210 P.2d 13, 16. This deficiency was called to his attention by a letter from the trial judge, and permission was granted to cure the defect by filing an additional affidavit. However, no further affidavit was presented. The absence of any allegations showing due diligence, of itself, was sufficient reason for denial of defendant's application. People v. Shorts, 32 Cal.2d 502, 506, 197 P.2d 330; People v. Tuthill, 32 Cal.2d 819, 821, 198 P.2d 505.

The order is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

146 Cal.App.2d 656

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Billy WILLIAMS, Defendant and Appellant.

Cr. 2715.

District Court of Appeal, Third District, California.

Dec. 6, 1956.

Prosecution for unlawful sale of a narcotic by defendant who allegedly sold marijuana cigarettes to special investigator who had, as part of investigation, become acquainted with defendant, to whom he had loaned money for purchase of narcotics, and for whom he had purchased drinks over period of time. The Superior Court, San Joaquin County, M. G. Woodward, J., found defendant guilty, and entered judgment and order denying motion for new trial. Defendant appealed from judgment and order. The District Court of Appeal, Schottky, J., held that evidence warranted implied finding that defense of entrapment had not been established, despite claim of defendant that evidence showed calculated course of unlawful inducement by paid agent to secure commission of crime.

Judgment and order affirmed.

1. Criminal Law 🔑37

The use by state officers of a decoy, informer or undercover operator to secure evidence and provide opportunity for one to commit a criminal offense does not of itself constitute entrapment.

2. Criminal Law 🔑330

The defense of entrapment is an affirmative defense imposing upon the accused the burden of proof.

3. Criminal Law 🔑569

In prosecution for unlawful sale of a narcotic by defendant who allegedly sold marijuana cigarettes to special investigator who had, as part of investigation, become acquainted with defendant, to whom he had loaned money for purchase of narcotics, and for whom he had purchased drinks over period of time, evidence warranted implied finding that defense of entrapment had not been established, despite claim of defendant that evidence showed calculated course of unlawful inducement by paid agent to secure commission of crime. West's Ann.Health & Safety Code, § 11500.

4. Poisons 🔑9

In prosecution for unlawful sale of a narcotic by defendant who allegedly sold marijuana cigarettes to special investigator who had, as part of investigation, become acquainted with defendant, to whom he had loaned money for purchase of narcotics, and for whom he had purchased drinks over period of time, evidence supported finding that defendant had not only made sale of narcotics but also that he was ready and willing to make sale without inducement. West's Ann.Health & Safety Code, § 11500.

Robert E. Green, Stockton, for appellant.

Edmund G. Brown, Atty. Gen., by G. A. Strader, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

Billy Williams was charged by information with the crime of a violation of section 11500 of the Health and Safety Code, unlawful sale of a narcotic. He pleaded not guilty, and following a trial before the court without a jury was found guilty. His motion for a new trial and his application for probation were denied and judgment was pronounced. He has appealed from the judgment and from the order denying his motion for a new trial.

The principal contention of appellant is that the judgment and order should be reversed for the reason that the evidence discloses as a matter of law that he was the victim of an unlawful entrapment. Before discussing this contention we shall give a brief summary of the evidence as shown by the record.

A Mr. Robert Mellen, while working as an insurance adjuster in the city of Stockton, became acquainted with the narcotic traffic in that city. He reported the matter to the District Attorney of San Joaquin County and was employed by the District Attorney as an investigator. His instructions were to investigate the narcotic traffic in the city and to discover if possible the source of the narcotics and the persons to whom sales were being made. The purpose of his employment was not to secure evidence particularly against Billy Williams.

In order to accomplish his purpose, Mr. Mellen frequented the various places in the city of Stockton where the subject of narcotics was discussed, and particularly a place referred to in the transcript as the Lido Club. During the course of his investigation, Mr. Mellen on several occasions advanced money to the appellant, Billy Williams, upon the agreement that the appellant would supply him with marijuana.

On the evening of April 7, 1956, Mr. Mellen met the appellant at the Red Rose Drive-In. At that time the appellant was with one Melvin Estrada and two young women. Mr. Mellen was in his own automobile. A conversation occurred at that time between Mr. Mellen and the appellant concerning marijuana. The appellant at that time had in his possession an envelope containing material which appeared to be marijuana, and it was agreed that the appellant would meet Mr. Mellen later at a place known as the Rolling Pin, in Stockton. Mr. Mellen later met the appellant at the Rolling Pin at approximately 1:00 or 2:00 a. m. He observed the appellant drive up and stop in front of the Rolling Pin and saw the appellant and Melvin Estrada leave their automobile and place something behind a barber pole. Mr. Mellen was later informed by the appellant that this was their "stash." The appellant, Mr. Estrada and Mr. Mellen then entered the Rolling Pin, secured a booth in a small room adjoining the soda fountain. Two young women and a Tom Sims were also present. They discussed the subject of marijuana, the appellant stating that he had marijuana with him and that he would take the same into the men's room and roll some cigarettes. The appellant then left with Mr. Estrada and went into the men's room and returned shortly when a negro sailor walked into the men's room. Appellant said that he had been upset because he did not know who walked into the men's room as he and Mr. Estrada were in the process of rolling the cigarettes. As soon as the negro sailor was seen to leave, appellant returned to the men's room where he remained approximately three or four minutes. The appellant then returned to the booth where Mr. Estrada and Mr. Mellen were sitting and handed Mr. Mellen two cigarettes. These cigarettes were retained by Mr. Mellen and delivered to a police officer who in turn delivered them to the State Bureau of Criminal Identification and Investigation. They were identified by a chemist as containing marijuana and introduced at the trial as People's Exhibit No. 1.

At the time of the delivery of the cigarettes to Mr. Mellen the appellant stated that they were in part payment of money previously advanced for the purpose of securing marijuana. Mr. Mellen had previously advanced money to the appellant for the agreed purpose of enabling the appellant to secure a quantity of marijuana on one of his "trips" south. Mr. Mellen had previously purchased narcotics from the appellant on March 31, 1956.

Appellant argues that the long length of time that the agent spent on appellant, the number of their meetings, the buying of drinks, the introduction to an attorney and the advancement of money all show a calculated course of unlawful inducement by a paid agent to secure the commission of a crime. Appellant also urges that appellant was under some pressure from the agent because appellant had gotten into his debt. Appellant argues that in view of this combination of persuasion, inducement and pressure, it cannot be said that this was an ordinary transaction between a willing buyer and a willing seller.

Appellant relies strongly upon the case of Lutfy v. United States, 9 Cir., 198 F.2d 760, 33 A.L.R.2d 879, in which the defendant testified that a special employee of the Federal Bureau of Narcotics struck up an acquaintance with the defendant and became his friend and drinking companion. He then induced defendant to procure narcotics for a friend. Defendant further testified that prior to these incidents, he had never engaged in the narcotic traffic; that he had no intention of selling narcotics and that he procured the narcotics only because of the urging of the agent. In reversing the judgment for failure to instruct on the doctrine of entrapment, the court stated, 198 F.2d at page 762:

> "* * * Taken as true, it [defendant's testimony] is sufficient to establish the defense of entrapment. It does not show the permissible actions of enforcement officers in merely offering an opportunity to commit a criminal offense to one already engaged in a course of similar criminal conduct, or to one who has the intent or is willing to commit such an offense. Appellant's testimony portrays, rather, the conception of the criminal design and the planning of the offense by the enforcement officers, the formation of the intent in their minds, and the procurement, by misrepresentation and deceit, of its commission by appellant, an otherwise law-abiding, innocent person, who had no intent to commit the offense and no disposition to commit it until he was induced to do so by the enforcement officers. On such a showing, appellant was entitled to have the jury properly instructed on the law covering his defense of entrapment."

While there is some similarity between the factual situation in the instant case and the factual situation in the case cited by appellant, the holding of the cited case was merely that the defendant was entitled to have the jury instructed as to the law of entrapment. There was no jury in the instant case and there is nothing in the cited case to support appellant's contention that entrapment was established as a matter of law.

As stated in People v. Lindsey, 91 Cal.App.2d 914, at page 916, 205 P.2d 1114, at page 1115:

> "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer. Persuasion or allurement must be used to entrap. People v. Hall, 133 Cal.App. 40, 45, 23 P.2d 783. The officer must induce the defendant to commit a crime which he would not have committed without such inducement. People v. Makovsky, 3 Cal.2d 366, 369, 44 P.2d 536. It is not the entrapping of a criminal that the law frowns upon but the seduction of innocent persons into a criminal career by its officers. United States v. Wray, D.C., 8 F.2d 429, 430."

In People v. Schwartz, 109 Cal.App.2d 450, at page 455, 240 P.2d 1024, at page 1027, the court stated:

> "It is not the entrapment of a criminal upon which the law frowns, but the seduction of innocent people into a criminal career by its officers is what is condemned and will not be tolerated."

[1] The use by state officers of a decoy, informer or undercover operator as in the present case to secure evidence and provide an opportunity for one to commit a criminal offense does not of itself constitute entrapment. People v. Nunn, 46 Cal.2d 460, 296 P.2d 813.

The traffic in narcotics is an activity which is pursued in a highly secretive manner. Sellers are undoubtedly very suspicious of the persons to whom they sell. An undercover operator must of necessity work carefully over a long period of time to gain the confidence of those engaged in the traffic and be "accepted" by them. The evidence in the present case shows that Mr. Mellen did just that. He frequented the Lido Club in Stockton where the subject of narcotics was habitually discussed.

[2] It is conceded by appellant that the defense of entrapment is an affirmative de-

fense imposing upon the accused the burden of proof. People v. Lee, 9 Cal.App.2d 99, 48 P.2d 1003.

The Supreme Court reiterated the rule in People v. Braddock, 41 Cal.2d 794, at page 803, 264 P.2d 521, at page 526, stating as follows:

> "Entrapment 'is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial.' People v. Schwartz, supra, 109 Cal.App.2d 450, at page 455, 240 P.2d at page 1027; People v. Grijalva, 48 Cal.App.2d 690, 694, 121 P.2d 32; People v. Lee, 9 Cal.App.2d 99, 109, 48 P.2d 1003."

The court in the last cited case also held that with respect to the special defense of entrapment, the often repeated rule applies that on appeal the evidence is to be construed most favorably to the respondent. The court in the Braddock case further stated as follows 41 Cal.2d at page 803, 264 P.2d at page 526:

> "* * * Where the record shows a conflict in the evidence, the judgment will not be reversed. People v. Crawford, 105 Cal.App.2d 530, 537, 234 P.2d 181." See also People v. Terry, 44 Cal.2d 371, 282 P.2d 19; People v. Nunn, 46 Cal.2d 460, 296 P.2d 813.

[3] In the present case the trial court was not required to believe the testimony of the appellant. The trial court had the opportunity, not available to this court, of observing the witnesses, their demeanor and manner of testifying. Obviously the court rejected the testimony of the appellant and accepted that of Mr. Mellen together with other evidence and circumstances which rebut the defense of entrapment. We are satisfied that there is ample evidence to support the implied finding of the trial court that the defense of entrapment had not been established.

[4] Appellant contends further that the prosecution failed to prove that appellant was ready and willing to make the alleged sale without inducement, and also that there was no proof that a sale was made, but as to these contentions it is clear that there is a conflict in the evidence. The court was not compelled to believe the statements of appellant and we are convinced that there is ample support in the evidence for the conclusion that appellant not only made a sale of narcotics but also that he was ready and willing to make it without inducement.

No other points raised require discussion.

The judgment and order are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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146 Cal.App.2d 541

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Peter John DORE, Defendant and Respondent.

Cr. 5685.

District Court of Appeal, Second District, Division 3, California.

Dec. 3, 1956.

Hearing Denied Dec. 27, 1956.

Defendant was accused of possessing marijuana and bound over for trial. From an order of the Superior Court of Los Angeles County, Herbert V. Walker, J., dismissing the information on ground that evidence at preliminary examination was insufficient to establish probable cause to believe defendant guilty of such offense, the People appealed. The District Court of Appeal, Shinn, P. J., held that police officers' testimony that defendant, after being signaled by them with their flashlights to stop automobile which he was driving toward them in an alley late at night, increased his speed, forcing them to jump aside, and stopped only when his progress was blocked by parked automobile, showed probable cause to commit defendant for trial as justifying reasonable belief by officers that defendant was probably engaged in some law violation and that their duty was to investigate, so that their search of defendant's automobile and arrest of defendant after finding marijuana therein were not illegal.

Order reversed.

1. Criminal Law ⚿238

Evidence which would lead one of ordinary caution and prudence to believe and conscientiously entertain strong suspicion that a person is guilty of crime discloses probable cause for committing such person for trial on charge of such crime.

2. Arrest ⚿63(3)
Criminal Law ⚿238
Searches and Seizures ⚿3(1)

Police officers' testimony, on preliminary examination of one charged with possession of marijuana, that defendant, after being signaled by officers with their flashlights to stop automobile, which defendant was driving toward them late at night in alley, increased his speed, forcing them to jump aside, and stopped only when his progress was blocked by parked automobile, showed ground for reasonable belief in officers' minds that defendant was probably engaged in some law violation and that their duty was to investigate, so that their search of defendant's automobile and arrest of defendant after finding marijuana therein were not illegal and there was probable cause to commit defendant for trial. West's Ann.Pen.Code, § 995.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Fred N. Whichello, Lewis Watnick, Deputies Dist. Atty., Los Angeles, for appellant.

Lewis N. Wurtzel, Paul P. Selvin, Los Angeles, for respondent.

SHINN, Presiding Justice.

Peter John Dore was accused of the possession of marijuana and bound over for trial. He made a motion for dismissal of the information upon the ground the evidence at the preliminary was insufficient to establish probable cause to believe he was guilty of the offense. Pen.Code, § 995. The People appeal.

The evidence of possession consisted of marijuana taken by officers from defendant's car, more of the same taken from his person at police headquarters and admissions allegedly made to officers while defendant was held under arrest. Defendant's motion for dismissal was made and granted upon the ground that the search of defendant's car and his arrest were illegal and that the marijuana was improperly received in evidence.

Two police officers, Beauchamp and Ross, were investigating some cars parked in an alley in Glendale. It was approximately 11:30 or 11:45 at night. By ordinance of the City of Glendale it was made unlawful to leave a car unattended or parked in an alley. As the officers were walking southerly about 200 feet from the south intersecting street a car, driven by defendant, entered the alley at a speed of about 15 miles per hour. The officers stopped in the center of the alley and attempted to stop the car by the use of their flashlight. The headlights of the car were on, the car slowed down, but as it approached the officers its speed was increased to about 30 miles per hour and when it was dangerously close to the officers they jumped aside. The car traveled about 100 feet further to the north where its progress was blocked by another parked vehicle. The officers approached the car and asked defendant and his passenger, Hooker, to step out. The two men were questioned as to why they had attempted to run by or run down the officers. Beauchamp entered the car to check the registration and observed a brown multi-colored handkerchief and a brown paper bag lying on the front seat. He opened the bag and found in it a brownish green weed-like material later identified as marijuana. The two men were placed under arrest and handcuffed. Dore stated at first that he knew the bag was in the car but did not know what it contained. Upon further questioning he admitted he knew what was in it. He stated he was taking it to a friend's house. At police headquarters marijuana cigarettes were taken from Dore's pocket.

[1, 2] The question is whether the evidence disclosed probable cause for committing defendant for trial. There was probable cause if there was evidence which would lead one of ordinary caution and prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused. Bompensiero v. Superior Court, 44 Cal.2d 178, 281 P.2d 250. If the fact that defendant had marijuana in his possession was established by competent and admissible evidence, probable cause was shown. If the evidence was improperly received, as defendant contends, it was because the officers had no right to enter defendant's car. In answering the question whether they acted reasonably in so doing we have only their testimony to consider. They testified they were in uniform, standing in the middle of the alley with the car's headlights upon them, and signaling the driver with their flashlights. The driver slowed down when some distance away but increased his speed to about 30 miles per hour. If the officers had stood their ground they would have been run down. Officer Beauchamp testified: "As the car went by me I got a flashing glimpse of Hooker leaning forward with his hands either down close to the floor board or up partially underneath the dashboard." It could reasonably be inferred that defendant recognized the officers as such, realized they were being signaled to stop and endeavored to take flight to avoid being questioned. Defendant may have an entirely different version as to what his actions and intentions were but the officers were justified in acting on appearances and reasonable deductions as to what defendant was endeavoring to do. They were not setting up a general blockade of a highway. They were not engaged in searching vehicles which stopped at their command. They did not enter defendant's car merely because he was driving in an alley late at night, although they had no other reason for directing him to stop for questioning. If defendant had stopped his car the situation would have been quite different. The simple fact that he was driving in an alley would have furnished no reason for searching the car. It was not unreasonable that the officers should have believed that defendant intentionally chased them out of his path, knowing they were officers and were signaling him to stop. And, as it developed, defendant had good reason to avoid questioning and would have left the scene had his path not been blocked by another car. We do not doubt that the actions of defendant, as related, were such as to engender in the minds of the officers a reasonable belief that defendant was probably engaged in some violation of law and that it was their duty to make an investigation. The facts speak for themselves. The factual situations developed in cases of claimed unlawful searches and arrests are of infinite variety but they are all weighed in the same scales. We find no occasion for comparing the weight of the suspicious circumstances in the instant case with those circumstances in the many recent cases in which the reasonableness of a search has been considered. It is sufficient to say that we are of the opinion that there was equal if not more reason for an investigation in the present case than there was in People v. Martin, 46 Cal.2d 106, 293 P.2d 52. It is our conclusion that the search and arrest in the present case were not illegal and that it was error to dismiss the information.

The order is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

146 Cal.App.2d 520

Daniel Claude GALLIPO, a minor, by Claude W. Gallipo, his guardian ad litem, Plaintiff and Appellant,

v.

CITY OF LONG BEACH, a municipal corporation, et al., Defendants and Respondents.

Civ. 21970.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1956.

Hearing Denied Jan. 30, 1957.

Action against municipality to recover, under Public Liability Act, for injuries sustained by eight year old boy when he fell while endeavoring to disentangle himself from barbed wire barricade in center of pipe line on which he was attempting to cross gap spanned by such pipe line and attached bridge, which provided no pedestrian walkway. The Superior Court of Los Angeles County, Ralph K. Pearson, J., rendered judgment of nonsuit, and plaintiff appealed. The District Court of Appeal, Fox, J., held that jury questions were presented as to whether a dangerous or defective condition known to city had existed and as to whether reasonable action had been taken to protect public from foreseeable risk of injury.

Reversed.

1. Trial 🔑139(1)

A judgment of nonsuit is proper only if, disregarding any conflict in evidence and according plaintiff's evidence all of value to which it is legally entitled and indulging every legitimate inference which may be drawn from such evidence, necessary result is a determination that no substantial evidence exists to support a judgment for plaintiff.

2. Municipal Corporations 🔑742(4)

To recover against city, in action under Public Liability Act, plaintiff was required to establish a dangerous or defective condition which city was authorized to remedy, actual or constructive knowledge thereof on part of city, opportunity to take action to protect public after acquisition of such knowledge, failure to do so by responsible officials, and injury proximately caused by reason of said condition. West's Ann.Gov. Code, § 53051(a, b).

3. Municipal Corporations 🔑788(1), 791(1), 821(15, 16)

Constructive, as well as actual, knowledge of dangerous or defective condition of street or highway may subject municipality to liability for damage sustained by reason of such condition; but it is ordinarily a question of fact for jury whether particular circumstances of case are sufficient to ascribe actual or constructive notice of condition to city. West's Ann.Gov.Code, § 53051(a, b).

4. Municipal Corporations 🔑857

Whether a given set of circumstances creates a dangerous or defective condition of public property is a question normally to be determined by trier of fact. West's Ann. Gov.Code, § 53051(a, b).

5. Municipal Corporations 🔑763(1)

It is duty of municipality to keep its streets and sidewalks in a reasonably safe condition for travel by public, using ordinary care to provide against such dangers to public as may reasonably be anticipated and having due regard to character of travel, incidental purposes for which highway may be used and nature of danger at point in question. West's Ann.Gov.Code, § 53051 et seq.

6. Municipal Corporations 🔑794

A municipality may be held liable for failure to guard against accidents due to a dangerous or defective condition even though that condition exists off of traveled portion of highway, so long as it is so connected with, or in such proximity to, traveled portion of highway as to render it unsafe to those traveling thereon. West's Ann.Gov.Code, § 53051 et seq.

7. Municipal Corporations 🔑796, 798

A duty rests upon a municipality either to give appropriate warning or to erect and maintain suitable barriers if it has knowledge of existence of dangerous condition adjacent to highway from which risk of injury to pedestrians is reasonably to be foreseen, and when municipality has knowledge that established public use is being made of government property outside the normal area of invitation under circumstances involving hazard to using public, municipality must take action reasonably necessary to protect public against condition. West's Ann.Gov.Code, § 53051 et seq.

8. Municipal Corporations ⚷847

Where children of tender years are exposed to hazard by manner of operation or maintenance of municipal facility, failure of city to provide a barrier to prevent injury at point or from source of danger constitutes a dangerous condition, within Public Liability Act. West's Ann.Gov.Code, § 53051 et seq.

9. Bridges ⚷46(8, 10)

In action against municipality to recover, under Public Liability Act, for injuries sustained by eight year old boy when he fell while endeavoring to disentangle himself from barbed wire barricade in center of pipe line on which he was attempting to cross gap spanned by such pipe line and attached bridge, which provided no pedestrian walkway, jury questions were presented as to whether a dangerous or defective condition known to city had existed and as to whether reasonable action had been taken to protect public from foreseeable risk of injury. West's Ann.Gov.Code, § 53051 et seq.

◆

Simpson, Wise & Kilpatrick, George E. Wise, and Adrian Kuyper, Long Beach, for appellant.

Walhfred Jacobson, City Atty., Long Beach, John R. Nimocks, Deputy City Atty., Long Beach, for respondent City of Long Beach.

FOX, Justice.

Plaintiff appeals from a judgment of nonsuit in an action filed under the Public Liability Act, Gov't Code, § 53051 et seq. The action was brought on behalf of a minor to recover for damages sustained as the result of a fall from a bridge owned, operated and maintained by the defendant city.

The issue involved is whether the bridge and an attached pipeline constituted a dangerous or defective condition of which the City had notice. The amended complaint charged the defendant knew that the structure was a menace within the Act by reason of its construction, state of repair, narrowness, lack of safeguards, and the absence of pedestrian crossings.

The accident here involved occurred on the California Avenue bridge, which was constructed prior to 1913 by the Pacific Electric Railway over the tracks of its right of way. Outside the railing of the bridge, on the west side, is a gas pipe and supporting structural members. The defendant city has operated and maintained the bridge and its appurtenances since 1924. The roadway portion of the bridge, which is approximately 20 feet wide, constitutes a two-lane arterial street used by north-south vehicular traffic, and carries several thousand vehicles daily. It appears that this is the only bridge in Long Beach upon which there is no provision for a pedestrian walkway. The north approach is within the city of Signal Hill.

The photographs in evidence and the testimony disclose the following physical features at the scene of the accident: The vehicular highway is a paved street which narrows down at the bridge entrance. The bridge spans a railroad right of way, with a drop of about 25 feet to the ground below at its highest point. There is a wooden railing on each side of the vehicular portion of the bridge. The roadway approaching the bridge has no sidewalks, nor is there any pedestrian passageway along the bridge. Adjacent to the lower railing on the west side of the bridge, and running parallel to and almost horizontal with it over the railroad right of way, is a pipeline about one foot in diameter. This pipeline, which is just outside the bridge railing, is attached to the bridge by a supporting structure, a part of which consists of two horizontal planks, one on each side of the pipe. The plank nearest the roadway extends the full length of the bridge; the outer plank extends from the south end of the bridge northward about three-fourths the length of the bridge. There is no barrier at either end of the approaches to the bridge or pipeline to prevent pedestrians from walking upon the pipeline or the two beams flanking it and attempting to cross over in that manner. The grass alongside the bridge has been flattened and beaten into what appears to be a defined path leading up to the pipeline structure. However, near the center of the bridge and outside the west railing there are two parallel 2″ x 4″ beams about 5 feet apart which connect the bridge and pipeline structure. The beams slant across the pipeline to form an obstacle to passage. They are attached at one end to the outer wooden beam beside the pipeline and at the other near the top of the bridge railing. Several strands of barbed wire were loosely strung between the two boards and dangled over the edges.

Plaintiff is an eight year old boy who had lived for three years one block south of the bridge. He had been advised by his parents not to play on the bridge. For approximately two years before the accident, he had walked along the pipeline to cross the bridge about once or twice a week. He had a "favorite spot" on the other side of the bridge, where he played with his friends. He did not tell his parents he went up on the pipeline. A couple of times before the accident he had lost his balance while crossing but regained it without mishap. When he came to the loose-ended barbed wire in the center, he put both his feet on the plank closest to the bridge to get by the barrier. He testified "it was kind of a tight squeeze getting in there underneath those boards." Plaintiff stated he crossed on the pipeline because he "had no place to walk on the bridge," and that, although he sometimes went under the bridge, "most of the time I went across the pipe." He had on occasions crossed the bridge roadway when there were no cars. There was no park in the area and the children played around the bridge. Plaintiff testified he always got on the pipeline and beams from the end of the bridge by just walking up and stepping on it.

On the day of the accident, plaintiff was playing near the bridge with three other youngsters, Steve, Bobby and Jay. Plaintiff started to cross along the pipeline structure. He made his way with one leg on each side of the pipe and, in the words of a child witness, "kind of scooting" along. Bobby, who had just stepped onto the pipeline, observed that as plaintiff attempted to go under the barbed wire, his trousers were caught by the wire and as he reached over to extricate himself, he fell about 25 feet to the ground below. Plaintiff suffered severe head injuries.

Several residents of the neighborhood testified that children were wont to play near the bridge and cross it over the pipeline. There was testimony that the bridge and its environs was a favorite meeting place of various children. One witness thought he recalled that a child was hit by a car on the bridge and killed.

It is not disputed that the bridge and pipeline were essentially in the same condition for many years prior to the accident. As stated in defendant city's brief, "notice of the condition of the bridge maintained by respondent for some 30 years prior to the accident was not an issue." There was no evidence that any complaints had been made with reference to any dangerous condition of the bridge.

Mr. Gilkerson, defendant's City Engineer, testified that the bridge in question is the only one in the city upon which no provision had been made for pedestrian crossing. He stated that he had personally seen children on the bridge "quite frequently," but not on the pipeline. After testifying that as early as 1915 defendant and the city of Signal Hill had corresponded on the subject of a new bridge, he remarked: "The pedestrian facilities would no doubt have been discussed in connection with the widening of the vehicular lanes." Asked whether, at the time of the accident, he regarded the bridge as dangerous or defective for pedestrians, he replied: "Only to the extent that it was narrow, and it would be necessary or desirable certainly for pedestrians not to attempt to cross with the vehicles." Also he stated that it would cost just a few hundred dollars to erect a barrier at the approaches to the pipeline structure at each end of the bridge.

James Kincaid testified as director of defendant's Public Service Office, which is responsible for bridge maintenance. His records, available merely from 1951, show that the only expenditure made on the California Avenue bridge was the sum of $11.74 for repair of a railing. He "presumed" that children crossed the bridge to reach two grammar schools in the vicinity.

Robert Dier, the Traffic Engineer, testified he had discussed with the City Engineer the general desirability of having a new bridge at the location here involved and possibly talked about the need for sidewalks. He testified that "any modern bridge would have such a sidewalk" and that the lack of a sidewalk "was one of the reasons I would want a modern bridge at that location." Asked whether the bridge was a hazard to pedestrians, Mr. Dier responded: "I would say it would depend on the pedestrians and the motor vehicles approaching, I would say that it might be safe for a person to cross. It would depend on certain conditions and on the actions of both the pedestrian and the motorist."

At the close of plaintiff's case the trial court granted a motion for nonsuit. Plaintiff appeals from the ensuing judgment.

Plaintiff's counsel makes no attempt to predicate liability through the application of the doctrine of attractive nuisance and asserts he relies entirely on the provisions of the Public Liability Act embodied in section 53051 of the Government Code.[1]

[1, 2] A judgment of nonsuit is proper only if, disregarding any conflict in the evidence and according plaintiff's evidence all the value to which it is legally entitled and indulging every legitimate inference which may be drawn from such evidence, the necessary result is a determination that no substantial evidence exists to support a judgment for plaintiff. Aguirre v. City of Los Angeles, 46 Cal.2d 841, 844, 299 P.2d 862. The only question for consideration is whether the evidence adduced would warrant an inference of tort liability against the City within the scope of the statute. To recover against the City, plaintiff was required to establish a dangerous or defective condition which the City was authorized to remedy, actual or constructive knowledge thereof on the part of the City, an opportunity to take action to protect the public after the acquisition of such knowledge, failure to do so in the responsible officials, and an injury proximately caused by reason of the said condition. McNeill v. A. Teichert & Son, Inc., 137 Cal.App.2d 5, 10, 289 P.2d 595.

[3] The essence of defendant's argument in support of the judgment of nonsuit is that, as a matter of law, neither the bridge nor the attached pipeline constituted a dangerous or defective condition within the meaning of the statute. It contends, as a corollary to this proposition, that there is not "an iota of evidence pointing to notice to any responsible city official that the pipeline was ever being used as this appellant used it." At the same time, defendant concedes that "there is no dispute that the City knew the condition of the bridge and the condition of the pipeline." The rule is well established that constructive as well as actual knowledge of a dangerous or defective condition of a street or highway may subject a municipality to liability for damages sustained by reason of such condition. Peters v. City & County of San Francisco, 41 Cal.2d 419, 427, 260 P.2d 55; Kirack v.

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[1] That section reads:

"A local agency is liable for injuries to persons and property resulting from the dangerous or defective condition of public property if the legislative body, board, or person authorized to remedy the condition:

"(a) Had knowledge or notice of the defective or dangerous condition.

"(b) For a reasonable time after acquiring knowledge or receiving notice, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition."

City of Eureka, 69 Cal.App.2d 134, 140, 158 P.2d 270. As the case last cited points out, it is ordinarily a question for the jury whether the particular circumstances of the case were sufficient to ascribe actual or constructive notice of the condition to the City. There is here present substantial evidentiary basis for a jury finding that defendant knew the pipeline structure was being used as a means of crossing the bridge. This evidence may be epitomized as follows: the bridge was under the City's control for 30 years and its officers knew of its condition; they knew that young children congregated about the bridge; that children had to cross the bridge in going and coming from nearby grammar schools; that the bridge was narrow, and had no pedestrian walks; and that it was dangerous to pedestrians under certain traffic conditions. The pipeline, with its supporting structure and planks, formed a crude passageway situated alongside, and attached to, the bridge. A path demarked in the grass along the side of the bridge led up to the pipeline. Finally, over the middle of the attached pipeline structure there had been erected a barrier consisting of two planks and some strands of barbed wire obviously to block passage beyond this midway point. This concatenation of fact and circumstance could readily suggest to a reasonable mind that the City knew children were crossing on the pipeline and that the only action taken to guard against this practice was to set up a kind of barricade at a halfway point along this route.

[4] We turn now to the question as to whether the manner in which defendant operated and maintained the bridge constituted a dangerous or defective condition. Whether a given set of circumstances creates a dangerous or defective condition of public property is a question normally to be determined by the trier of fact. Aguirre v. City of Los Angeles, supra. In Hawk v. City of Newport Beach, 46 Cal.2d 213, at page 217, 293 P.2d 48, at page 50, the Supreme Court stated: "It is the fact a condition involves an unreasonable risk of injury to the public that renders it a dangerous or defective condition within the meaning of the Public Liability Act [citation], and each case must be determined upon its own particular facts [citation]."

[5–8] The bridge upon which this accident occurred was a part of a street or highway under the control of defendant city, and defendant's liability is governed by the requirements stated in the Public Liability Act and the principles developed in the cases construing the statute. Bennett v. Kings County, 124 Cal.App. 147, 150, 12 P.2d 47. It is the duty of a municipality to keep its streets and sidewalks in a reasonably safe condition for travel by the public, using ordinary care to provide against such dangers to the public as may reasonably be anticipated and having due regard to the character of the travel, the incidental purposes for which the highway may be used and the nature of the danger at the point in question. McLaughlin v. City of Los Angeles, 60 Cal.App.2d 241, 243, 140 P.2d 416. The most recent cases have laid down the rule that a municipality may be held liable for failure to guard against accidents due to a dangerous or defective condition even though that condition exists off the traveled portion of the highway so long as it is so connected with or in such proximity to, the traveled portion of the highway as to render it unsafe to those traveling thereon. Alderson v. County of Santa Clara, 124 Cal.App.2d 334, 340–341, 268 P.2d 792; Alwood v. City of Los Angeles, 139 Cal.App.2d 49, 57–58, 293 P.2d 69. Accordingly, the cases last cited point out that a duty rests upon a municipality either to give appropriate warning or to erect and maintain suitable barriers if it has knowledge of the existence of a dangerous condition adjacent to a highway from which risk of injury to pedestrians is reasonably to be foreseen. Furthermore, when a municipality has knowledge that an established public use is being made of government property outside the normal area of invitation under circumstances involving a hazard to the using public, the situation presents a jury question as to whether in fact a dangerous condition of public property existed and whether the City has discharged its duty to "'take action reasonably necessary to protect the public against the condition.'" Hawk v. City of Newport Beach, 46 Cal.2d 213, 217, 293 P.2d 48, 50. Additionally, where children of tender years are exposed to hazard by the manner of operation or maintenance of a municipal facility, the failure of the City to provide a barrier to prevent injury at the point or from the source of danger has been held to constitute a dangerous condition within the statute. Bauman v. City and County of San Francisco, 42 Cal.App.2d 144, 153, 108 P.2d 989; Huff v. Compton City Grammar School Dist., 92 Cal.App. 44, 47, 267 P. 918. See Gorman v. County of Sacramento, 92 Cal.App. 656, 268 P. 1083; Hawk v. City of Newport Beach, supra.

[9] When these principles are applied to the particular facts of this case, it surely cannot be held as a matter of law that the bridge and attached pipeline did not constitute a dangerous condition. The bridge in question was taken over by the City and maintained for over 30 years. Since then, although residential and traffic conditions had radically changed and many schoolchildren were required to cross and recross the bridge daily, no alteration of the structure had been effected to provide sidewalks or other protected means of passage for child travelers. However, as a part of this bridge and accessible by a wellworn path adjacent to the highway lay an unguarded pipeline situated between flat beams in such fashion as to make a primitive passage. A jury might reasonably find that to the indiscreet or indiscriminate juvenile mind this constituted an implied invitation for use as an alternate route across the bridge, one perhaps even preferable to the highway if traffic was heavy. Certainly the jury might find that the absence of a proper barrier at the bridge approaches to prevent travelers from leaving the highway and using the pipeline as a crossing made the bridge dangerous, especially for youthful pedestrians. Furthermore, the only barrier erected was in the center of the pipeline and consisted of two boards over which some loosely-hung barbed wire was strung. It was this barbed wire along the pathway in which plaintiff became ensnared, and his fall occurred as he attempted to disentangle himself. Whether the presence of barbed wire maintained in a loose condition along a pipeline frequented by children constituted a trap or pitfall for such immature persons and thus constituted a dangerous condition on the bridge was likewise a question which properly should have been submitted to the jury. Caston v. City of Rock Hill, 107 S.C. 124, 92 S.E. 191, 193. See Marton v. Jones, 44 Cal.App. 299, 186 P. 410.

The cases primarily relied on by defendant are not in point. Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993; Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971, and Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472, are cases in which the minor plaintiff departed from the highway and was led by childish whim to explore a body of water in which he drowned. Other cases turn on the fact that at the time plaintiff was injured he was impelled by motives of childish sportiveness into a situation which the municipality could not reasonably be required to guard against. The case before us is, of course, markedly different and reasonably within the ambit of the municipality's liability for a dangerous condition on a public street being used by a pedestrian.

Since it is our conclusion that the evidence presented substantial questions of fact as to whether a dangerous or defective condition known to the City existed and whether reasonable action had been taken to protect the public from the foreseeable risks of injury, the refusal of the court to submit these matters to the jury constituted reversible error.

The judgment is reversed.

MOORE, P. J., and ASHBURN, J., concur.

STATE of California, Subsequent Injuries Fund, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Gust Erickson, et al., Respondents.*

Civ. 8980.

District Court of Appeal, Third District, California.

Nov. 28, 1956.

Rehearing Denied Dec. 21, 1956.

Hearing Granted Jan. 23, 1957.

Proceeding, by Subsequent Injuries Fund, to review determination of Industrial Accident Commission. The District Court of Appeal, Van Dyke, P. J., held that statute authorizing, in case of award based on silicosis in underground metal mining operations, payment to employers who have paid award, from Subsequent Injury Fund, where other employers who would otherwise be liable for payment, of part of award are beyond commission's jurisdiction, dead, insolvent or not subject to enforcement for award, applies to silicotic cases arising before its passage but culminating in compensable injury thereafter but does not apply where cause arose before statute was enacted.

Decision annulled and subsequent proceedings remanded.

1. Workmen's Compensation 🔑551

For purposes of workmen's compensation statutes, date of injury in case of occupational disease is that date upon which employee first suffered disability therefrom and either knew, or in exercise of reasonable diligence should have known, that disability was caused by present or prior employment. West's Ann.Labor Code, § 5412.

2. Workmen's Compensation 🔑55

Law at time of injury governs all right and liabilities arising out of such injury. West's Ann.Labor Code, §§ 5412, 5500.5, 5952.

3. Statutes 🔑261

A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to its adoption.

4. Statutes 🔑263

It is presumed that statute was not to have retrospective effect unless such intent is expressed or appears from necessary implications.

5. Workmen's Compensation 🔑64

Statute authorizing, in case of award based on silicosis in underground metal mining operations, payment from Subsequent Injuries Fund, to employers, who have paid award, where other employers who would otherwise be liable for payment of part of award are beyond Commission's jurisdiction, dead, insolvent, or not subject to enforcement for award applies to silicotic cases arising before its passage but culminating in compensable injury thereafter but does not apply where cause arose before statute was enacted. West's Ann.Labor Code, § 5500.5.

6. Statutes 🔑212.1

Legislature is presumed to know provisions of statutes in force.

7. Workmen's Compensation 🔑1949

Where only review sought from award of Industrial Accident Commission apportioning liability between several carriers and Subsequent Injuries Fund was sought by Fund which attacked only decision made against itself, court, upon determining that decision was improper in that Fund was not liable for award would not reapportion liability between carriers but would remand matter to Industrial Accident Commission. West's Ann.Const. art. 20, § 21; West's Ann.Labor Code, §§ 5500.5, 5952.

Edmund G. Brown, Atty. Gen., F. G. Girard, Deputy Atty. Gen., for petitioner.

Daniel C. Murphy, San Francisco, for Industrial Acc. Commission.

Loton Wells, San Francisco, for Compensation Fund.

Leonard, Hanna & Brophy, San Francisco, for Industrial Indemnity Exchange.

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* Opinion vacated 310 P.2d 1.

VAN DYKE, Presiding Justice.

Heretofore, this court granted a writ to review a final decision and award made by respondent Industrial Accident Commission against petitioner, State of California, Subsequent Injuries Fund.

Gust Erickson was employed as an underground miner over the period 1924–1949 by various mining employers. During said periods of employment Erickson was exposed to free silica dust. The cumulative effect of the several exposures was that Erickson contracted the disease of silicosis, which the commission found resulted in disability on September 10, 1949. The commission found that the injury caused temporary and permanent total disability, entitling Erickson to compensation from the State Compensation Insurance Fund, which had been the insurance carrier for Central Eureka Mining Company during the periods March 5, 1941–March 8, 1941 and May 25, 1949–September 10, 1949. It was further found that beginning in 1924 and continuing to the date of disability Erickson had been employed by 20 different employers in whose employments he had been exposed to deleterious free silica dust and that these several exposures had all contributed to his disability. Erickson elected to hold Central Eureka Mining Company and State Compensation Insurance Fund liable for the award made to him. The commission, in proceedings supplemental to the granting of the award, determined the percentage that each exposure bore to the total employment exposure and apportioned the liability as between the several employers and their insurance carriers. The commission found that certain employers were without the commission's jurisdiction and that neither such employers' nor any insurer which they may have had would be subject to the enforcement of an award for contribution which could be made by the commission. Accordingly, the commission declared that the State of California, Subsequent Injuries Fund, was chargeable with and liable for contribution to the State Compensation Insurance Fund for the proportionate part which said employments contributed to Erickson's disability, namely, 34.6 per cent. It was ordered that certain employers and certain insurance carriers make other contributions. The State of California, Subsequent Injuries Fund, petitioned for review.

The legislation under which this award was made against petitioner, State of California, Subsequent Injuries Fund, hereinafter called the Subsequent Injuries Fund, was first enacted during 1951 and took effect September 22d of that year. It is to be noted that this was nearly two years after the date of Erickson's injury as fixed by the commission. Petitioner contends, among other things, that the award against the Subsequent Injuries Fund was and is invalid because the commission wrongfully made a retrospective application of the subject legislation. Petitioner asserts it was never the intention of the legislature that such retrospective application should be given to the legislation and further contends that if this court shall hold that such was the intent, then for various reasons advanced the legislature was without power to carry out such intent by reason of constitutional prohibitions.

The legislation referred to is found in Section 5500.5 of the Labor Code. The section confines itself mainly to claims for compensation benefits made on account of occupational disease where the disability arises out of more than one employment. The legislation is largely procedural and remedial. It prescribes the form and content of such an application for compensation benefits; it provides for the joinder by the applicant of any former employer whose employment of the applicant may be claimed by any party to have so contributed to the occupational disease and resultant injury as to render such employer liable for compensation benefits; it declares that in any case involving such a claim the employee making the claim, or his dependents, may elect to proceed against any one or more of the employers named in the application; it provides for the bringing in by interested parties of additional employers claimed to be liable for any award made; and it provides that at any time within one year after the commission has made an award any employer held liable may institute supplemental proceedings before the commission for the purpose of determining an apportionment of liability or right of contribution, but that such proceedings shall not diminish, restrict, or alter in any way the recovery previously allowed the employee or his dependents. Having so provided generally as to claims for compensation benefits made on account of disability from an occupational disease arising out of more than one employment, the act then declares as follows:

> "In any proceeding before the commission for the purpose of determining an apportionment of liability or of a right of contribution where any employee incurred a disability or death resulting from *silicosis in underground metal mining operations,* the determination of the respective rights and interests of all the employers joined in the proceedings either initially or supplementally shall be as follows:
>
> "(a) All employers whose underground metal mining operations resulted in a silicotic exposure during the period of the employee's employment in such operations shall be jointly and severally liable for the payment of compensation and medical, surgical, legal and hospital expense which may be awarded to the employee or his estate or dependents as the result of disability or death resulting from or aggravated by such exposure.
>
> "(b) *If any of the employers who have not contributed to payment of the original award shall be without the commission's jurisdiction, or are dead, insolvent, or not subject to enforcement of awards against them for such contributions, either directly or through solvent insurance carriers, then upon such showing being made to the satisfaction of the commission, it shall make an award in favor of the employer or employers who have paid the original award, payable out of the fund* [Subsequent Injuries Fund] *used for payment of the additional compensation provided for in Section 4751 of this code, in an amount equal to the unreimbursed portions of the original payment or payments to which such employer or employers are found entitled as aforesaid. The use of the fund for such reimbursement in addition to the purposes specified in Section 4751 of this code is hereby authorized.* * * *" (Italics ours.)

[1, 2] The date of injury in cases of occupational disease is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that said disability was caused by his present or prior employment. Labor Code, Section 5412; Argonaut Mining Company v. Industrial Accident Commission, 104 Cal. App.2d 27, 30, 230 P.2d 637. Erickson's cause of action, therefore, accrued September 10, 1949. Argonaut Mining Company v. Industrial Acc. Comm., supra, 104 Cal.App. 2d at page 31, 230 P.2d 637. On that date the law provided for joint and several liability of any employer made a party to the action for compensation whose employment contributed to the disease and for an apportionment of liability among such employers through supplemental action. Colonial Insurance Company v. Industrial Accident Commission and Pedroza, 29 Cal. 2d 79, 172 P.2d 884. At that time the law cast no liability upon the Subsequent Injuries Fund. The law in effect at the time of the injury is the law governing all rights and liabilities arising out of such injury. It is at that time that the employer's liability becomes fixed, and the law at the time of Erickson's injury provided for joint and several liability of employers whose employment had contributed to the injury, Aetna Casualty and Surety Co. v. Industrial Acc. Comm., 30 Cal.2d 388, 182 P.2d 159; Marsh v. Industrial Acc. Comm., 217

Cal. 338, 18 P.2d 933, 86 A.L.R. 563, but gave no rights to such employers to recoup from the Subsequent Injuries Fund. As stated, the commission found the conditions for recoupment to exist in the present case and accordingly charged the Subsequent Injuries Fund.

[3] Turning now to the contention of petitioner, Subsequent Injuries Fund, that the award is invalid because a wrongful retrospective application of the law was made in this cause, we state certain familiar and pertinent canons of interpretation. A retrospective law is one which affects rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute. Aetna Casualty and Surety Company v. Industrial Accident Commission, supra, 30 Cal.2d at page 391, 182 P.2d 159. This case states, 30 Cal. 2d at page 393, 182 P.2d at page 161:

> "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."

[4] It is presumed that such an intent did not exist unless the intent is expressed or appears from necessary implication. Krause v. Rarity, 210 Cal. 644, 655, 203 P. 62, 77 A.L.R. 1327; People v. Allied Architects Association, 201 Cal. 428, 435–437, 257 P. 511.

Before testing the propriety of giving retrospective application to the subject legislation we will discuss certain contentions of respondent that in fact no such application has been given. Respondents claim that the legislation is procedural and remedial to such an extent that it is a misnomer to designate it as having retrospective effect. Procedural statutes, say respondents, may become operative only when and if the procedure or remedy is invoked, and, hence, if the trial post-dates the enactment, the statute operates in the future regardless of the time of occurrence of the events giving rise to the cause of action. See Davis & McMillan v. Industrial Accident Commission, 198 Cal. 631, 246 P. 1046, 46 A.L.R. 1095; Morris v. Pacific Electric Railroad Co., 2 Cal.2d 764, 768, 43 P.2d 276; Aetna Cas. and Surety Co. v. Industrial Acc. Comm., supra, 30 Cal.2d at pages 393–394, 182 P.2d 159. In the latter case it is stated, 30 Cal.2d at page 394, 182 P.2d at page 161:

> "* * * In such cases the statutory changes are said to apply not because they constitute an exception to the general rule of statutory construction, but because they are not in fact retrospective. There is then no problem as to whether the Legislature intended the changes to operate retroactively."

We think respondents' contentions here based upon the procedural and remedial character of the subject legislation are disposed of by what the Supreme Court said in the last cited case, 30 Cal.2d at page 394, 182 P.2d at page 162, from which we quote:

> "This reasoning, however, assumes a clear-cut distinction between purely 'procedural' and purely 'substantive' legislation. In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears. * * * The argument that the statute in this case is a procedural law to which the general rule of statutory construction does not apply is but a different statement of the respondent commission's original contention that it did not give a retrospective application to the amendment. As we have heretofore concluded, the amendment of section 4661 is substantive in its effect, and its operation would be retroactive, since it imposes a new or additional liability and

substantially affects existing rights and obligations."

As we have stated before, when this legislation took effect respondent State Compensation Insurance Fund had been held liable as insurance carrier for Central Eureka Mining Company for the total award made in favor of Erickson. Coincidentally, there arose in its favor rights to have this total liability apportioned among other employers and to receive from them or their carriers proportionate contributions; but this right of recoupment was then limited to such other employers and their carriers. Subsequent Injuries Fund could not then be held liable. Therefore, to apply the legislation in this cause would be to give it retrospective application "because the legal effect of past events would be changed."

We turn now to the contention that the legislature intended to give retrospective operation to the subject legislation. That intention does not appear on the face of the amendment since no express provision was made for its application to cases such as this. But respondents contend that such intention appears by necessary implication. They argue that the legislature clearly intended that the provisions of Labor Code, Section 5500.5, with respect to contributions from the Subsequent Injuries Fund should be applicable to injuries resulting from exposure to silicosis though the exposure antedated the legislation, that is, that, if an employee had contracted the disease of silicosis prior to the effective date of the legislation, but the injury, in the legal sense, had not occurred until after that date, then contribution from the fund in a factually proper case would be available to those held liable to pay compensation. With this we agree and think that the conclusion is reasonably apparent from the face of the legislation itself, wherein it is stated:

> "* * * The Legislature finds that as a matter of public policy and public welfare, sufferers from silicosis resulting from employment in underground metal mines should be compensated for such disability; that due to the peculiar nature of this disease it often does not manifest itself until long after periods of exposure have expired; that this frequently results in disability occurring in or after the last of a series of employments where such exposure existed; that underground metal mining is a class of industry having special character, both as to silicotic hazard and investment hazard; that the latter hazard has resulted in the past in closure of mines, disappearance or financial nonresponsibility of former owners or lessees of such mines and consequent inability of the commission to enforce against them compensation awards for proportionate liability in silicosis cases."

[5, 6] We have already quoted the legislative statement of the conditions under which contributions may be enforced against the Subsequent Injuries Fund, and we think it apparent from the text itself that the legislature had no intention of excluding from the legislative provisions silicotic exposure cases that had not yet progressed to the point where they had become disabling. The legislature is presumed to have known those provisions of the workmen's compensation legislation with reference to the time when an injury in such cases should be deemed to have occurred and when, therefore, a cause of action arose in favor of the injured employee to enforce liability for compensation upon the employer or the employers whom he elected to hold. We, therefore, agree with petitioner that the legislation does show an intent that it be applied to silicotic cases arising before its passage but culminating in compensable injury thereafter. However, there is nothing retrospective in the application of the legislation to causes of action which arise after its effective date. Prior to that date there is nothing for the law to operate on with respect to cases which have not resulted in compensable injury. It cannot be certain that such a cause will ever arise, however

grave the infection may be. Death from other causes may intervene, disabling injury may occur from causes unconnected with silicosis. But from the foregoing we cannot read into the statutory language any implied intent that the legislation should apply where the cause of action arose before the legislation was passed. We think the date of injury as determined by the commission significant in that it marks the point dividing cases out of the range of the statute from those to which the legislation was intended to be applied. We think the legislature intended to adopt that date as such point. But respondents argue that this date of injury is of no significance here, although it may be important and significant with respect to establishing the rights and liabilities as between the injured employee and his employer or employers and for certain other purposes. They say the legislation authorizing compulsory contribution from the Subsequent Injuries Fund does not affect the employer's liability to the employee or the employee's claim against his employers; that the statute merely affords a remedy to California underground metal mining companies and their insurance carriers which did not exist before. We quote the following from respondents' brief as clearly stating their arguments which we are now discussing: "Section 5500.5 is in the nature of a curative statute having a remedial purpose. The Legislative intent and purpose in enacting section 5500.5 was to relieve California mining companies which employed miners suffering from silicosis, and their insurance carriers, from an inequitable development of the California law. As the result of the Pedroza decision (Colonial Ins. Co. v. Industrial Acc. Comm., 1946, 29 Cal.2d 79 [172 P.2d 884]), a single California mining company could be held for the full burden of paying compensation, including the furnishing of medical treatment, where it employed a worker suffering from silicosis even though he had contracted the disease primarily as the result of working in mines for many years in states other than California. This was true even though the miner had worked for only a relatively short time for the California company. In section 5500.5, the Legislature has stated: 'It is inequitable that total ultimate liability should fall on one or more such employers who happened to be solvent or have solvent insurance carriers within the commission's jurisdiction or in reach of its process.' As far as relieving such inequity is concerned, it makes no difference whether the disability to the employee occurs before or after the effective date of the section. The situation is just as inequitable where the California mining company employs an experienced miner who has contracted silicosis, and who later becomes disabled but *prior* to the effective date of the section, as it is where the mining company employs a miner who is suffering from silicosis but who does not actually become disabled until *after* the effective date of the section. In either case, under the law as it existed prior to the effective date of section 5500.5, the California employer could be held for the full liability even though the great portion of exposure took place outside the State."

We think these arguments are nothing more than arguments that the legislature might have broadened its remedial scheme. But we think, also, that the legislation cannot be so construed, in the absence of express declarations to that effect. We think the legislature intended the incidence of injury in the legal sense to serve as the cut-off point. It is our conclusion that the subject legislation did not authorize the state through the Subsequent Injuries Fund to be held partially responsible for the award made to Erickson.

What has been said makes it unnecessary to discuss other assignments of error.

[7] The two insurance carriers held liable each for a portion of the total award have stated in their brief: "The possibility always exists that this court may entertain a different view of the law than that entertained by counsel for these respondents, and that the award against the Subsequent Injuries Fund may be annulled. Should

that occur, there then remains the question 'What happens to the 34.6 per cent of the workmen's compensation benefits paid, or to be paid, to the respondent Gust Erickson which had been charged to the Subsequent Injuries Fund?'" They say there are three possible alternatives: 1. That the amount apportioned to the Subsequent Injuries Fund must be borne by the State Compensation Insurance Fund, in addition to the 44.9 per cent now charged to it by the commission; 2. The 34.6 per cent must be apportioned between the State Compensation Insurance Fund, the other respondent carriers, and the respondent self-insured employer; 3. The benefits payable to Erickson must be reduced by 34.6 per cent because of the part his out-of-state employment has played in causing his present disability. They urge that all factual issues which would be involved in such determination have been decided by the commission and that, therefore, only legal issues remain and they urge this court, if, as it has done, it annuls the award against the Subsequent Injuries Fund, to proceed then to adjudicate which of the three alternatives should be adopted as to the disposition of the 34.6 per cent disability award thus lifted from the shoulders of the Subsequent Injuries Fund. However, we think it not proper for this court to act upon the request. By Section 21 of Article XX of the Constitution the legislature has been vested with plenary power to fix and control the manner of review of decisions rendered by the Industrial Accident Commission. The legislature has provided for review by the appellate courts. It has fixed the scope of such review by Section 5952 of the Labor Code. It has declared that the review shall not extend further than to determine, based upon the entire record, whether the commission acted without or in excess of its powers, fraudulently, unreasonably or without substantial evidentiary support for its decision. Petitioner herein attacked only the decision made against itself. No other party to the subject proceedings has asked for review, and we think that, under the circumstances, we would be extending the review unwarrantably if we went further than the annulling of that part of the decision of the commission which the petitioner has attacked.

That portion of the decision of the Industrial Accident Commission which casts liability on petitioner is annulled and the supplemental proceedings are remanded to the commission.

SCHOTTKY and PEEK, JJ., concur.

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146 Cal.App.2d 688

Thomas P. CRUCE, Plaintiff and Respondent,

v.

J. R. STEIN, a/k/a Jack R. Stein, and Bernice C. Stein, Defendants and Appellants.

Civ. 21480.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1956.

Rehearing Denied Jan. 2, 1957.

Unlawful detainer action brought by purchaser at trustee's sale. The Superior Court of Los Angeles County, J. Howard Zeimann, J., entered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Fourt, J., held that where purchaser at trustee's sale proceeds under unlawful detainer statute, title may be litigated to limited extent, as provided by statute, that purchaser must prove his acquisition of title by purchase at sale; and pendency of prior quiet title action between parties is not ground of abatement of unlawful detainer action.

Judgment affirmed.

1. Forcible Entry and Detainer 🔑6(2)

In summary proceeding of unlawful detainer, right to possession alone is involved. West's Ann.Code Civ.Proc., § 1161a, subd. 3.

2. Abatement and Revival ⚷8(2)

Where purchaser at trustee's sale proceeds under unlawful detainer statute, title may be litigated to the limited extent, as provided by statute, that purchaser must prove his acquisition of title by purchase at sale; and pendency of prior quiet title action involving same parties is not ground of abatement of unlawful detainer action. West's Ann.Code Civ.Proc., § 1161a, and subd. 3; West's Ann.Civ.Code, § 2924.

3. Evidence ⚷474(18)

The owner of property, whether or not generally familiar with property values, is competent to estimate its worth, the lack of knowledge going to weight rather than admissibility of testimony, in unlawful detainer action.

4. Mortgages ⚷372(4)

In unlawful detainer action brought by purchaser at trustee's sale, in view of competence of testimony of owner that reasonable rental value of property was $350 a month, even though owner may not have been familiar with such values, evidence sustained finding that reasonable rental value of property was $350 a month. West's Ann.Code Civ.Proc., § 1161a, and subd. 3.

◆

B. W. Kemper, North Hollywood, for appellants.

Max Tendler, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from a judgment in favor of the plaintiff in an action in unlawful detainer brought under the provisions of section 1161a(3) of the Code of Civil Procedure.

A fair résumé of the facts of the case is as follows: On or about July 24, 1947, J. R. Stein and Bernice C. Stein, his wife, executed and delivered a deed of trust wherein the Realty Title Company, Ltd., was named trustee and the property described was conveyed to it, as trustee, as security for the payment of the Steins' indebtedness to Harry Bassett, who was the named beneficiary. The trust deed was recorded in the office of the County Recorder of Los Angeles County on July 24, 1947.

The trust deed recites that the Steins, as trustors, grant, transfer and assign to the Realty Title Company, Ltd., trustee, in trust, with power of sale of the property described therein "for the purpose of securing payment of an indebtedness of J. R. Stein and Bernice C. Stein, his wife, to Harry Bassett, in the amount of $18,416.02, payable on demand; and more particularly, to impose a specific lien on the hereinbefore described real property as security for the payment of said indebtedness of J. R. Stein and Bernice C. Stein, his wife, to Harry Bassett, on demand, which said indebtedness has heretofore been a general lien on all property of J. R. Stein and Bernice C. Stein, under writing signed by them dated August 12, 1946, in words and figures as follows:

" 'Los Angeles, California
" 'August 12, 1946.

" 'As security for the indebtedness due from the undersigned, J. R. Stein, to Harry Bassett in the sum of Eighteen Thousand Four Hundred and Sixteen Dollars and two cents ($18,416.02) and as further security for any further moneys that may be advanced by said Harry Bassett to the undersigned, jointly or severally, we, the undersigned, do hereby sell, assign and transfer to said Harry Bassett all moneys due to us, or to either one of us, as well as any other moneys that may become due to us, or to either one of us in the future.

" 'Said assignment shall be in full force and effect until the entire indebtedness presently due, or hereafter to become due, is paid in full.

" 'This assignment is subject to the lien of the Hollywood State Bank granted to said bank by said J. R. Stein by written assignment of even date.

" '(signed) J. R. Stein
" '(signed) Bernice C. Stein.'

"and for the further purpose of securing payment, on demand of any further moneys heretofore or hereafter advanced by said Harry Bassett to said J. R. Stein and/or Bernice C. Stein."

In addition to the $18,416.02 referred to in the deed of trust, Bassett advanced to and for the Steins a sum of not less than $24,307.61, at their request. The defendants made no payments to Bassett and the latter received nothing on account of the indebtedness to him.

On March 27, 1953, at the request of Bassett, the trustee recorded a notice of default and breach of condition and of the election of Bassett to sell the property to satisfy the obligations. On December 31, 1953, Bassett assigned to the plaintiff and respondent all of his beneficial interest in the trust deed, together with the obligations of the defendants to Bassett, secured by the deed of trust.

The court found, upon ample and sufficient evidence, that more than three months after the recordation of the notice of default and election to sell under the deed of trust, and after having given notice of the time and place of sale, as required by the deed of trust and by law, the Realty Title Company, Ltd., as trustee, under the deed of trust, on the 8th day of January, 1954, sold to the plaintiff at public auction, in accordance with section 2924 of the Civil Code, and all applicable statutes, the real property described in the deed of trust, and the said sale was under the express power of sale contained in the deed of trust executed by the defendants.

The trial court further found that on said January 8, 1954, the Realty Title Company, Ltd., as trustee under the deed of trust, acknowledged, executed and delivered to the plaintiff its trustee's deed upon the aforesaid sale, which trustee's deed was dated January 8, 1954, conveying the premises described in the deed of trust to the plaintiff, and the said trustee's deed to the plaintiff was thereafter recorded on January 11, 1954, in Book 43564, at page 407, Official Records, in the office of the County Recorder of Los Angeles County, and that plaintiff's title to the real property in this action has been duly perfected under the trustee's sale. A copy of the said recorded trustee's deed to the plaintiff was attached to the complaint, and the original was received in evidence.

The deed of trust under which the property was sold by the trustee to the plaintiff provided, among other things, that the recitals in the trustee's deed of any matters of fact should be conclusive proof of the truthfulness thereof. The trustee's deed recites a default in that no payment of any kind was made; execution and delivery to the trustee of a written declaration of default and demand for sale; recordation in the office of the Los Angeles county recorder of notice of default and election to sell after three months shall have elapsed following the recordation thereof; assignment by Harry Bassett to Thomas P. Cruce of the beneficial interest under the trust deed; notice of trustee's sale in compliance with the terms of the trust deed; posting of notices for not less than 21 days before the date of sale in three public places in Los Angeles and in a conspicuous place on the property to be sold after not less than three months after recordation of notice of default and election to sell; publication in a newspaper of general circulation, printed and published in the city or judicial township in which the real property is situated once a week for 20 days, and sale at public auction to Thomas P. Cruce, the highest bidder.

The trial court also found, upon good and sufficient evidence, that after title was duly perfected in the plaintiff as aforesaid, the plaintiff caused to be served on the defendants the three-day notice to quit, which required the defendants to quit and deliver up possession of the premises to the plaintiff three days after the receipt of such notice; that the defendants refused to quit and surrender and remained and continued to remain in possession of the premises without the consent of and in violation of the rights of the plaintiff.

In November, 1951, prior to the time the instant action was filed, suit was instituted by one Lou Miller against the Steins, Bassett, Russell Brown Simpson and David Welts, his attorney, Realty Title Co., Ltd., and numerous other defendants, including fictitious defendants. Thomas P. Cruce, the plaintiff herein, is one of the fictitious defendants in the Miller case, which was pending in the superior court in Los Angeles County when the present action in unlawful detainer was commenced and tried. Counsel for defendants set forth in their brief that the Miller case "is one to quiet title in the subject property, in which Lou Miller seeks a judicial declaration of rights and a determination of the legal and equitable proprietary and possessory rights in the subject property of the respective parties to the action." It is defendants' contention that the pendency of the prior quiet title action is a ground of abatement to the prosecution of the unlawful detainer action.

[1, 2] In the summary proceeding of unlawful detainer the right to possession alone is involved and when the purchaser at a trustee's sale proceeds under section 1161a of the Code of Civil Procedure the title may be litigated to the limited extent, as provided by the statute, that the purchaser must prove his acquisition of title by purchase at the sale. Cheney v. Trauzettel, 9 Cal.2d 158, 159, 69 P.2d 832; Abrahamer v. Parks, 141 Cal.App.2d 82, 296 P.2d 341.

Cheney v. Trauzettel, supra, was a proceeding in unlawful detainer brought under section 1161a of the Code of Civil Procedure by the purchaser at a sale under a deed of trust. The defendants answered and cross-complained, setting up a claim of title and several other defenses, including the pendency of a quiet title suit between the parties involving the same property. The trial court, on motion of the plaintiffs, struck out the cross-complaint and special defenses and gave judgment for the plaintiff. Defendants appealed and in affirming the judgment the court stated, 9 Cal.2d at pages 159–160, 69 P.2d at page 833: "The trial court properly held that in the summary proceeding in unlawful detainer the right to possession alone was involved, and the broad question of title could not be raised and litigated by cross-complaint or affirmative defense. [Citing cases.] It is true that where the purchaser at a trustee's sale proceeds under section 1161a of the Code of Civil Procedure he must prove his acquisition of title by purchase at the sale; but it is only to this limited extent, as provided by the statute, that the title may be litigated in such a proceeding. [Citing cases.]

"* * * In our opinion, the plaintiff need only prove a sale in compliance with the statute and deed of trust, followed by purchase at such sale, and the defendant may raise objections only on that phase of the issue of title. Matters affecting the validity of the trust deed or primary obligation itself, or other basic defects in the plaintiff's title, are neither properly raised in this summary proceeding for possession, nor are they concluded by the judgment."

In Abrahamer v. Parks, supra, 141 Cal. App.2d 82, 296 P.2d 341, at page 343, the court said: "The deed of trust under which the property was sold contains the usual provision that the recitals in the trustee's deed of any matters or facts shall be conclusive proof of the truthfulness thereof. The trustee's deed recites a default, the execution and delivery to the trustee of a written declaration of default and demand for sale, compliance with sections 2924 and 2924b of the Civil Code, the giving of notice of sale by publication and by posting in 3 public places in Los Angeles and in a conspicuous place on each parcel of the property after not less than 3 months from the date of recording the notice of default, and the sale at public auction to plaintiff, the highest bidder. Defendants were precluded in this proceeding by these recitals. Cobb v. California Bank, 6 Cal. 2d 389, 390, 57 P.2d 924. The issues defendants sought to have litigated have no place in this summary proceeding."

[3, 4] Defendants further contend that there is no evidence to sustain the finding

of the trial court that the reasonable rental value of the property was $350 a month. The plaintiff testified, without objection, that the reasonable rental value of the property was $350 a month. The owner of property, whether generally familiar with such values or not, is competent to estimate its worth, the lack of knowledge going to the weight rather than the admissibility of the testimony. Stroman v. Lynch, 91 Cal.App.2d 406, 408, 205 P.2d 409; Hood v. Bekins Van & Storage Co., 178 Cal. 150, 152, 172 P. 594; Sanders v. Park Beverly Corp., 109 Cal.App.2d 698, 702, 241 P.2d 597; Shook v. Beals, 96 Cal. App.2d 963, 974, 217 P.2d 56, 18 A.L.R.2d 919.

The judgment is affirmed.

WHITE, P. J., and DORAN, J., concur.

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147 Cal.App.2d 11

Leslie L. HICKSON and James E. Hickson, Plaintiffs and Respondents,

v.

Harry F. THIELMAN, Robert Q. Thielman, First National Bank of Elsinore, California, a national banking association, Medley E. Thielman, Doe I, Doe II, Doe III, Doe IV and Doe V, Defendants.

Harry F. Thielman, Robert Q. Thielman and Medley E. Thielman, Appellants.

Civ. 21543.

District Court of Appeal, Second District, Division 3, California.

Dec. 17, 1956.

Rehearing Denied Jan. 16, 1957.

Judgment creditors brought action against judgment debtor and his son and daughter to have fraudulent transfers made by judgment debtor to his son and daughter set aside. The Superior Court of Los Angeles County, Fred Miller, J., entered judgment adverse to the judgment debtor and his son and daughter, and they appealed. The District Court of Appeal, Shinn, P. J., held that where judgment debtor and his son and daughter made no attempt to make a fair statement or anything approaching a fair statement of the evidence claimed to be insufficient to sustained findings that transfers were made within intent to defraud judgment creditors, failure to do so would be deemed tantamount to a concession that the evidence supported the findings.

Judgment affirmed.

1. Appeal and Error 🔑757(3)

When an appellant urges insufficiency of evidence to support findings, it is his duty to set forth a fair and adequate statement of evidence, which is claimed to be insufficient, and he cannot shift burden onto respondent or onto reviewing court.

2. Appeal and Error 🔑757(3)

Where appellants made no attempt to make a fair statement or anything approaching a fair statement of the evidence claimed to be insufficient to support findings, their failure to do so would be deemed tantamount to a concession that evidence supported findings.

3. Fraudulent Conveyances 🔑278(1)

Where transfers by judgment debtor to his children were gifts, and the transfers rendered him insolvent, they were presumptively fraudulent. West's Ann. Civ.Code, § 3439.01 et seq.

4. Fraudulent Conveyances 🔑314

Where gifts made by judgment debtor rendered him insolvent, and judgment debtor and his children had actual intent to defraud judgment creditors, personal judgments against the children and in favor of the judgment creditors were proper. West's Ann.Civ.Code, § 3439.01 et seq.

5. Fraudulent Conveyances 🔑315(3)

Where judgment debtor and his children had actual intent to defraud judgment creditors, and judgment debtor sold note and gave part of proceeds to children, and judgment debtor's son used $400 to improve his home, and judgment debtor spent $760 of the remainder in improving home, in which judgment debtor had an equity, court properly awarded judgment creditors a lien of $400 against home of son and a lien of $760 against home, in which judgment debtor had an equity. West's Ann. Civ.Code, § 3439.01 et seq.

6. Fraudulent Conveyances ⚷314

Where judgment debtor and his son and daughter acted with the intent of defrauding judgment creditors, and judgment debtor made a gift of $1,500 to daughter, alleged fact that daughter returned the money to the judgment debtor would not relieve her of responsibility. West's Ann. Civ.Code, § 3439.01 et seq.

7. Judgment ⚷736

Where fraud in assignment from judgment debtor to son was not in issue in prior action, and judgment denied judgment creditors specific performance as against judgment debtor with respect to note and awarded damages instead, and nothing more was adjudicated, the judgment was not res judicata in subsequent action by judgment creditors to set aside fraudulent transfers made by judgment debtor to his son and daughter.

◆

James C. Webb, Long Beach, for appellants.

Ball, Hunt & Hart and Clark Heggeness, Long Beach, for respondents.

SHINN, Presiding Justice.

This is an action by judgment creditors of defendant Harry F. Thielman to set aside certain alleged fraudulent transfers made by him to his son, defendant Robert Q. Thielman, and to his daughter, defendant Medley E. Thielman. The matter came on for trial on a second amended complaint and the answer thereto. Trial was to the court. The court made findings of fact and entered judgment for plaintiffs. Defendants appeal from the judgment. They contend that the evidence does not support the findings, the judgment is unsupported by the findings and that a judgment in favor of defendants in a prior action between the parties is res judicata as to this action.

Defendant Harry F. Thielman is the surviving husband of Nellie Thielman. During their married life, Harry and Nellie acquired two assets, an equity in a home located in Compton, California, and an installment promissory note in the amount of $10,200, payable to Harry and Nellie at the rate of $100 per month and secured by a trust deed upon real property in Perris, California. Plaintiffs are the children of Nellie by a former marriage; defendants Robert Thielman and Medley Thielman are the children of Harry by a former marriage.

Nellie Thielman died in April, 1951, and left a holographic will which bequeathed to plaintiffs an interest in the home in Compton, subject to a life estate in favor of Harry, and a one-half interest in the promissory note. After Nellie's death, plaintiffs claimed that the home and the promissory note were the community property of Harry and Nellie (although they were both held in joint tenancy) and asserted their rights under Nellie's will. This claim was compromised by means of a written agreement, dated May 23, 1951, whereby plaintiffs waived their rights under the will and Harry agreed to terminate the joint tenancies and to convey to plaintiffs a one-half interest in the note and a one-third interest in the home, subject to a life estate in his favor. The joint tenancies were terminated by decree in July, 1951. Later that same month Harry served plaintiffs with a notice of rescission of the May agreement, charging undue influence and lack of consideration. On July 30, 1951, Harry assigned his interest in the note and trust deed to Robert. The assignment was recorded.

On October 4, 1951, plaintiffs filed an action against Harry and Robert, in which they sought specific performance of the May agreement against Harry, or for damages if specific performance could not be had. The court granted specific performance of Harry's promise to convey a one-third interest in the home, but denied specific performance of his promise to convey the one-half interest in the note and trust deed. In lieu of the latter, the court awarded plaintiffs $4,264 damages, being one-half of the balance due on the promissory note as of August 1, 1951. The court found that Harry had assigned the note and trust deed to Robert prior to the commencement of the action and decreed that plaintiffs were not entitled to specific performance against Robert. The judgment in that action was entered in June, 1953, and is now final.

After an execution on the money judgment against Harry was returned *nulla bona,* plaintiffs filed the present action to set aside the assignment to Robert (as well as certain other transfers by Harry to his children which will be described presently) on the ground that they were a fraud upon plaintiffs as judgment creditors of Harry. Their second amended complaint set forth the obtaining of the judgment against Harry. It contains the following allegations: That the only assets owned by Harry and subject to execution were his equity in the home (which did not exceed $500) and the note and trust deed; that on or about August 3, 1951, Harry assigned the note and trust deed to Robert without consideration and for the purpose of hindering, delaying and defrauding plaintiffs and that, notwithstanding the assignment, Harry continued to receive the monthly payments due under the note; that Harry was, and at all times since the assignment of the note and trust deed, had been insolvent and his assets subject to execution insufficient to pay his obligation to plaintiffs; that Robert took the note and trust deed with knowledge of plaintiffs' claim under the agreement of May, 1951 and with knowledge that the assignment rendered Harry insolvent. There follow allegations based upon information and belief that Harry subsequently sold the note and trust deed to a bank and gave a portion of the proceeds of the sale to his daughter Medley without consideration. Plaintiff prayed that Harry's gifts to his children be set aside and asked for personal judgments against Robert and Medley.

Defendants admitted the judgment against Harry and denied the other allegations of the complaint. The answer alleged that at the time of the commencement of this action, the prior action was pending in the superior court between the same parties and for the same cause of action as in the instant case, and that the judgment in favor of Robert in the prior action is res judicata.

After a trial on the merits, the court made the following findings of fact. It found that on or about August 1, 1951, defendants entered into a conspiracy to defraud plaintiffs as judgment creditors of Harry and that they committed a number of acts in furtherance of the conspiracy and with the actual intent to delay, defraud and hinder plaintiffs in the collection of their judgment. The court found that Harry voluntarily assigned to Robert the note and trust deed without consideration in 1951 and that Robert voluntarily reassigned them to his father without consideration in November, 1953. It found that Harry sold the note and trust deed to a bank in January, 1954. Harry received $6,000 for the note; at that time it had a value of $7,000. The court found that Harry made several gifts to his children from the proceeds of the note, a gift of $1,500 to Medley, and two gifts to Robert, one of $1,200 (which Robert deposited with a credit union) and another gift of $1,000 (out of which Robert spent $400 towards the improvement of his home). The court found that Harry spent $760 of the remainder in improving the Compton residence.

The court likewise found that these gifts rendered Harry insolvent and that defendants intended, knew and believed them to be a fraud upon plaintiffs as judgment creditors. It found the defenses of prior action pending and res judicata to be untrue. It awarded plaintiffs $1,500 against Medley and $2,200 against Robert. It also awarded plaintiffs a $400 lien against Robert's home and a $760 lien against Harry's residence.

[1] The first contention of defendants is that the findings are unsupported by the evidence. In this connection, we repeat what every lawyer should know, namely, that when an appellant urges the insufficiency of the evidence to support the findings it is his duty to set forth a fair and adequate statement of the evidence which is claimed to be insufficient. He cannot shift this burden onto respondent, nor is a reviewing court required to undertake an independent examination of the record when appellant has shirked his responsibility in this respect.

[2-5] The reporter's transcript in the instant case contains 246 pages of testimony. The matter occupied the court below for several days. Appellants have made no attempt to make a fair statement, or, indeed, anything approaching a fair statement of the evidence claimed to be insufficient. Their failure to do so will be deemed tantamount to a concession that the evidence supports the findings. See Goldring v. Goldring, 94 Cal.App.2d 643, 211 P.2d 342; Jiral v. Day, 95 Cal.App.2d 214, 212 P.2d 275; Morrell v. Clark, 106 Cal.App.2d 198, 234 P.2d 774; People v. Shannon, 110 Cal.App.2d 153, 241 P.2d 1007; Kruckow v. Lesser, 111 Cal.App.2d 198, 244 P.2d 19; Tesseyman v. Fisher, 113 Cal.App.2d 404, 248 P.2d 471; Eisindrath v. Bank of America, 118 Cal.App.2d 434, 258 P.2d 13; McCosker v. McCosker, 122 Cal.App.2d 498, 265 P.2d 21; People v. Johnson, 136 Cal.App.2d 665, 289 P.2d 90; Elliott v. Rodeo Land & Water Co., 141 Cal.App.2d 404, 297 P.2d 129. However, there was substantial evidence that Harry's transfers to his children were gifts and it is undisputed that the gifts rendered him insolvent. They were therefore presumptively fraudulent, Civil Code, § 3439.01 et seq., and the presumption is itself evidence of fraud. Moreover, the court found that Harry, Robert and Medley had an actual intent to defraud plaintiffs. For the reasons stated the evidence will be deemed sufficient to support the finding. The personal judgments against Robert and Medley were therefore proper. Harry and Robert admitted using $760 and $400 from the proceeds of the note in improving their respective homes. The court was justified in awarding plaintiffs liens in those amounts against the real property owned by Harry and Robert.

[6] Defendants contend that Medley testified that she returned the $1,500 to Harry and for that reason it was error to render judgment against her. The court was not required to believe her testimony and we must assume that the court did not believe it. But there was evidence to support the findings that Medley conspired with the others to defraud plaintiffs and if, as the court found, she received the money with that intention and purpose, returning the money to Harry would not have relieved her of responsibility. It is immaterial whether she entered into the scheme for the benefit of herself or for the benefit of Harry.

[7] Defendants' second contention is that the judgment in favor of Robert in the prior action is res judicata. They argue that there is an identity of parties, issues and subject matter in the two actions and that the former judgment bars plaintiffs from asserting any interest in the proceeds of the note. The argument is without merit. Fraud in the assignment from Harry to Robert was not in issue in that case. The judgment denied specific performance as against Harry with respect to the note and awarded damages instead. Nothing more was adjudicated. The judgment in the present action adjudicated the title to the proceeds of the note after the note and trust deed had been reassigned by Robert to Harry, without consideration, and a part of its proceeds distributed, likewise without consideration, by Harry to his children. Harry's gifts of the proceeds to his children were a fraud upon his creditors. The prior judgment did not bar plaintiffs from asserting the fraud.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

146 Cal.App.2d 516

Matter of the ESTATE of Edith E. OFF, Deceased.

Robert C. KIRKWOOD, State Controller, Contestant and Appellant,

v.

Elmer P. BROMLEY, Executor, Petitioner and Respondent.

Civ. 21873.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1956.

Hearing Denied Jan. 30, 1957.

Executor brought action against the State Controller to recover a refund of a portion of estate tax previously assessed and paid. The Superior Court, Los Angeles County, Burdette J. Daniels, J., entered an order in favor of the executor, and the State Controller appealed. The District Court of Appeal, Moore, P. J., held that where amount of charitable bequest exceeded the maximum allowed by the Probate Code, and taxing authorities levied estate tax on assumption that heirs of deceased testatrix would take a portion of the charitable bequest, and order imposing tax became final by lapse of time without appeal, and heirs refused to take a portion of the charitable bequest, and entire charitable bequest was distributed to charity, order imposing tax could not be challenged and was res judicata in subsequent action by executor against State Controller for refund of a portion of estate taxes assessed and paid.

Order reversed.

1. Taxation ⚷893

An order determining inheritance tax liability is in the nature of an ordinary civil judgment. West's Ann.Rev. & Tax.Code, § 14672.

2. Taxation ⚷893

Where amount of charitable bequest exceeded the maximum allowed by the Probate Code, and taxing authorities levied estate tax on assumption that heirs of deceased testatrix would take a portion of the charitable bequest, and order imposing tax became final by lapse of time without appeal, and heirs refused to take a portion of the charitable bequest, and entire charitable bequest was distributed to charity, order imposing tax could not be challenged and was res judicata in subsequent action by executor against State Controller for refund of a portion of estate taxes assessed and paid. West's Ann.Prob.Code, § 41; West's Ann.Rev. & Tax.Code, § 14672.

3. Taxation ⚷904

The "contingency" relieved against by section of the Revenue and Taxation Code providing that if a tax has been paid on a transfer subject to a "contingency" which might burden, abridge, defeat, or diminish the interest of the transferee, and gift was valued without allowance for the "contingency," the taxpayer should be allowed a tax refund when the "contingency" occurs and divests him of the gift, is the technical contingency of the type which may vest, divest, or diminish an estate, as in the case of a contingent remainder, in the sense usually employed in conveyancing, and with reference to the divesting or diminution of a presently vested or enjoyed estate by the vesting or coming into enjoyment of a contingent future estate. West's Ann.Rev. & Tax Code, § 14401.

See publication Words and Phrases, for other judicial constructions and definitions of "Contingency".

4. Taxation ⚷904

Where amount of charitable bequest exceeded maximum allowed by Probate Code, waiver or renunciation by heirs of testatrix of right to inherit the amount in excess of the maximum allowed by the Probate Code, would not relieve against estate taxes on the amount, which the heirs might have claimed under section of the Revenue and Taxation Code providing that if a tax has been paid on a transfer subject to a "contingency" which might burden, abridge, defeat, or diminish the interest of the transferee, and the gift was valued without allowance for the "contingency", the taxpayer should be allowed a tax refund when the "contingency" occurs and divests him of the gift. West's Ann.Prob. Code, § 41; West's Ann.Rev. & Tax.Code, § 14401.

5. Taxation ⚯904

The possibility that a court may distribute property erroneously in contravention of the law is not a "contingency" within meaning of section of the Revenue and Taxation Code providing that if a tax has been made on a transfer subject to a "contingency" which might burden, abridge, defeat, or diminish the interest of the transferee, and the gift was valued without allowance for the "contingency", the taxpayer should be allowed a tax refund when the contingency occurs and divests him of the gift. West's Ann.Rev. & Tax.Code, § 14401.

James W. Hickey, Chief Inheritance Tax Atty., Sacramento, Walter H. Miller, Chief Asst. Inheritance Tax Atty., Los Angeles, William A. Parsons, Asst. Inheritance Tax Atty., Sacramento, for appellant.

H. E. Lindersmith, Los Angeles, for respondent.

MOORE, Presiding Justice.

The State Controller appeals from the order allowing an inheritance tax refund.

Decedent Edith E. Off bequeathed two thirds of the residue of her estate to the Shriners Crippled Children's Hospital, a charity exempt from taxation. The amount of the gift exceeded the maximum allowed by Probate Code section 41 which provides, in general, that under certain circumstances a testator may not leave in excess of one third of his estate to charity to the exclusion of specified lawful heirs. The taxing authorities levied the estate tax on the assumption that certain of the decedent's heirs would take a portion of the gift which the will designated for the charity. The order imposing the tax became final by lapse of time without appeal. When time for distribution arrived, those heirs who were entitled to take that portion of the gift to the charity in excess of one third of the estate acquiesced in the generosity of the testator. Such acquiescence resulted in the distribution of the residue in accordance with the terms of the will. By its order, the court distributed the estate without regard to the benefits reserved to such heirs by Probate Code section 41. Thereupon, Elmer P. Bromley, executor of decedent's estate, brought this action for refund of a portion of the taxes previously assessed and paid. The trial court erroneously awarded the relief sought.

[1, 2] An order determining inheritance-tax liability is in the nature of an ordinary civil judgment. Rev. & Tax.Code, § 14672. The order having become final without appeal therefrom, its correctness may no longer be challenged. In re Estate of Willis, 34 Cal.2d 782, 788, 215 P.2d 453. Thus respondent cannot now argue that the heirs were never truly the transferees of any of the sums bequeathed to the charity and that the tax imposed on the assumption that they were such transferees was invalid. It is *res adjudicata* between the parties at bar that the heirs were the transferees of the sums for purposes of taxation.

[3] However, section 14401 of the Revenue and Taxation Code provides an avenue of relief for taxpayers which may be pursued even after the order imposing tax has become final. As indicated, only such a statute may benefit respondent at this state of the proceedings. The section provides, *inter alia*, that if a tax has been paid on a transfer subject to a "contingency which might burden, abridge, defeat, or diminish the * * * interest of the transferee, and the gift was valued without allowance for the * * * contingency," the taxpayer should be allowed a tax refund when the contingency occurs and divests him of his gift. The "contingency" relieved against by the section "is the technical contingency of the type

which may vest, divest or diminish an estate, as in the case of a contingent remainder * * * in the sense usually employed in conveyancing, and with reference to the divesting or diminution of a presently vested or enjoyed estate by the vesting or coming into enjoyment of a contingent future estate." In re Estate of Willis, supra, 34 Cal.2d 782, 786, 215 P.2d 453, 456.

The parties hereto have utilized a considerable portion of their briefs in arguing the issue of whether Probate Code section 41 renders an excessive gift to charity void in part or only voidable at the instance of the aggrieved heirs. Respondent cites cogent authorities to the effect that the gift is not void ab initio, but that the section merely allows a certain class of blood relations to demand the annulment of a portion of the gift so that it might devolve to their benefit. In re Estate of Leymel, 103 Cal. App.2d 778, 781, 230 P.2d 48; In re Estate of Randall, 86 Cal.App.2d 422, 426, 194 P.2d 709; In re Estate of Haines, 76 Cal.App.2d 673, 679, 173 P.2d 693. The theory of these decisions is that the section is not a true mortmain statute enacted to serve the policy of the state in curbing the wealth of powerful charitable institutions, but that it is only a legislative protection of the natural objects of a testator's bounty from his excess of zeal to assist those he believes to be deserving. In re Estate of Dwyer, 159 Cal. 680, 687, 115 P. 242. On the other hand, appellant urges that the section is a statute of succession; that immediately upon the death of the testator, the heirs acquired by descent a portion of those sums which the will designated for the charity. Estate of Moran affords some support to this contention inasmuch as certain of the Moran heirs were allowed to contest the testator's excessive gift to charity for the first time on appeal from "the decree of distribution which was *erroneous* under section 41 of the Probate Code." In re Estate of Moran, 122 Cal.App.2d 167, 170, 264 P.2d 598, 601, emphasis added. However, in the instant matter it is clear that respondent is entitled to no relief from the tax levied regardless of which of the foregoing views prevails.

[4] Accepting as true respondent's contention that section 41, supra, merely vests certain heirs with the right to effect the avoidance of a portion of the charity's bequest, we have to determine what is the "contingency" which has burdened, abridged, defeated or diminished the transfer to those determined to be the transferees for the purpose of taxation. The only event which prevented those heirs from in fact receiving all to which the law entitled them was their own failure to assert their rights at the time the will was probated. In the first place, this is certainly not the technical "contingency" required by In re Estate of Willis, supra. In the second place, section 13409 of the Revenue and Taxation Code provides that if "an heir waives or renounces his interest in the estate * * * the tax is nevertheless computed as if he had not so waived or renounced." If waiver or renunciation of the right to inherit will not relieve against taxation in the first instance, it is certainly not the sort of "contingency" which will justify a refund of the tax after the order imposing it has become final.

[5] But, assuming that section 41 of the Probate Code does in fact govern succession and that the heirs were immediately vested with a portion of the charity's gift upon the death of the testator, what then was the "contingency" which prevented its actual transfer to them? The event which prevented their taking the property was an erroneous decree of distribution entered by the probate court. The possibility that a court may distribute property erroneously in contravention of the law is not the sort of technical contingency referred to in Re Estate of Willis, supra.

Finally, it must be emphasized that respondent's arguments now urged might have been efficacious upon an appeal from the order imposing the tax. Had respondent attacked that order on the ground that Probate Code section 41 was not a statute of succession and thus did not render the heirs transferees of any portion of the gift to charity, his arguments might have prevailed. However, respondent has relegated himself to his limited rights under Revenue and Taxation Code section 14401, and that section affords him no relief.

The order decreeing the refund of inheritance taxes paid is reversed.

FOX and ASHBURN, JJ., concur.

Hearing denied; CARTER, J., dissenting.

146 Cal.App.2d 405

Bernice M. NEMETH et al., Plaintiff and Appellant,
v.
ALUMINUM COOKING UTENSIL COMPANY, Inc., et al., Defendants and Respondents.
Civ. 16904.

District Court of Appeal, First District, Division 1, California.
Nov. 30, 1956.

Rehearing Denied Dec. 28, 1956.
Hearing Denied Jan. 23, 1957.

Action by wife for personal injuries arising out of automobile accident. The Superior Court, County of Alameda, James R. Agee, J., entered summary judgment for defendant and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that where automobile collision insurer, acting under subrogation agreement, brought action in name of husband for amount paid to husband for the damage to the automobile, and also for amount paid by husband under deductible provision of policy, wife was in privity with husband in that action and judgment entered therein was res judicata in wife's subsequent action against same defendants for injuries arising out of same accident.

Judgment affirmed.

Judgment 🔑693

Where automobile collision insurer, acting under subrogation agreement, brought action in name of husband for amount paid to husband for damage to automobile and also for amount paid by husband under the deductible provision of the policy, wife was in privity with husband in that action and judgment in that action was res judicata in subsequent action by wife against same defendants for injuries arising out of the same accident. West's Ann.Civ.Code, §§ 161a, 171c; West's Ann.Prob.Code, § 201.

Lange & Rockwell, San Francisco, for appellant.

Allan H. Fish, San Francisco, for respondent.

PETERS, Presiding Justice.

Bernice M. Nemeth appeals from a summary judgment adverse to her rendered by the Superior Court of Alameda County. The basic question involved is whether a prior Municipal Court judgment adverse to her husband is *res judicata* as to Mrs. Nemeth in this Superior Court action.

The Nemeths owned an automobile as community property. On September 14, 1953, Mr. and Mrs. Nemeth, and their son Anthony, were riding in the car then being driven by Mr. Nemeth when it collided with an automobile then being driven by one Hair. The Nemeths carried a $40 deductible collision insurance policy. The insurance carrier then paid to Mr. Nemeth the sum of $151.74, the amount of the damages to the Nemeth car less the $40 deductible, and took back a standard form of subrogation agreement. On April 22, 1954, the insurance company, acting under the express terms of the subrogation agreement, brought an action in the name of Mr. Nemeth in the Municipal Court against Hair and the Aluminum Cooking Utensil Company for the $151.74 it had paid to Nemeth, for Nemeth's $40 paid by him under the deductible policy, and for damages for loss of use of the car. Nemeth was not consulted about the filing of this action. The corporate defendant moved for a summary judgment on the ground that it did not own the offending automobile and that Hair, as a matter of law, was an independent contractor. This motion was denied.

On August 4, 1954, Mrs. Nemeth and her minor son commenced an action in the Superior Court against the same two defendants to recover damages for the personal injuries claimed to have been suffered by them in the same accident.

On August 10, 1954, the corporate defendant renewed its motion for a summary judgment in the Municipal Court action, and this time, on August 31, 1954, the motion was granted. An appeal was taken to the Appellate Department of the Superior Court, and on January 28, 1955, that court affirmed this summary judgment in favor of the corporate defendant. The judgment is now final.

In the meantime, a similar motion was made in the Superior Court action. This motion, on December 2, 1954, was denied, but after the affirmance by the Appellate Department of the Superior Court, it was renewed on the ground that as to Mrs. Nemeth, but not as to her son, the Municipal Court judgment was *res judicata*. This time the motion was granted, and from this summary judgment Mrs. Nemeth appeals.

The only question involved on this appeal is whether the Municipal Court judgment is *res judicata* against Mrs. Nemeth in this Superior Court action brought by her against Hair and the Aluminum Cooking Utensil Company.

The answer to this question, at least prior to 1951, is to be found in the case of Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461. There, as here, the husband and wife were riding in a car being driven by the husband when it was involved in an accident. The husband brought an action against the driver of the other car for the injuries suffered by him in that accident. Three weeks later the wife sued the same defendant for her injuries suffered by her in the same accident. The action by the husband was tried first, and resulted in a judgment for the defendant. That judgment became final. The defendant then raised the defense in the wife's action that the judgment in the husband's action was *res judicata*. By a six-to-one vote the Supreme Court held that, because damages for injuries to either spouse are community property, the wife was in privity with her husband in the first action, and was bound by that judgment in her action. Whatever our opinion as to the correctness of that decision may be, as an intermediate court, we are bound by it. Therefore, if that case is still the law, it is controlling in the present case. Whether it is still the law depends upon whether an amendment to section 171c of the Civil Code, adopted in 1951, changed the rule of that case. Appellant claims that it did.

The section reads as follows:

> "Notwithstanding the provisions of Section 161a and 172 of this code, and subject to the provisions of Sections 164 and 169 of this code, the wife has the management, control and disposition, other than testamentary except as otherwise permitted by law, of community property money earned by her, or community property money damages received by her for personal injuries suffered by her, until it is commingled with other community property, except that the husband shall have management, control, and disposition of such money damages to the extent necessary to pay for expenses incurred by reason of the wife's personal injuries.
>
> "During such time as the wife may have the management, control and disposition of such money, as herein provided, she may not make a gift thereof, or dispose of the same without a valuable consideration, without the written consent of the husband.
>
> "This section shall not be construed as making such money the separate

property of the wife, nor as changing the respective interests of the husband and wife in such money, as defined in Section 161a of this code."

This section gives the wife the management and control, subject to the enumerated exception, of the damages received by her in a personal injury action, but expressly does not change the character of such property from community to separate property. Does this change the rule of the Zaragosa case?

This problem was raised by counsel in Kesler v. Pabst, 43 Cal.2d 254, 273 P.2d 257. In that case the Supreme Court held that, because the cause of action there involved arose before the effective date of section 171c of the Civil Code, it would not decide what effect, if any, the adoption of the amendment might have had on the rule announced in the Zaragosa case.

The Zaragosa case is predicated on the rule, which it reaffirmed, that personal injury damages recovered by either spouse are community property. Section 171c of the Civil Code did not change that rule as to damages recovered by the wife. In fact, the section expressly provides in its last paragraph that the Legislature had no intent to change that rule. What section 171c did was to give the wife management and control of a portion of the damages recovered by her, while expressly declaring such damages shall remain community property. In other words, the husband still retains a "present, existing and equal" interest in such recovery, § 161a, Civ.Code, and still retains testamentary control over one-half of such property. § 201, Prob. Code. The mere change in the management and control of a portion of such property could not operate to change the rule of the Zaragosa case. The rationale of that case is that a wife is in privity with her husband when he sues for his damages to such an extent that she is, in effect, a real party in interest in that action, and is bound by the judgment therein. The necessary "privity" was found in the fact that the cause of action for the personal injuries of either spouse is community property, and, therefore, when the husband sues he is representing the community in bringing the action. The basis of that "privity" still exists in that such damages are still community property. Thus, the rule of the Zaragosa case was not affected by the adoption of section 171c of the Civil Code. It should be mentioned that this view is supported by the various commentators who have discussed the new section. 2 Armstrong, California Family Law, p. 1512; 42 Cal.L.Rev. 848; 6 Hasting's Law Journal, p. 92.

Appellant next contends that even if Zaragosa v. Craven, 33 Cal.2d 315, 202 P.2d 73, 6 A.L.R.2d 461, is still the law, it is distinguishable from the case at bar. This argument is based upon the contention that in the Zaragosa case the husband was in fact representing the community in the prior action, while in the instant case the insurance carrier of the husband brought the Municipal Court action, using the name of the husband by reason of the subrogation agreement. Appellant urges that she was not in privity with the insurance company. It should be noted that the insurance company sued in the Municipal Court action not only for the money it was out of pocket, but also for the $40 claim of the husband for his share of the deductible portion of his policy, and for his loss of the use of the car. Moreover, although the husband here did not have knowledge that the Municipal Court action was to be filed, he had, by the subrogation agreement, authorized it to be brought in his name. Thus, the husband was clearly bound by the Municipal Court judgment. He was a party to that suit, and was represented in it. Since the husband is estopped to relitigate the issue of the corporate defendant's liability, the appellant is also bound, under the doctrine of the Zaragosa case.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

146 Cal.App.2d 436

E. Clarke AUSTIN, Plaintiff and Respondent,

v.

Agnes M. RICHARDS, Defendant and Appellant.

Civ. 21658.

District Court of Appeal, Second District, Division 3, California.

Nov. 30, 1956.

Hearing Denied Jan. 23, 1957.

Action by real estate broker on a contract to recover commission from vendor who rescinded contract of sale of property with purchaser. The Superior Court, Los Angeles County, Jerold E. Weil, J., entered judgment for broker and vendor appealed. The District Court of Appeal, Vallée, J., held that the execution of the contract of sale by vendor of realty was conclusive proof that he was satisfied as to the qualifications of the purchaser and of purchaser's ability to perform the contract and rendered the vendor liable for broker's commission, although difference between value of property and cash value of the consideration might render the transaction unfair, unjust and inequitable as between purchaser and vendor so as to preclude specific performance of agreement at instance of purchaser.

Judgment affirmed.

1. Appeal and Error 🔑1010(1)

The District Court of Appeal may not set aside trial court's finding because it might have reached a different conclusion and where there is evidence which sustains the trial court's finding it will not be set aside.

2. Brokers 🔑86(7)

In action by real estate broker on a contract to recover real estate commission, where the consideration for the contract as between vendor and purchaser was inadequate and although difference between value of property and cash value of consideration might render transaction unfair, unjust and inequitable as between vendor and purchaser, evidence sustained trial court's finding that real estate broker was free and clear of any fraud, misrepresentation or overreaching.

3. Brokers 🔑65(3)

Where difference between value of property and cash value of consideration might render a real estate transaction unfair, unjust and inequitable as between vendor and purchaser so as to preclude specific performance of contract at instance of purchaser, but real estate broker was in no way responsible for such unfairness, injustice or inequity or for any inadequacy of the consideration, inadequacy of purchase price was not a good defense to claim for broker's commission for sale of the property.

4. Brokers 🔑54

The execution of a contract of sale by the vendor of realty was conclusive proof that he was satisfied as to qualifications of purchaser and of purchaser's ability to perform contract and vendor was liable for broker's commission and was estopped by such approval from denying such liability.

5. Brokers 🔑65(3)

Where real estate broker was given the exclusive and irrevocable right to sell property for $350,000 on terms of cash or acceptable to vendor, in consideration of which vendor agreed to pay real estate broker $10,000 commission and vendor entered into an agreement with purchaser procured as a result of an advertisement by the broker, whereby vendor agreed to sell for $310,000 payable $90,000 in cash and balance at $1,300 per month without interest, broker earned his commission although vendor subsequently rescinded contract to sell.

6. Brokers 🔑40

Where vendor and real estate broker entered into an agreement providing that broker's fees of $10,000, $5,000 to be paid "on close of escrow" and $5,000 on a designated date, and escrow instructions provided commission was payable $5,000 "at close of escrow" and $5,000 on the designated date, the promise to pay broker's fees was absolute and not contingent upon the escrow's closing since the dates used in the instruments merely fixed the times for payment.

Russell E. Parsons, Beverly Hills, for appellant.

Robert C. Mardian, of Boyle, Bissell & Atwill, Pasadena, for respondent.

VALLÉE, Justice.

Appeal by defendant from a judgment for plaintiff in an action to recover a real estate broker's commission.

Defendant was the owner of a parcel of improved realty. On March 6, 1954, by an instrument in writing, defendant granted plaintiff, a licensed real estate broker, "the exclusive and irrevocable right" to sell the property for $350,000 on terms of "Cash or acceptable to Seller," in consideration of which she agreed to pay plaintiff a commission of 5 per cent of the purchase price.

In May plaintiff received an inquiry in answer to an advertisement from a Mr. Gerhardt, a resident of New Jersey. Gerhardt came to California and examined the property with defendant, and the two entered into negotiations. On June 7, 1954 defendant and Gerhardt entered into a written agreement whereby defendant agreed to sell and Gerhardt to buy the property for $310,000, payable $90,000 in cash and the balance at the rate of $1,300 a month without interest. In the contract defendant agreed to pay plaintiff as commission the sum of "\$10,000$^{\underline{00}}$-(5000.$^{\underline{00}}$ on close of Escrow \$5,000^{00} Jan 4 1955 (Note.)." Plaintiff initialed this provision as "OK." On the following day an escrow was opened on joint escrow instructions signed by defendant and Gerhardt which called for performance on or before August 1, 1954. The escrow instructions contained the following: "Commission: payable as follows:—$5,000.00 at close of escrow & $5,000.00 on January 4, 1955, the seller will execute a personal note for second payment on commission without interest," and "Commission is acceptable in full settlement. E. C. Austin."

On June 25, 1954 defendant gave Gerhardt a notice of rescission of the contract on the grounds of fraud purportedly practiced on her by Gerhardt.

The complaint alleged the foregoing facts. The answer admitted them, denied plaintiff had performed all the conditions and agreements on his part to be performed, denied that anything was due or owing, and admitted defendant had not paid plaintiff any sum. The answer set up three affirmative defenses: 1. The complaint does not state facts sufficient to constitute a cause of action. 2. The contract to pay a commission was procured by fraud of plaintiff and the contract to sell was procured by fraud of Gerhardt, aided and abetted by plaintiff. 3. The consideration for the purchase was inadequate. The court found for plaintiff on all issues, except it found that the consideration for the purchase was inadequate but plaintiff was not responsible therefor. Judgment was for plaintiff in the sum of $10,000, from which defendant appeals.

[1, 2] It is asserted the evidence does not support the finding that plaintiff was free and clear of any fraud, misrepresentation, or overreaching. The point is untenable. The short of the matter is that the evidence on the point was conflicting. The bone of contention is merely the evaluation of that evidence. There was evidence which sustains the finding. There was other evidence from which the court could have reached a different conclusion. "As Mr. Justice McComb stated in Marson v. Rand, 107 Cal.App.2d 466, 468, 237 P.2d 18, 20: '"It is not the province of a reviewing court to present, by way of opinion, a detailed argument on the sufficiency of the evidence to support the judgment, where it appears that the question is one purely of determining which side shall be believed. The trial court having determined this with the witnesses before it, the controversy is settled."'" Gillespie v. Gillespie, 121 Cal.App.2d 95, 97, 262 P.2d 607, 608; Sonkin v.

Hershon, 130 Cal.App.2d 491, 492, 279 P.2d 156. This court may not set aside the trial court's finding because it might have reached a different conclusion.

[3] The court found that the consideration for the sale was inadequate, and "[t]he court finds that although such difference between the value of the property and the cash value of the consideration on June 7, 1954 might render the transaction unfair, unjust and inequitable as between said Agnes M. Richards and the purchaser Leon Gerhardt so as to preclude the specific performance of said contract at the instance of said purchaser, that the plaintiff was in no way responsible for such unfairness, injustice or inequity or for any inadequacy of consideration and the transaction was agreed to and accepted by the seller, the defendant Agnes M. Richards, with full knowledge of its terms and effects and there was nothing unfair, unjust or inequitable in the transaction as between the plaintiff and the defendant." Defendant asserts the inadequacy of the purchase price is a good defense to this action for the broker's commission. The point is without merit.

[4, 5] A broker properly authorized to sell property has performed his contract and is entitled to his commission when he proves he has in pursuance of his employment and within the time specified procured a buyer ready, willing, and able to buy on the terms and conditions specified in the contract of employment; or, if the exact terms are not specified in his contract, on terms satisfactory and acceptable to his employer. (9 Cal.Jur.2d 255, § 87.) The execution of a contract of sale by the owner of realty is conclusive proof that he was satisfied as to the qualifications of the purchaser and of his ability to perform the contract, thus rendering the owner liable for the payment of the broker's commission. McNamara v. Steckman, 202 Cal. 569, 572, 262 P. 297; Deeble v. Stearns, 82 Cal.App.2d 296, 299, 186 P.2d 173; Ralston v. Demirjian, 86 Cal.App.2d 124, 126, 194 P.2d 41. Defendant's approval of the contract with Gerhardt estops her from denying plaintiff's claim for his broker's commission. Deeble v. Stearns, supra, 86 Cal.App.2d 299, 186 P.2d 173; Mann v. Mueller, 140 Cal.App.2d 481, 487, 295 P.2d 421. The fact that because of inadequacy of consideration Gerhardt could not compel defendant to specifically perform the contract is not a defense to plaintiff's action for his commission. Plaintiff procured a buyer who was ready, willing, and able to buy, and who was accepted by defendant. Plaintiff earned his commission. Diamond v. Fay, 23 Cal.App. 566, 138 P. 933, relied on by defendant, is not in point. In that case the broker did not procure a lessee who was *able* to enter into the lease; hence, it was held he was not entitled to a commission.

[6] Finally, defendant asserts that the fact she instructed the escrow holder to pay half of the commission "at close of escrow" prevents plaintiff from recovering his commission when she in good faith rescinded and refused to pass title.

The same point was made in Clark v. Dulien Steel Products, Inc., 54 Cal.App.2d 92, 128 P.2d 608, 609, where after the broker's principal had signed a contract with the seller for the purchase of scrap iron, the broker and his principal entered into a contract for the broker's commission. The contract provided that "Whereas Rosenberg [the broker] 'has rendered services, as a broker, in the consummation of the sale of approximately 5,000 tons of iron ship scrap * * * [the defendant] agrees to pay to first party (Rosenberg) the sum of $1.50 per each gross ton of such scrap purchased by [the defendant] * * * immediately upon delivery and complete shipment and payment of the purchase price of such scrap. * * *'" The contract between the principal and the seller was mutually cancelled by the parties. The plaintiff, the assignee of Rosenberg, sued to recover the broker's commission. The court held that the words "'upon delivery and complete shipment and payment of the purchase price,' * * * merely provide a time for the payment of services already rendered, not a limitation of his right thereto."

The contract between defendant and Gerhardt which plaintiff initialed expressly provided that $5,000 would be paid plaintiff "on close of escrow" and $5,000 on January 4, 1955 to be evidenced by defendant's note. Construing the contract and the escrow instructions together, it is evident that the promise to pay was absolute and that "on close of escrow," "at close of escrow," and January 4, 1955 merely fixed the times for payment. The promise to pay was not contingent on the escrow's closing. (See 3 Williston, Contracts, § 799.)

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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146 Cal.App.2d 674

Urban K. VOIGT, Petitioner,

v.

SUPERIOR COURT of the State of California, in and for the COUNTY OF LOS ANGELES, and Eva Furr Cornelison Voigt (Real Party in Interest), Respondents.

Civ. 22150.

District Court of Appeal, Second District, Division 1, California.

Dec. 7, 1956.

Brother of deceased testator brought an original mandamus proceeding in the District Court of Appeal against the Superior Court in and for the County of Los Angeles and alleged widow of deceased testator to compel the Superior Court to compel the alleged widow to answer certain questions propounded to her when the brother was taking her deposition. The District Court of Appeal, Nourse, J. pro tem., held that where brother of deceased testator filed a petition for probate of will and prayed that letters of administration with will annexed be issued to him, and alleged widow of testator filed petition for probate and prayed that she be appointed administratrix, and neither filed written objections to the petition of the other, no issue as to competency of either was presented, and competency of both was presumed, and therefore brother was not entitled to litigate competency of alleged widow and hence was not entitled to take her deposition for purpose of determining competency of alleged widow.

Writ of mandate denied.

Discovery 🔑36

Executors and Administrators 🔑21(2)

Where brother of deceased testator filed a petition for probate of will and prayed that letters of administration with will annexed be issued to him, and alleged widow of testator filed petition for probate and prayed that she be appointed administratrix, and neither filed written objections to the petition of the other, no issue as to competency of either was presented, and competency of both was presumed, and therefore brother was not entitled to litigate competency of alleged widow and hence was not entitled to take her deposition for purpose of determining competency of alleged widow. Probate Code, §§ 326, 440.

◆

Claude L. Welch, Jesse A. Hamilton, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, Wm. E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Bentson & Blumberg, Myron Blumberg, Long Beach, for real party in interest.

NOURSE, Justice pro tem.

Petitioner is the brother of one Kurt A. Voigt, deceased. By a petition filed in the Superior Court of the State of California, in and for the County of Los Angeles, he prayed for an order appointing him as special administrator of the estate of the decedent, and thereafter filed a petition for the probate of the will of the decedent and prayed that letters of administration with will annexed issue to him.

Thereafter Eva Furr Cornelison Voigt (hereinafter called Cornelison), one of the legatees named in the will which petitioner offered for probate, filed a petition to probate the will of the decedent, claiming to be the widow of the decedent and asking that letters of administration with will annexed be issued to her and that the will and codicils offered by petitioner be admitted to probate. Neither petitioner nor Cornelison filed written objections to the petition filed by the other.

After the filing by Cornelison of her petition, petitioner gave notice of the taking of her deposition and caused a *subpoena duces tecum* to be issued and served upon her. After being ordered by the court so to do, she appeared before the notary, but refused to answer seventy-one of the questions propounded to her. Upon being cited by the court she was ordered to answer all of the questions which were pertinent to the question as to whether she was in fact married to the decedent, but her objections to answering the other questions propounded (all of which were relevant to the question of Cornelison's integrity) were sustained by the court.

Petitioner now seeks a writ of mandate to compel the respondent court to compel Cornelison to answer the questions as to which the court had sustained Cornelison's objections.

We have reached the conclusion that, petitioner having failed to file any written objections to the petition of Cornelison, there were no issues of fact framed to which the questions addressed to Cornelison by petitioner at the time of the taking of her deposition were pertinent or material. Both petitioner and Cornelison having filed petitions for letters with will annexed, and each showing a relationship to the decedent which would entitle the petitioner to letters, the only question presented to the court by the petitions was the priority in right to letters between the two petitioners. Neither petitioner was required to allege anything relative to his or her competency, Probate Code, §§ 326, 440, and in the absence of written opposition averring the facts which it is claimed render the petitioner incompetent, his or her competency is presumed and no issue on the question of competency is presented, In re Estate of Rollins, 189 Cal. 392, 208 P. 280.

If petitioner desired to raise the question of Cornelison's competency to act as an administratrix, either on account of age, conviction of a crime, mental incompetency, drunkenness, improvidence, or want of understanding or integrity, it was incumbent upon him to file objections to Cornelison's petition specifically placing in issue the question of her competency and the grounds of his objections, Prob.Code, §§ 407, 442. In the absence of such objection he was not entitled to litigate those facts, and consequently was not entitled to examine her as to any facts bearing upon any of the matters that might affect her competency. In re Bauquier's Estate, 88 Cal. 302, 315, 316, 26 P. 178, 532; In re Estate of Heldt, 98 Cal. 553, 33 P. 549; Carter v. Waste, 159 Cal. 23, 25, 112 P. 727.

The writ of mandate prayed for is therefore denied, with instructions to the respondent court to permit the petitioner to file written objections to the petition of Cornelison if he is so advised, and thereafter to permit petitioner to interrogate Cornelison as to any matters material to the issues raised by the written opposition of petitioner, should such opposition be filed.

WHITE, P. J., and FOURT, J., concur.

146 Cal.App.2d 804

Lucia KAICHEN, Plaintiff and Appellant,
v.
Victor P. SHOWERS, Defendant and Respondent.
Civ. 21987.

District Court of Appeal, Second District, Division 1, California.
Dec. 14, 1956.

Rehearing Denied Jan. 2, 1957.
Hearing Denied Feb. 6, 1957.

Action for injuries to one riding in an automobile struck by defendant's automobile at a street intersection. From a judgment of the Superior Court of Los Angeles County, Newcomb Condee, J., on a jury's verdict for defendant, plaintiff appealed. The District Court of Appeal, Doran, J., held that evidence was sufficient to support the verdict and judgment.

Judgment affirmed.

1. Automobiles ⚷244(11)
Damages ⚷185(1)

In action for alleged injuries to one riding in automobile struck by defendant's automobile at street intersection, evidence was sufficient to support jury's verdict and judgment thereon for defendant as warranting jury's conclusion that plaintiff failed to make out case of actionable negligence or that no injury resulted from collision.

2. Appeal and Error ⚷1001(1), 1002

A judgment supported by any substantial evidence in record cannot be reversed by appellate court on ground of insufficiency of evidence to support judgment, whether evidence is contradicted or uncontradicted.

3. Automobiles ⚷246(60)

In action for alleged injuries to one riding in automobile struck by defendant's automobile at street intersection, trial court properly refused to instruct jury on res ipsa loquitur doctrine, in view of evidence raising fact question as to whether there was an occurrence proximately causing injury to plaintiff.

Brock, Easton, Fleishman & Rykoff, Stanley Fleishman, Hollywood, for appellant.

H. T. Ellerby, and Henry F. Walker, Los Angeles, for respondent.

DORAN, Justice.

The action herein is for injuries sustained by plaintiff while seated in the back seat of a Ford automobile, alleged to have resulted when the defendant's Buick ran into the rear of plaintiff's car at the intersection of Fifth and Hill Streets in Los Angeles. A jury returned a verdict in favor of the defendant.

The record discloses that about an hour before the accident occurred defendant had had a tooth extracted under local novocain anaesthesia. About noon the defendant started for lunch but gave up the idea because the gum was still bleeding and uncomfortable. The defendant then drove out of a parking station, turned south on Hill Street and after going around a stopped bus near the intersection, ran into plaintiff's car in what is termed by the plaintiff as a "light collision". A policeman testified that "There was no vehicular damage to either (car), that I could see". The officer stated that the defendant "was in a dazed or unconscious condition", was unable to make any statement as to what had occurred, and was taken from the scene by stretcher and ambulance. It was stipulated that the defendant was not under the influence of liquor.

The action was originally brought against Dr. Schildwachter, dentist, on the theory that an excessive amount of novocain had been used and that the dentist had not warned Mr. Showers not to drive. After testimony that the novocain could not have had any after effect and that only 2 cubic centimeters had been injected, the action against the dentist was dismissed.

Plaintiff did not receive any cuts or bruises from the collision and felt no pain until 15 or 20 minutes later. A doctor at the receiving hospital later bound up plaintiff's neck and the asserted pain cleared up in matter of four days. There were later complaints of ear trouble, rib and back pain. There was testimony that plaintiff had always had scoliosis, curvature of the spine, from which back pains could be expected.

Two contentions are advanced by appellant: (1) that the evidence is insufficient to support the verdict, and (2) that the trial court erred in refusing to give instructions on the res ipsa loquitur doctrine.

[1, 2] Appellant's contention that the evidence is insufficient to support the verdict and judgment is untenable. It is a well established principle of appellate procedure that where the record reveals any substantial evidence in support of the judgment, there can be no reversal on the ground of insufficiency. This rule applies whether the evidence is contradicted or uncontradicted and precludes any reappraisal of the testimony. That the record herein does disclose substantial evidence in support of the verdict cannot be doubted. From this evidence the jury came to the conclusion that the plaintiff had not made out a case of actionable negligence or that no injury had resulted from the slight collision.

[3] Nor is there any merit in appellant's argument that the trial court improperly refused to instruct on the doctrine of res ipsa loquitur. As stated in the respondent's brief: "To have given B.A.J.I. 206–B as requested by plaintiff would have constituted a determination by the court *as a matter of law* that there was no question but that plaintiff proximately was injured in an occurrence so as to require application of the doctrine. This is erroneous when there is a question of fact for determination by the jury as to whether there was an occurrence or as to whether plaintiff proximately was injured thereby * * * It cannot be said herein that plaintiff as a matter of law established that she received any injury. The least that may be said is that it was a question for the jury."

The instructions given, considered as an entirety, clearly presented the various issues raised by the testimony. One of these issues was that of unavoidable accident, and it may well be that this was the conclusion of the jury. Likewise the jury, from the evidence, may have been convinced that the plaintiff had suffered no injury from the collision and that the condition complained of had resulted from plaintiff's previous health condition. In any event, as hereinbefore indicated, the judgment is supported by substantial evidence, and no reversible error is apparent.

The judgment is affirmed and the attempted appeal from the order denying a new trial is dismissed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; CARTER, J., dissenting.

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146 Cal.App.2d 722

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Irvin Leon MORGAN and Thomas Draper, Defendants.

Thomas Draper, Defendant and Appellant.
Cr. 5709.

District Court of Appeal, Second District, Division 2, California.
Dec. 12, 1956.

Defendant was convicted in the Superior Court of Los Angeles County, H. Burton Noble, J., of an infamous crime against nature, and he appealed. The District Court of Appeal, Ashburn, J., held that where defendant, subsequently charged with an infamous crime against nature, and his codefendant, charged with willingly submitting, were taken in flagrante delicto by police and transported to hospital where doctor, without objection, took from defendant's private parts certain fecal matter from which doctor made smears and slides subsequently introduced into evidence, there was neither a violation of defendant's immunity from self-incrimination nor making of an unreasonable search and seizure.

Affirmed.

1. Criminal Law 🔑393(2)

Searches and Seizures 🔑7(25)

Where defendant, subsequently charged with an infamous crime against nature, and his codefendant, charged with willingly submitting, were taken in flagrante delicto by police and transported to hospital where doctor, without objection, took from defendant's private parts certain fecal matter from which doctor made smears and slides subsequently introduced into evidence, there was neither a violation of defendant's immunity from self-incrimination nor making of an unreasonable search and seizure.

2. Criminal Law 🔑1169(1)

Where there is sufficient other evidence to sustain conviction, any evidence procured through unlawful search will be disregarded and judgment affirmed.

3. Sodomy 🔑6

In prosecution for commission of an infamous crime against nature, there was sufficient evidence of penetration to sustain conviction. West's Ann.Pen.Code, § 287.

4. Mental Health 🔑443

In case of adult defendant, matter of ordering sexual psychopath proceeding lies within sound discretion of trial court. West's Ann.Welfare & Inst.Code, § 5501.

5. Criminal Law 🔑1136

Having acquiesced in trial court's failure to order sexual psychopath proceeding, defendant was in no position to claim error in that regard. West's Ann.Welfare & Inst.Code, § 5501.

◆

Eugene V. McPherson, Joseph A. Armstrong, and Gladys Towles Root, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant Draper appeals from a judgment of conviction of the charge of commission of the infamous crime against nature, Pen.Code, § 286, upon his willing co-defendant Morgan. The crime was proved by an eye witness and defendant did not testify or offer any defense witnesses.

It is claimed that certain evidence was received in violation of the Cahan rule, People v. Cahan, 44 Cal.2d 434, 282 P.2d 905. Defendant and Morgan were taken in flagrante delicto by the police. They were transported forthwith to the police station, thence to Valley Hospital, where the police requested Dr. Nieremberg to make some slides for them. Neither defendant objected and the doctor took from appellant's private parts certain fecal matter from which he made some smears and slides that were introduced into evidence over defendant's objection that they were obtained by unlawful search and seizure.

[1] Appellant relies upon Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183, which condemned as brutal and violative of due process the forcible extraction of evidence from the stomach of one under arrest. That case is not apposite for there was nothing resembling brutality here and there was apparent consent to the examination of defendant's person. Upon the authority of the following cases it must be held that there was neither a violation of defendant's immunity to self-incrimination nor the making of an unreasonable search and seizure. People v. Haeussler, 41 Cal.2d 252, 257, 259, 260 P.2d 8; People v. Woods, 139 Cal.App.2d 515, 525, 293 P.2d 901; People v. Smith, 142 Cal.App.2d 287, 298 P.2d 540; People v. Robarge, 41 Cal.2d 628, 632–633, 262 P.2d 14. In the Smith case this court said in 142 Cal.App.2d at page 293, 298 P.2d at page 544: "It is the duty of law-enforcing agencies, after such arrest, to explore every area suggested by the circumstances of the apprehension of the accused to the end that if the latter is probably guilty, the evidence will have been so assorted and sys-

tematized as to expedite judicial procedure, and if the evidence should not in the opinion of the People's counsel warrant a trial, the accused will be promptly discharged."

[2] Moreover, the evidence of the police officer who witnessed the crime was sufficient to sustain the conviction without the aid of the physical examination of the defendant or the smear made as a result of same. In such circumstances any evidence secured through an unlawful search will be disregarded and the judgment affirmed. People v. Tarantino, 45 Cal.2d 590, 596–597, 290 P.2d 505; People v. Lujan, 141 Cal.App.2d 143, 296 P.2d 93.

[3] It is urged that the evidence is insufficient to sustain the finding of guilt because it does not prove penetration as required by Penal Code, § 287. On the contrary, the testimony of the eye witness is sufficient for that purpose, although he said it would be impossible to state that he saw penetration; his description of what he saw left no room for a negative inference. See People v. Ramos, 125 Cal.App.2d 383, 270 P.2d 540. If that were not so, the circumstantial evidence afforded by Dr. Nieremberg's slides would suffice. People v. Singh, 93 Cal.App. 32, 35, 268 P. 958; People v. Barber, 3 Cal.App.2d 124, 125, 38 P.2d 798.

[4] Appellant further complains that the court erred in not ordering a sexual psychopath proceeding, although he did not file the affidavit requisite to his initiation of such an inquiry. Apparently the probation officer had recommended one, for, on mention of his report, the court said: "I think sex psychopathy in the case of the defendant Draper is just a waste of time and expense, Mr. Rosen. This man has had a sexual problem for the last 25 years and he has been in the penitentiary before for the same or similar thing." There is no showing of a situation which would require the court to make the order on his own motion, and, as above stated, defendant did not proceed by affidavit as required by § 5501, Welfare and Institutions Code. The matter is committed to the sound discretion of the trial court in a case not involving a child under 14 years of age, 27 Cal.Jur.2d § 143, p. 456; People v. Haley, 46 Cal.App.2d 618, 622, 116 P.2d 498; People v. Smith, 100 Cal.App.2d 162, 165, 223 P.2d 82, and there is no showing of an abuse of that discretion as there was in People v. Barnett, 27 Cal.2d 649, 656, 166 P.2d 4, upon which appellant relies.

[5] In People v. Gross, 139 Cal.App.2d 607, 611, 294 P.2d 88, 90, it is said: "Every person convicted of sexual psychopathy should understand that the period of his confinement might be no less than the maximum time prescribed for sex offenders plus time spent in mental hospitals. People v. Gross, 115 Cal.App.2d 502, 505, 252 P.2d 416." In response to counsel's suggestion that a 90-day observation period at Atascadero State Hospital would not "be lost" the court, apparently having the Gross case in mind, said: "If he comes back from there the chances are more than even that he is going to go to the State Prison anyhow. We might as well send him there and if they want to send him to Atascadero, that is up to them," and defendant's attorney replied: "Of course, your Honor, I would hate to ask any court to send a man to a hospital for 2 or 3 years with the man having the feeling that when he returns he is going to go to State Prison. I think that is unjust to the individual." After this acquiescence in the court's ruling defendant is in no position to allege error, if one there were.

There was no prejudicial error in this case. The judgment is affirmed.

MOORE, P. J., and FOX, J., concur.

146 Cal.App.2d 322

Joseph G. WILLIAMS, Plaintiff and Respondent,

v.

STAUFFER CHEMICAL COMPANY, a corporation, Louis A. Joaquin, and Jack A. Rexelle, individually and doing business under the name and style of Lou-Jak Trucking Service, a copartnership, Julius Kaeten, et al., Defendants and Appellants.

Civ. 16468.

District Court of Appeal, First District, Division 1, California.

Nov. 28, 1956.

Rehearing Denied Dec. 28, 1956.

Hearing Denied Jan. 23, 1957.

Action by employee of chemical dealer against chemical company, owner-driver of delivery truck and trucking service company for injuries sustained when sulfuric acid sprayed from hose during delivery from tank-trailer to stationary tank. The Superior Court, City & County of San Francisco, Preston Devine, J., entered judgment for employee and trucking service company appealed. The District Court of Appeal, Fred B. Wood, J., held that where instruction told contrasting legal consequences of covenant not to sue and settlement of claim, that agreement under consideration between employee and chemical company and its insurer was according to its terms a covenant not to sue and that defendants had burden of proving that parties intended release and not a covenant to sue, instruction was correct.

Judgment affirmed.

1. Master and Servant 🔑330(3)

In action by chemical dealer's employee who was injured when acid sprayed from hose during delivery from tank-trailer to stationary tank against owner-driver of delivery truck and trucking service company which assigned company number to truck, which could terminate driver's services at any time, which made all charges to shippers, which was sole user of driver's services for two years, which instructed driver on safety and execution of receipts and which included driver in group hospitalization plan, evidence sustained finding that driver was employee of company and not independent contractor.

2. Automobiles 🔑197(3)

Fact that owner-driver of truck was duly licensed radial highway carrier did not require him to contract independently, and trucking service company which used owner-driver and truck could be liable for owner-driver's negligence.

3. Master and Servant 🔑332(4)

In action by chemical dealer's employee who was injured when acid sprayed from hose during delivery from tank-trailer to stationary tank against owner-driver of delivery truck and trucking service company, instruction using word agent several times interchangeably with employee was not confusing.

4. Master and Servant 🔑332(4)

In action by chemical dealer's employee who was injured when acid sprayed from hose during delivery from tank-trailer to stationary tank against owner-driver of delivery truck and trucking service company, instruction which listed various factors to consider in determining whether driver was employee or independent contractor but which did not expressly state what use to make of that particular factor was not misleading.

5. Appeal and Error 🔑1064(1)

In action by chemical dealer's employee against owner-driver of delivery truck and trucking service company for injuries sustained when acid sprayed from hose during delivery from tank-trailer to stationary tank, where contributory negligence was well covered by separate general instructions and instruction which pointed out the distinctions between assumption of risk and contributory negligence, it was not prejudicial error for court when giving requested instruction on assumption of risk to delete therefrom instructions on contributory negligence.

6. Negligence 🔑139(2)

In action by chemical dealer's employee against owner-driver of truck and trucking service company for injuries sustained when sulfuric acid sprayed from hose during delivery from tank-trailer to stationary tank, instruction that owner-driver of truck had duty to exercise ordinary care in operating hose and its equipment and in furnishing and supplying truck and trailer with proper equipment adequate to render unloading of acid reasonably safe was not erroneous.

7. Compromise and Settlement ⚷25
Release ⚷59

In action by employee of chemical dealer against chemical company, owner-driver of delivery truck and trucking service company for injuries sustained when acid sprayed from hose during delivery from trailer tank to stationary tank, instruction covering issue whether document constituted covenant not to sue or release and settlement of claim, was correct.

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Theodore Tamba, F. A. Plank, San Francisco, for appellants.

Hoberg & Finger, Joseph M. Paper, San Francisco, for respondent.

FRED B. WOOD, Justice.

Plaintiff (an employee of Britz Chemical Company, a dealer in commercial fertilizers) was injured by sulphuric acid when sprayed from a hose that slipped out of place during delivery from a tank-trailer to a stationary tank on the ranch of one of Britz' customers.

Britz ordered the acid from defendant Stauffer Chemical Company and Stauffer called on defendant Lou-Jak Trucking Service (the name under which defendants Louis Joaquin and Jack Rexelle, partners, did business) to pick up a loaded tank-trailer and deliver it at the Britz plant. Defendant Kaeten, with his own truck, did the hauling. After he had filled a certain tank at the Britz plant, he was instructed to deliver the remainder at four smaller tanks at the ranch of one of Britz' customers. During delivery at the fourth of these tanks the accident occurred.

After suit filed, plaintiff gave Stauffer a covenant not to sue and dismissed without prejudice as to Stauffer. He recovered against Joaquin and Rexelle (Lou-Jak) and Kaeten a judgment for $125,000, which by stipulation was reduced to $110,000. Joaquin and Rexelle have appealed.

[1] (1) *Appellants claim the trial court should have instructed the jury that Kaeten was an independent contractor instead of giving them the question whether he was an independent contractor or an employee of Lou-Jak.*

To establish this claim appellants must be able to show that it appears from the evidence as a matter of law that Kaeten was an independent contractor. This cannot be done. There is a conflict in the evidence. There is substantial evidence which, with inferences that reasonably may be drawn therefrom, supports the jury's implied finding that Kaeten was an employee, not an independent contractor. The following is a summary of the significant features of that evidence.

Lou-Jak made use of the services of 9 or 10 persons, including truck drivers, whom they admitted were employees and a considerable number, including Kaeten, whom they called "subhaulers." Although Kaeten owned and operated his own truck (power unit) it was painted and decorated the same as those owned by Lou-Jak, bore a sign reading "Lou-Jak Trucking Service" and was assigned a Lou-Jak number.

Kaeten had no contract, written or oral, with Lou-Jak, who could terminate his services at any time. This gave Lou-Jak the right to direct and control Kaeten in the performance of the delivery services he rendered. These and other significant factors[1] furnish ample support for the implied finding that Kaeten was an employee, not an independent contractor.

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[1] The orders for deliveries were received at the Lou-Jak office usually by phone and all charges to be made for a haul were determined by Lou-Jak, Kaeten receiving 90% of the charge, Lou-Jak 10%. Kaeten never billed any shipper for any of the hauling he did, all bills being sent out on Lou-Jak stationery. Kaeten was

That such evidence and the inferences that reasonably may be drawn therefrom support the jury's implied finding of an employer-employee relationship, clearly appears by use of the rules for determining the existence of such a relationship which were enunciated and expounded by our Supreme Court in Riskin v. Ind. Acc. Comm., 23 Cal.2d 248, at pages 253–255, 144 P.2d 16; See also Malloy v. Fong, 37 Cal.2d 356, 370, 232 P.2d 241; Isenberg v. California Emp. Stab. Comm., 30 Cal.2d 34, 37–40, 180 P.2d 11; Empire Star Mines Co. v. Cal. Emp. Comm., 28 Cal.2d 33, 43–44, 168 P.2d 686; Industrial Indem. Exch. v. Ind. Acc. Comm., 26 Cal.2d 130, 134–136, 156 P.2d 926; Sudduth v. California Emp. Stab. Comm., 130 Cal.App.2d 304, 311–312, 278 P.2d 946; Phillips v. Larrabee, 32 Cal.App.2d 720, 724–728, 90 P.2d 820.

[2] Appellants emphasize the fact that Kaeten is a duly licensed radial highway carrier, contending that appellants could not be liable for the negligence of a person operating under a separate and independent license of his own. That is a non sequitur. Kaeten's possession of the license authorizes but does not require him to contract independently. We find nothing to the contrary in Gaskill v. Calaveras Cement Co., 102 Cal.App.2d 120, 226 P.2d 633; Gilbert v. Rogers, 117 Cal.App.2d 712, 256 P.2d 574, or Eli v. Murphy, 39 Cal.2d 598, 248 P.2d 756.

[3] (2) *Did the court properly instruct the jury on the question of employee or independent contractor relationship?*

(a) *In these instructions the court used the word "agent" several times interchangeably with the word "employee."* Appellants contend this was misleading and confusing. We do not think so.

These two words were used by the court as if synonymous, and proper tests for determining the employee relationship were given.

Under these circumstances we do not believe it reasonable to assume that the jury knew the difference between the legal concepts "agent" and "employee" and upon the basis of that assumption to infer that

always paid by Lou-Jak at the end of the month regardless of whether or not the shipper had paid Lou-Jak. Often Lou-Jak arranged to give the shippers credit but Kaeten had no part in these transactions. Each month Lou-Jak rendered a statement to Kaeten, deducting charges for P.U.C. and B.E. Although Kaeten was not certain what "B.E." meant, he accepted Lou-Jak's statement as proper.

For a two-year period immediately prior to the accident, Kaeten had not done any hauling for any one except Lou-Jak. During the year prior to the accident, Kaeten had hauled only Stauffer products and only for Lou-Jak.

The evidence showed that Kaeten reported daily to Lou-Jak yards; defendant Joaquin answered affirmatively to the question whether he was "supposed" to do this.

Lou-Jak maintained a bulletin board upon which all safety instructions sent out by their insurer would be posted. When safety bulletins on the hauling of acids were received from the insurer, Lou-Jak would post them and the drivers were instructed to come and look to find out what they should do in regard to taking safety precautions. If bulletin board instructions pertained to Kaeten, he would accept them.

Lou-Jak desired to deal directly with its customers and if a customer had a complaint against a driver or about the load, or a driver had a complaint, about anything other than the tank-trailer, i.e., routes or other conditions, Lou-Jak handled them. Joaquin admitted that Lou-Jak did not want the drivers to take their complaints to the shippers.

Kaeten was instructed how to execute a receipt for consigned goods and concerning the procuring of the consignee's signature. The receipts used were supplied to all drivers by Lou-Jak and bore a letterhead imprinted "Lou-Jak Trucking Service."

Frequently one of the Lou-Jak partners would inspect the trucks in Lou-Jak's yards for safety features and if Kaeten had his truck in the yard at the time, it would be inspected along with any other piece of equipment.

Lou-Jak had a group hospitalization plan which covered those who worked for it. Kaeten was included under this plan along with those drivers who admittedly were employees.

the jury was confused by the use of these two terms.

[4] (b) *When listing the various factors to consider in determining whether Kaeten was an employee or an independent contractor, the court did not in each instance expressly inform the jury what use to make of that particular factor.*

Appellants claim that this must have confused the jury. We do not so view it.

The jury was explicitly informed that "the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that control is exercised with respect to all details, an employer-employee relationship exists. But if the employer does not have such authority, the relationship is one of employer-independent contractor," and that "another important factor to be considered is the right of the employer to discharge the person working for him at will, without cause. If such right exists, it points toward an employment relationship. If it does not, its absence points towards an employer-independent contractor relationship."

Having described these two "important" factors, the court took up "other" factors, saying: "Other factors to be taken into consideration by you are whether or not the one performing services is engaged in a distinct occupation or business; the kind of occupation, with reference to whether in the locality the work is usually done under the direction of the principal or by specialists without supervision; the skill required in the particular occupation; whether the principal or the workman supplies the instrumentalities, tools, and the place of work, or the person doing the work; the length of time for which services are to be performed; the method of payment, whether by the time or by the job; whether or not the work is part of the regular business of the principal; and whether or not the parties believe they are creating the relationship of employer-employee, or of employer and independent contractor."

While in this portion of such an instruction it might be well to tell the jury explicitly which way each factor points, we think the bearing and significance of each is reasonably clear from the context in which mentioned and from the nature of the subject dealt with, especially in the light of definitions of the two relationships (employee and independent contractor) given in another instruction. We do not think the jury could have been misled.

[5] (3) *It was not prejudicial error for the court, when giving appellants' instructions on assumption of risk, to delete therefrom instructions on contributory negligence.*

The latter subject was well covered by separate general instructions and an instruction which pointed out the distinctions between assumption of risk and contributory negligence.

Appellants make the claim that the deleted instruction[2] was peculiarly applicable to the facts of this case; hence, the general instructions did not pointedly cover this particular feature. We do not think appellants are entitled to complain. They presented this particular instruction as an integral part of an instruction on assumption of risk. In that form it could have been confusing to the jury. It was not incumbent upon the court, when striking it from the assumption of risk instruction, to set it up as a separate instruction; especially as no claim is made that appellants brought to the attention of the trial court the asserted specific and peculiar character of the deleted portion.

[6] (4) *Appellants take exception to two instructions concerning the duty of defendant Kaeten to exercise ordinary care*

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[2] The gist of it was that if in the exercise of ordinary care one should or would have known of the existence of the danger, he would be guilty of contributory negligence if he placed himself in a position which renders him subject to the danger.

(a) in operating the hose and its equipment and (b) in furnishing or supplying the truck and trailer with proper equipment adequate to render the unloading of sulphuric acid reasonably safe. We find no error in either instruction, and appellants cite no authorities. Appellants say that this was Stauffer's tank-trailer; hence, Kaeten had no duty to equip it. That is beside the point. He had the job of delivering the acid and of doing it safely. That, in the instant case, involved the use of a suitably stout hose. No hose was furnished with the tank-trailer. Kaeten joined and used two lengths of hose which he found at Britz' plant. There was evidence that tended to prove that he knew one of these pieces was of poor quality.

[7] (5) *Was prejudicial error committed when the court rejected appellants' instruction concerning plaintiff's covenant not to sue Stauffer Chemical and gave a different one instead?*

A few days before the trial plaintiff filed a document dismissing the action, without prejudice, as to defendant Stauffer Chemical Co.; also, written agreements were executed with Stauffer whereby plaintiff and his employer's workmen's compensation insurance carrier, respectively, agreed not to sue Stauffer. Williams was paid $15,000 by Stauffer's insurance carrier. There was a special interrogatory concerning the "transaction between Plaintiff * * * and Stauffer Company (and its carrier Hartford Accident & Indemnity Company)" the question being whether this transaction was "a covenant not to sue" or "a release and satisfaction." The jury found it was a covenant not to sue.

In respect to this issue, the court instructed as follows: "Now, one who has a claim against two or more persons may, if he so desires, do one of two things, and if the parties agree. He may enter a settlement of his cause and of his claim—of his entire claim against the other. If he does that one against one joint tort-feasor, or alleged joint tort-feasor, he releases all; but if he does not do that, but enters into an agreement that he will not sue, or will not further pursue a suit, and gives an indemnity of such alleged joint tort-feasor against any further action on his part or on his behalf, then he does not release the other alleged joint feasors. In this case there was entered into between the Stauffer Chemical Company and its insurance carrier on the one hand, and the plaintiff, a certain document which is entitled 'a covenant not to sue', and which according to its terms is a covenant not to sue.

"As between those two parties, the plaintiff and Stauffer Chemical Company or its carrier, neither one can later be ever made to say that it was anything but a covenant not to sue. However, as to third parties, they are not bound by the terms of the written instrument, necessarily; but may show that it was something other than what it says it was, and other than its terms show it to be.

"The burden of proof, then, is upon them to show, if they can, by evidence in the case that what was intended by the parties to the transaction was a release, a settlement between them, and if that is done it releases all; but if there is nothing outside the agreement to show that it was other than what its terms show it to be, then I instruct you that it is a covenant not to sue and not a release. That is, the Court has the determination of the legal effect of that document in itself as it stands, and I instruct you that it is by its terms a covenant not to sue, and not a release; and it is only if the defendants show by a preponderance of evidence that it is, or that despite its legal terms it was intended as a release, that the other defendants are released."

This impresses us as a correct instruction. It tells the jury the contrasting legal consequences of the covenant not to sue and the settlement of a claim; that the agreement here involved is a covenant not to sue but that third parties may show by evidence outside the agreement that the parties to the agreement intended a release, a settlement; and that the defendants have the burden of proving that the parties intended a release and not a covenant not to sue.

Appellants contend the pivotal issue was whether the $15,000 was paid plaintiff as "compensation for the injuries and damages" he had sustained, not by way of "settlement of his cause and of his claim." There is not much difference between these two expressions but the latter seems the broader, the more appropriate of the two. It is the type of expression used in Pellett v. Sonotone Corp., 26 Cal.2d 705, 712, 160 P.2d 783, 787, 160 A.L.R. 863, acceptance of payment "in satisfaction or in compromise of his right of action." In Dougherty v. California Kettleman Oil R., Inc., 13 Cal. 2d 174, 88 P.2d 690, both expressions were used but with emphasis upon satisfaction of the claim, of the cause of action: "* * * the theory behind the rule is that there can be but one compensation for the joint wrong; that each joint tort feasor is responsible for the whole damage, and that once the injured party is paid for the injury he has suffered by any one of the wrongdoers, his cause of action is satisfied and his right to proceed against the others is at an end; or, stated in another way, if the payment is, in law, a satisfaction of the claim against one, it is a satisfaction of the entire claim and necessarily releases all." 13 Cal.2d at pages 180–181, 88 P.2d at page 693. Four of the five instructions on this subject requested by appellants and rejected by the court used the expression "compensation for injuries and damages," or a variant thereof. Their remaining instruction spoke in terms of "discharge" of "any further or future liability or responsibility."

Appellants complain of that portion of the court's instruction in which the court interpreted the agreement; told the jury that the burden was upon appellants to show "if they can" by evidence in the case that the transaction was intended to be a release and settlement; and that "if there is nothing outside the agreement to show other than what its terms show it to be" it was a covenant and not a release. Appellants say "the implication is that the evidence presented was 'nothing outside the agreement' to show the intention of the parties." We derive no such inference. It was the function of the court to interpret the agreement, inform the jury thereon, and advise the jury of its function, which this instruction clearly did.

Appellants' instructions went into some detail in mentioning evidence they thought material to the issue. We do not think that was necessary. The court defined and explained the issue. When it told the jury they should look to "evidence in the case" outside the agreement itself for an intent, if any, to settle the cause or claim, and that it would take a "preponderance of evidence" to establish such an intent, we are convinced the jury understood, particularly in view of some of the general instructions given, that they were to consider all of the evidence in the case (outside of the agreement) and inferences that might be reasonably drawn therefrom. Moreover, we find that the court's instruction was more clearly expressed than those offered by the appellants, and easier for the jury to follow and comprehend.

Finally, appellants did not in their opening brief cite any substantial evidence showing an intent different from that expressed in the agreement. Respondent in his reply brief said there is none, and appellants have filed no closing brief.

We conclude there was no error, certainly no prejudicial error, in the giving and refusing of instructions on this subject.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

146 Cal.App.2d 694

Mae K. HOWARTH, Plaintiff and Respondent,
v.
Fred J. HOWARTH, Defendant and Appellant.
Civ. 21677.

District Court of Appeal, Second District, Division 1, California.
Dec. 10, 1956.
Hearing Denied Feb. 6, 1957.

Action to recover accrued installments due under property settlement agreement. The Superior Court of Los Angeles County, Kenneth C. Newell, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Fourt, J., held that in view of prior appeals the instant appeal was so frivolous as to warrant assessment of penalty against defendant.

Affirmed.

1. Divorce ⚿**245(1), 255, 400(1)**

Recital in Utah divorce decree that the "property settlement and agreement attached to the complaint on file herein which has been entered into by and between the parties hereto relative to their property is hereby confirmed and approved" did not merge the agreement in the decree, and hence payments under agreement were not such alimony payments as were subject to modification by Utah court, and consequently California court could permit recovery of installments due under agreement without violating full faith and credit clause of federal Constitution. U.S.C.A.Const. art. 4, § 1.

2. Costs ⚿**260(4)**

Where all points raised by appellant had been determined against him at least once and most of them twice in prior appeals, such appeal was without any semblance of substance, and penalty would be imposed against appellant for maintaining a frivolous appeal. West's Ann.Code Civ. Proc., § 957; West's Ann.Rules on Appeal, rule 26(a).

L. M. Cahill, Los Angeles, for appellant.

William J. Donahue, Pasadena, for respondent.

FOURT, Justice.

This is an appeal by the defendant from a judgment in favor of the plaintiff in the sum of $4,725.

[1] The plaintiff brought this action to recover accrued installments due under a property settlement agreement, executed by the parties hereto, which has been the subject of two previous actions. The first of such actions was brought in January, 1945, and was to collect $2,640, allegedly due under the property settlement agreement. Judgment was rendered in favor of the plaintiff and affirmed upon appeal in this court. Howarth v. Howarth, 81 Cal.App.2d 266, 183 P.2d 670. A petition for a hearing by the Supreme Court was denied and the United States Supreme Court denied a petition for a writ of certiorari. 333 U.S. 842, 68 S.Ct. 659, 92 L.Ed. 1126.

The second of such actions was started about May 1, 1946, and was to collect $6,615, due under the property settlement agreement. Judgment was rendered in favor of the plaintiff and affirmed upon appeal in this court. Howarth v. Howarth, 115 Cal.App.2d 769, 252 P.2d 743. A petition for a hearing by the Supreme Court was denied and thereafter, the United States Supreme Court denied a petition for a writ of certiorari. 346 U.S. 872, 74 S.Ct. 121, 98 L.Ed. 380.

Appellant now, for all intents and purposes, makes the identical contentions as were made in the second appeal and substantially the same contentions which he made in the first appeal. Each and every contention heretofore raised by the appellant has been decided against him. No useful purpose would be served in setting forth a résumé of the two previous decisions, and to do so would but consume useful space and unduly enlarge this opinion.

In Howarth v. Howarth, supra, 115 Cal.App.2d 769, at page 770, 252 P.2d 743, the court stated: "Briefly stated, appellant's primary contention is that the agreement sued upon was incorporated and merged in the decree granted by the District Court in and for Tooele County, Utah, in the divorce action between the parties, and as corollary thereto (a) that the payments under said agreement were in the nature of alimony and hence subject to modification by the Utah Court, and (b) any attempt by a California court to enforce payment thereof constitutes a violation of the full faith and credit clause of the Federal Constitution. In the previous action between the parties heretofore adverted to, the Superior Court in and for the County of Los Angeles decided each of these contentions adversely to appellant, and, as stated, upon appeal this judgment was affirmed. Hence appellant is estopped from re-litigating the same questions in the instant proceeding."

Appellant's theory now, apparently, is that in the light of Worthley v. Worthley, 44 Cal.2d 465, 283 P.2d 19, and Flynn v. Flynn, 42 Cal.2d 55, 265 P.2d 865, the trial court erred in (1) determining under the laws of California the rights of the parties under the Utah decree; (2) concluding that the property settlement agreement was not by the Utah court incorporated nor made an operative part of the decree of divorce therein rendered; (3) concluding that the payments were not in the nature of alimony but were by the way of property settlement and (4) the court did not give full faith and credit to the Utah decree, contrary to the provisions of Article IV, Section 1 of the Constitution of the United States.

In the Flynn case, supra, 42 Cal.2d at page 57, 265 P.2d at page 865, the property settlement agreement provided that in any action for divorce brought by either party " 'this agreement may be approved by [the] court and that the terms and provisions hereof may be made and become a part of and incorporated in any decree which may be made by such court, and the parties ordered to comply with the provisions thereof.' " The decree provided that " 'The property settlement agreement between the parties hereto dated October 11, 1941 and received in evidence herein, is hereby ratified, approved and confirmed and the same is hereby specifically incorporated herein and made a part of this decree, and defendant is hereby ordered to make all of the payments provided therein to be paid by him, at the times and in the manner therein provided, and plaintiff and defendant are hereby ordered to comply in all respects with each and all of the terms and provisions of said agreement and to perform all their obligations thereunder as therein provided.' " The Supreme Court held that there could be no doubt as to the intent of the parties and the court that a merger should occur; that a property settlement agreement may be incorporated in a judgment or decree by reference, and that an examination of the property settlement incorporated by reference in the interlocutory decree made it clear that it was an "integrated bargain" and subject to modification only according to the terms contained therein.

A comparison of the language used in the property settlement agreement and judgment in the instant case with that in the Flynn case discloses that there is no similarity whatsoever between the two. In the case before us the decree merely recites that the "property settlement and agreement attached to the complaint on file herein which has been entered into by and between the parties hereto relative to their property is hereby confirmed and approved." As stated in Flynn v. Flynn, supra, 42 Cal.2d at page 58, 265 P.2d at page 866: " * * * the parties may intend only to have the validity of the agreement established, and not to have it become a part of the decree enforceable as such." Citing Howarth v. Howarth, supra, 81 Cal.App.2d 266, 272, 183 P.2d 670. And, "If a merger is not intended, the purpose of incorporation will be only to identify the agreement so as to render its validity res judicata in any subsequent action based upon it." Citing Howarth v. Howarth, supra, 81 Cal.App.2d 266, 272, 183 P.2d 670.

In Worthley v. Worthley, supra, 44 Cal. 2d 465, at page 474, 283 P.2d 19, at page 25, the holding is concisely set forth in the concluding paragraph of the main opinion: "Accordingly, we hold that foreign-created alimony and support obligations are enforceable in this state. In an action to enforce a modifiable support obligation, either party may tender and litigate any plea for modification that could be presented to the courts of the state where the alimony or support decree was originally rendered."

There is nothing in the holdings in Lubin v. Lubin, 144 Cal.App.2d 781, 302 P.2d 49, and Foust v. Foust, 47 Cal.2d 121, 302 P.2d 11, cited by appellant, or in Flynn v. Flynn, supra, and Worthley v. Worthley, supra, which is in any wise contrary to those set forth by this court in the two prior actions on the property settlement agreement which is the subject of the instant action.

[2] It would appear to us that the appellant in this case is insistent that he will not comply with his agreement to pay under the property settlement agreement unless he is compelled to do so by court action. The plaintiff herein has now been compelled to bring three separate actions for a total of about $13,980, representing approximately 7½ years of delinquencies on the part of appellant.

As already pointed out, there is no doubt in our mind that all of the points raised by appellant have heretofore been determined against him at least once, and most of them twice. In our opinion the appeal is without any semblance of substance and is a proper case to impose a penalty against the appellant as is provided for under Rule 26(a), Rules on Appeal and section 957 of the Code of Civil Procedure. We are thoroughly familiar with the holdings to the effect that appellate courts are reluctant to hold that an appeal is frivolous; at the same time we are convinced that the appellant here has, by this appeal, imposed a wholly unnecessary burden upon the respondent and has in addition thereto improperly consumed the time of the courts which might well be devoting their efforts and time to matters which have not already been twice decided by the Supreme Court of California and the United States Supreme Court.

The judgment is affirmed, and pursuant to the provisions of Rule 26(a) of the Rules on Appeal, and section 957 of the Code of Civil Procedure, the sum of $300 is assessed against the appellant and added to the costs as a penalty for the taking of a frivolous appeal.

WHITE, P. J., and DORAN, J., concur.

146 Cal.App.2d 575

Lewis A. WINCHELL and Opal May Winchell, Plaintiffs and Respondents,

v.

Albert L. LAMBERT and Myrtle C. Lambert, Defendants and Appellants.

Civ. 21781.

District Court of Appeal, Second District, Division 1, California.

Dec. 4, 1956.

Hearing Denied Jan. 30, 1957.

Action to quiet title to lots. From a judgment for plaintiffs in the Superior Court of Los Angeles County, Donald R. Wright, J., the defendants appealed. The District Court of Appeal, White, P. J., held that where plaintiffs claimed title by record title, they did not meet the burden upon them to prove title to the lots involved and that defendant established that title by adverse possession.

Judgment reversed.

1. Quieting Title 🔑44(1)

In a quiet title action, plaintiff must prove his title to recover.

2. Quieting Title 🔑44(4)

In quiet title action, grant deed to the property in dispute to the plaintiffs was prima facie evidence of the plaintiffs' ownership of the lots involved from and after the date of the grant deed. West's Ann. Civ.Code, § 1105.

3. Appeal and Error ⇨842(8)

In quiet title action, where portions of the lots involved were held by flood control district and evidence of the district's title was documentary and without conflict, question of the district's title was a question of law which could be reviewed on appeal. West's Ann.Civ.Code, § 1007.

4. Deeds ⇨121

A quitclaim deed is not necessarily or even usually a grant of real property.

5. Deeds ⇨121

In action to quiet title to lots which were deeded by quitclaim deeds from a flood control district to the plaintiffs' predecessors, wherein quitclaim deed did not purport to grant a fee title or any other definite interest, statute did not authorize a presumption that a fee simple title was conveyed either to or by the district. West's Ann.Civ.Code, § 1105; West's Ann. Code Civ.Proc., § 1963, subd. 32.

6. Evidence ⇨23(1)

The courts take judicial knowledge of the fact that land which is owned in fee simple by the Los Angeles County Flood Control District is not taxed.

7. Evidence ⇨383(4)

In action to quiet title to lots which were conveyed by flood control district to predecessors of plaintiffs, certificate of deputy assessor that taxes on a lot were assessed to and paid by another not having been contradicted, negatived a finding that lot was owned in fee by the district during such years, in view that land which is owned in fee by a flood control district is not taxed.

8. Adverse Possession ⇨57

In action to quiet title to lots, evidence did not support a finding of public ownership during any part of the period required to complete title by adverse possession.

9. Trial ⇨404(1)

Findings of fact must be liberally construed to support the judgment.

10. Appeal and Error ⇨1149

Appellate court has power when a jury trial is not a matter of right or has been waived, to correct findings where conflicting as a result of inadvertence in order to affirm the judgment.

11. Trial ⇨398

Where general findings conflict with specific findings, the specific findings control.

12. Adverse Possession ⇨3

In action to quiet title to a lot where the defendants' deed did not cover any portion of the lot, defendants' adverse possession was governed by the statutes. West's Ann.Code Civ.Proc., §§ 324, 325.

13. Adverse Possession ⇨65

Title by adverse possession may be acquired through possession or use commenced under mistake.

14. Appeal and Error ⇨931(4)

In action to quiet title to a lot where plaintiffs' claim was based on record title and defendants' by title by adverse possession, in support of a judgment for plaintiffs, a finding that defendants did not pay taxes upon their encroachment upon the lots must be presumed unless all the evidence was to the contrary.

15. Adverse Possession ⇨95

In action to quiet title to lots, evidence established that defendants paid taxes on the whole of their residence including the lanai and upon land under them, not merely to the property line which was not marked upon the land, so as to entitle defendants to claim title by adverse possession.

◆

Robert B. Heggen, Los Angeles, for appellants.

Frye & Yudelson, Collman E. Yudelson, North Hollywood, for respondents.

WHITE, Presiding Justice.

Defendants have appealed from a judgment quieting plaintiffs' title to portions of Lot A and Lot 204. The following is a summary of the uncontroverted evidence. Appellants are the owners of Lot 285, which is in the shape of a triangle, on the west 115.43 feet along the street, on the south 115.73 feet at right angles to the street, and on the northeast the hypotenuse 163.46 feet along the southwest line of respondents' Lot A. Said Lot A extends beyond both the north and the southeast extremities of Lot 285.

Since 1938 appellants have lived in the house on Lot 285. Two triangular portions of the house encroach upon respondents' Lot A. About nine feet of unobstructed boundary line is between the two encroachments. In 1941, appellants added at the end of their house a lanai 21.80 feet by 22.95 feet, with a cement floor, wooden louvre fence, and a partial covering of widely spaced boards. Most of the lanai is on respondents' Lot A. A portion of it extends across the entire width of said Lot A and encroaches on respondents' Lot 204 also. Appellants also planted and cared for grass, trees and shrubs on a portion of respondents' said lots. Except for appellants' buildings and landscaping, said Lots A and 204 are vacant and unimproved.

[1] One of the grounds urged by appellants for reversal of the judgment is that respondents did not meet the burden upon them to prove title to said Lots A and 204. In a quiet title action the plaintiff must prove his title in order to recover. Pacific States Savings & Loan Co. v. Warden, 18 Cal.2d 757, 759, 117 P.2d 877.

Respondents' exhibits include: (1) a map of Tract 7578, recorded January 9, 1924, which shows Lot 285 and Lot A as a part of said tract; and (2) a map of the survey of appellants' improvements upon Lots 285, A and 204.

The evidence also includes a grant deed of Lot A and a portion of Lot 204 to respondents from S. August and Rae I. English and Harold A. and Mary M. Rood, dated August 27, 1952; a grant deed of the same property to English and Rood, dated August 19, 1952, executed by Publix Title Company, a California corporation; a quitclaim deed of a portion of Lot 204 from Leo and Leatrice Goodman to Publix Title Company, dated August 16, 1952; a quitclaim deed to Goodman of the portion of Lot 204 from Los Angeles County Flood Control District dated May 27, 1952; a quitclaim deed of the portion of Lot 204 to Los Angeles County Flood Control District from Eleanor Town Opid and Lois Miriam Town Hobson, dated March 15, 1924; and a quitclaim deed of a portion of Lot A to Publix Title Company, dated August 5, 1952, executed by the Los Angeles County Flood Control District.

In addition to the documents above listed, also in evidence are: (1) an "easement" dated September 4, 1923, between I. C. Ijams, W. F. Ijams, Isaac E. Ijams and Marguerita Ijams, as first parties, and Los Angeles County Flood Control District, as second party, for the purpose of establishing an official channel to carry the water of Tujunga Wash in a single definite course. Said easement is given over a portion of Lot 2, all of Lots 1 and 3, and the northeasterly 50 feet of Lots 4 and 5 of the Ijams Tract; and (2) a quitclaim deed dated December 4, 1931, from Isaac E. Ijams to Los Angeles County Flood Control District of property "which I received from the Los Angeles County Flood Control District under the quitclaim deed dated August 18, 1930", which property is described as portions of Lots 1, 2 and 3 of the Ijams Tract.

[2] The grant deed first above listed is prima facie evidence of respondents' ownership of Lot 204 and Lot A from and after August 1952. Civil Code, § 1105; Wilson v. Nichols, 39 Cal.App.2d 527, 532, 103 P.2d 1007; Overton v. Harband, 6 Cal.App.2d 455, 460, 44 P.2d 484; Code Civ.Proc. §§ 1951, 1920, 1948. Appellants contend that the uncontroverted pleadings and evidence of appellants' possession and use of said property continuously from 1941 to the commencement of the action in November 1954 nullifies respondents' said prima facie showing of ownership. On the other hand, respondents urge that appellants' occupancy of Lots A and 204 could not begin to ripen into title by adverse possession until 1952, when the Los Angeles County Flood Control District made its quitclaim deeds of those lots to respondents' predecessors, for

the reason that until 1952 said lots were public property. Section 1007 of the Civil Code provides that "* * * no possession * * * of any land * * * owned by any * * * irrigation district * * * shall ever ripen into any title * * *."

[3] The court found that the portions of Lots A and 204 here in question were held in fee by the Los Angeles County Flood Control District from 1931 to 1952 and that respondents acquired the fee simple title thereto in the year 1952. The evidence of the District's title being entirely documentary and without conflict, it is a question of law which must be reviewed on this appeal. Moffatt v. Tight, 44 Cal.App. 2d 643, 648, 112 P.2d 910; Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Moore v. Wood, 26 Cal.2d 621, 630, 160 P.2d 772; Meyer v. State Board of Equalization, 42 Cal.2d 376, 381, 267 P.2d 257.

[4, 5] In respondents' brief they contend that the evidence supports the finding that the District owned the fee title. As to Lot 204, they rely upon the quitclaim deed from Eleanor Town Opid and Lois Town Hobson to the Los Angeles County Flood Control District in 1924 and the District's quitclaim deed to appellants' predecessor in 1952. From proof of the quitclaim deed to the Flood Control District in 1924, it is presumed that whatever interest was conveyed to the District remained in it until it is shown to have been transferred by it to others in 1952. Code Civ. Proc. § 1963, subd. 32. Respondents refer us to nothing whatever in the record, and we find nothing therein, from which it can be presumed or inferred that either the Flood Control District or its grantors ever owned the fee simple title to Lot 204. The quitclaim deeds executed by them do not purport to grant a fee title or any other definite interest. A quitclaim is not necessarily or even usually a "*grant* of real property". Therefore, section 1105 of the Civil Code authorizes no presumption that a fee simple title was conveyed either to or by the District.

As to Lot A, respondents rely upon the easement granted to the Flood Control District by the several Ijams on September 4, 1923, together with the quitclaim deed of Isaac E. Ijams dated December 4, 1931. Respondents, in their brief, state: "Prior to 1931 the then owners thereof granted an easement to the Los Angeles County Flood Control District * * * In 1931 this easement ripened into fee title when the grantors of the easement joined in and delivered a quitclaim deed to the District * * * Thereafter Lot A remained in public ownership until conveyed by the Flood Control District in 1952 and plaintiffs became the eventual owners in August 1952 * * *"

The quitclaim in 1931 from the Ijams to the District, and its quitclaim of Lot A in 1952 to Publix Title Co. do not support the finding that the District owned Lot A *in fee* from 1931 to 1952 for the same reasons hereinbefore set out with reference to the quitclaim deeds of Lot 204.

In addition to those quitclaims of Lot A, there are also in the record certificates of semi-annual payments of taxes thereon for the years 1948 to 1952, both included, assessed to General Title Clearing Company.

[6, 7] While the assessment and payment of taxes is not conclusive evidence of ownership, and either party could have produced evidence to explain or contradict the certificates, they are the only evidence in the record from which the ownership of Lot A during the years prior to 1952 may be inferred. The courts take judicial knowledge of the fact that land which is owned in fee simple by the Los Angeles County Flood Control District is not taxed. Therefore, the certificates of the deputy assessor that taxes on Lot A were assessed to and paid by General Title Clearing Co. each April and December from December 1948 to December 1952, not having been contradicted or explained in any way, negative the finding that Lot A was owned in fee by the District during those years.

[8] The record does not support the finding of public ownership during any part

of the period required to complete title by adverse possession.

Respondents, in their brief, state that: "The uncontroverted testimony of the Defendant, Mr. Lambert, was that he never at any time intended to deprive anyone of anything and that he placed improvements upon property that he thought was his lot. Such an honest mistake has never been the basis of adverse possession and is not sufficient to establish title thereby". No authority for that statement is given. The testimony referred to is as follows:

"The Witness: It was our intention to claim the land as our own. We thought our land ran to the Flood Control fence.

"Q. When did you know that you were encroaching? A. When our surveyor completed the survey.

"Q. That was in May of this year? A. This year.

"Q. Had you at any time from 1938 to the present date entered into an agreement with anyone with reference to occupancy of Lot A, that portion that we have been discussing? A. No, we didn't.

"Q. And has your intention with reference to the occupancy of it varied at any time since 1938 to the present date? A. No, it hasn't."

On cross-examination the witness was asked:

"Q. I am going to ask you, Mr. Lambert, isn't it a fact that you never at any time ever intended to take any part of Lot A or Lot 204 if it didn't actually belong to you? A. No.

"The Court: That is not true? I often get confused by the double negatives.

"Mr. Yudelson: Let me reframe the question. I may have confused the witness by it.

"Q. Did you ever at any time actually intend to take any part of Lot A or Lot 204, if you had discovered it did not belong to you? A. No, I would not have."

On redirect examination the witness testified:

"Q. Mr. Lambert, what was your intention with building up to that line where the fence was? * * * A. I just thought that our property ran to the Flood Control Fence.

"Q. Did you claim it as your own or not? A. Yes."

The court found that subsequent to the purchase of Lot 285 by defendants in 1938, "there was constructed on said lot 285 a single family dwelling, the two northernmost corners of which extend over and upon and encroach upon Lot A, one corner projecting into Lot A a distance of 3.75 feet x 3.25 feet, the other extending into Lot A a distance of 8.70 ft. x 8.60 ft; that in addition defendants did cultivate a portion of Lot A by planting grass and flowers and did extend a wooden fence across the front of said Lot A; that the said wooden fence, the cultivation, and the portions of the family dwelling of defendants daily and continuously did encroach upon and extend into plaintiffs' land and beyond the true and correct northerly boundary line of defendants' property.

"That the encroachment * * * at no time was intentional or willful, but was completely unintentional and arose through a unilateral mistake of facts by defendants as to the true boundary of defendants' land; and that defendants at all times intended only to erect buildings upon their own land and upon no other."

The court then found untrue each and every allegation of each of defendants' affirmative defenses, including those denominated "counterclaim".

[9–11] "The findings of fact must be liberally construed to support the judgment (Woodbine v. Van Horn, 29 Cal.2d 95, 173 P.2d 17; 2 Cal.Jur. 871–872), and this court has power where a jury trial is not a matter of right or has been waived, to correct and amend findings where conflicting as the result of inadvertence in order to affirm the judgment." Johndrow v. Thomas, 31 Cal.2d 202, 207, 187 P.2d 681, 684, and cases there cited. But, where general findings conflict with specific findings as in the instant action, the specific findings control. Staub v. Muller, 7 Cal. 2d 221, 226, 60 P.2d 283; Garten v. Garten, 140 Cal.App.2d 489, 495, 295 P.2d 23.

[12] Since appellants' deed of Lot 285, according to the map of Subdivision 7578, did not cover any portion of Lot A or Lot 204, appellants' adverse possession is governed by sections 324 and 325 of the Code of Civil Procedure. Park v. Powers, 2 Cal.2d 590, 594, 42 P.2d 75; Sorensen v. Costa, 32 Cal.2d 453, 458, 196 P.2d 900.

[13] In California, for many years it has been the law that "title by adverse possession may be acquired through the possession or use commenced under mistake". Woodward v. Faris, 109 Cal. 12, 17, 41 P. 781; Lucas v. Provines, 130 Cal. 270, 272, 62 P. 509; Park v. Powers, supra, 2 Cal.2d 596, 42 P.2d 77; Sorensen v. Costa, supra, 32 Cal.2d 460, 196 P.2d 905.

Respondents urged at the trial that appellants did not pay taxes on Lot A during the five year period before respondents commenced the instant action to quiet title. It is conceded by appellants that they paid no taxes on Lot A as such. However, it is their contention that, since the certificates of assessment and payment of taxes on Lot A show it to have been vacant and unimproved, taxes on the parts of Lot A covered by their improvements were assessed and paid by them as a part of their taxes on Lot 285.

[14] There is in the record no finding as to payment of taxes. However, in support of the judgment, a finding that appellants did not pay taxes upon their encroachments must be presumed unless all the evidence is contra. We have carefully examined the entire record with reference to this question. It contains appellants' receipted bills for taxes on Lot 285 and improvements from 1938 to 1954. The improvements were assessed at $250 in 1938, $560 in 1939, $610 in 1940, $660 in 1941, $990 from 1942 to 1947, and $1,250 from 1947 to 1954. Also in the record are the certificates of payment of taxes on Lot A assessed to General Title Clearing Co. from 1948 to 1952 and those assessed on a portion of Lot A to Publix Title Co. for the year 1953 and paid by it December 10, 1954. Each of the certificates shows no improvements on Lot A during those years. The respondent testified that Lot A was vacant when he purchased it in 1952, and no building had been done thereon by him.

In 1893, our Supreme Court had before it the case of McDonald v. Drew, 97 Cal. 266, 32 P. 173, involving the land of coterminous owners. Defendant had for more than five years had a strip of plaintiff's land within his fence. Each had paid the taxes assessed to him for his respective lot by number. Judgment for defendant was reversed, and the Court, 97 Cal. at page 269, 32 P. at page 174, said:

"The controversy is reduced to the question of law, as to whether the possession of the defendants could have been adverse without payment by them of all taxes which had been levied and assessed upon the land in question during the five-years' period of the alleged adverse possession, as required by section 325 of the Code of Civil Procedure.

"This question has been answered negatively by this court in several cases."

Other cases have followed the above rule.

In Frericks v. Sorensen, 113 Cal.App.2d 759, 248 P.2d 949, the disputed parcel was covered by a shed, chicken house and rabbit hutches. Owners of adjoining land paid taxes assessed to them on the descriptions in their respective deeds. The taxes on the improvements were assessed to and paid by the party who was not the record owner of the land under them. The court, 113 Cal.App.2d at page 762, 248 P.2d at page 951, said:

"* * * Although these descriptions on the tax roll conformed to the deeds of the parties, they did not describe the parcels which the parties occupied. The land which was assessed to plaintiffs and their predecessors by a visual observation on the ground was 342.05 feet in depth. This was necessarily so inasmuch as the improvements were assessed to their land. Plaintiffs and their predecessors not only paid taxes upon the land which they occupied, but they were the equitable owners of it.

"While the assessment roll described defendants' land according to their deed, they were not actually assessed for the 50.5 feet upon which the shed and other improvements were located. The assessment roll did not correctly describe the land which was actually assessed to either the plaintiffs or the defendants and their predecessors. Payment of taxes under these circumstances was payment of taxes upon land in the possession of the parties. The court correctly determined that plaintiffs and their predecessors had paid all taxes on the land in dispute and that plaintiffs have a good prescriptive title. Price v. De Reyes, supra, 161 Cal. 484, 119 P. 893; Sorensen v. Costa, 32 Cal.2d 453, 196 P.2d 900."

[15] Under the facts in the instant action, it is apparent that defendants paid taxes on the whole of their residence including the lanai and upon the land under them, not merely to the property line which was in no manner marked upon the land.

The judgment is reversed.

DORAN and FOURT, JJ., concur.

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147 Cal.App.2d 27

J. B. ANDERSON, Plaintiff and Respondent,

v.

Sherman L. HEACOCK and Amy J. Heacock, Defendants and Appellants.

Civ. 8985.

District Court of Appeal,
Third District, California.
Dec. 17, 1956.

Action on promissory note. The Superior Court, Plumas County, Bertram D. Janes, J., entered order denying defendants' motion for change of venue, and defendants appealed. The District Court of Appeal, Van Dyke, P. J., held that where affidavit in support of motion for change of venue to county of defendants' residence did not deny truth of recitals in note that note was payable in county in which action was brought, motion was properly denied, in view of plaintiffs' right, which he exercised, to elect to bring action in county in which contractual obligation was incurred and was to be discharged.

Order affirmed.

Venue 🔑7

Where affidavit in support of motion for change of venue to county of defendants' residence did not deny truth of recitals in note, upon which action was based, that note was payable in county in which action was brought, motion was properly denied, in view of plaintiff's right, which he exercised, to elect to bring action in county in which contractual obligation was incurred and was to be discharged. West's Ann.Code Civ.Proc., § 395.

Frank L. Stearns, Azusa, for appellants.

Samuel B. Stewart and M. E. Cardoza, San Francisco, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order denying a motion for a change of venue to the county of appellants' residence.

A copy of the promissory note upon which this action was brought was attached to and made a part of the complaint. The affidavit in support of the motion does not deny the truth of the recitals in the note that it was payable in Portola in Plumas County, where the action was begun. Consequently, action upon the note was properly commenced in the County of Plumas. Section 395 of the Code of Civil Procedure provides, in part:

> "* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact

> was entered into, or the county in which the defendant, or any such defendant, resides at the commencement of the action, shall be a proper county for the trial of an action founded on such obligation, * * *."

The respondent could, and did, elect to bring the action in the county wherein the contractual obligation was incurred and was to be discharged.

The order appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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146 Cal.App.2d 702

In the Matter of the Application of Refugio Gonzalez LOZOYA for a Writ of Habeas Corpus.

Cr. 5826.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1956.

Petition for writ of habeas corpus. The District Court of Appeal held that contention that petitioner had been once in jeopardy and that his trial and acquittal on charges of violating federal tax statutes with respect to transfer of marijuana constituted a bar to prosecution for unlawful possession of marijuana in violation of state statute afforded no ground for release on habeas corpus prior to trial on state charge.

Writ denied.

1. Criminal Law 🔑290

Defense of once in jeopardy is a special defense which must be specially pleaded in the manner provided by Penal Code, and if not so pleaded, such defense is waived. West's Ann.Pen.Code, §§ 656, 793, 794, 1017, 1023; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14.

2. Habeas Corpus 🔑3

Contention that defendant had been once in jeopardy and that his trial and acquittal on federal charges of having unlawfully acquired marijuana without having paid the transfer tax and of having unlawfully transferred such marijuana constituted a bar to prosecution in state court for unlawful possession of marijuana, could be properly presented as a defense to state charge, but afforded no ground for release on habeas corpus prior to trial on state charge. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, §§ 656, 793, 794, 1017, 1023; 26 U.S.C.A. (I.R.C.1954) § 4741(a); West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amends. 5, 14.

David C. Marcus, Los Angeles, for petitioner.

PER CURIAM.

Petitioner has applied to this court for a writ of habeas corpus, alleging that he is unlawfully imprisoned by reason of the fact that the complaint issued against him and under which he is detained charges a crime as to which he has been heretofore tried and acquitted.

The relevant facts are: By a complaint filed in the municipal court of the Los Angeles judicial district, petitioner is charged with violation of section 11500 of the Health and Safety Code, in that he did, on the 17th of May, 1956, willfully and unlawfully have in his possession marijuana. Prior to the issuance of the complaint and petitioner's arrest thereunder, he was indicted by a federal grand jury. The indictment returned by the grand jury was in two counts. In the first count it was charged that on May 17 he unlawfully transferred nine and one-half pounds of marijuana without obtaining a written order on a form issued for that purpose by the Secretary of the Treasury of the United States. By Count II he was charged with being a transferee of marijuana within the meaning of section 4741(a) of Title 26 United States Code, and having knowingly and unlawfully acquired and obtained approximately nine and one-half pounds of marijuana without having paid the transfer tax imposed by said section, and that said transaction took place on the 17th of May, 1956.

To this indictment petitioner pleaded not guilty, and upon trial was acquitted on both counts. He alleges in his petition here that the transactions alleged in the federal indictment are the same transactions with which he is charged by the complaint under which he is now charged by the People of this state, and that therefore he has been once in jeopardy and under the provisions of sections 656, 793, 794, and 1023 of the Penal Code of this state his acquittal in the federal court is a bar to the prosecution of this action, and that his prosecution is in violation of his constitutional rights under the Fifth and Fourteenth Amendments to the Constitution of the United States and article I, section 13, of the Constitution of this state.

We find it unnecessary to pass upon the question as to whether petitioner's trial and acquittal of the charges preferred against him by the federal indictment would sustain a defense upon the ground that he had been once in jeopardy upon the same charges as now made in the state court, or to pass upon the question as to whether the acquittal in the federal court is *res judicata* of the question of his possession of the marijuana in question. As to *res judicata,* see People v. Beltran, 94 Cal.App.2d 197, 210 P.2d 238; Sealfon v. U. S., 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180; and "Res Adjudicata in Criminal Cases" (Sept.–Oct. 1951) 26 State Bar J. 366 et seq.

[1, 2] The defense of once in jeopardy is a special defense which must be specially pleaded in the manner provided by section 1017, Penal Code, and if not so pleaded it is waived. Until the defense is pleaded, there is no such issue to be determined either here or in the court below; and the fact, if it be a fact, that the defense of once in jeopardy is available to petitioner, should he be held for trial in the superior court on an information issued by the district attorney, in nowise affords any ground for petitioner's release on habeas corpus, In re Collins, 151 Cal. 340, 350, 90 P. 827, 91 P. 397.

We cannot here, upon habeas corpus, try any of the defenses that may be available to petitioner should he be brought to trial upon the charges now made against him. All of his defenses must be presented in a proper manner to the trial court; and if it errs in the determination of those defenses, that is a matter for appeal.

For the reasons hereinbefore stated, the writ is denied.

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146 Cal.App.2d 855

Constant E. CUENIN and Frances C. Sides, Plaintiffs and Appellants,

v.

E. D. LAKIN, as the Executor of the Estate of William Henry Barnett, Bert S. Harper, Lorraine Harper, Mary Ann Pringle, East Palo Alto Community Church, Defendants and Respondents.

Civ. 16936.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1956.

Rehearing Denied Jan. 16, 1957.

Hearing Denied Feb. 14, 1957.

Action was brought to enforce an agreement to devise realty and to impress a trust in favor of plaintiffs for reasonable value of realty. The Superior Court, County of Santa Clara, John D. Foley, J., entered judgment adverse to the plaintiffs, and they appealed. The District Court of Appeal, Agee, J. pro tem., held that where grantee probably acquired no interest by deed, because it was allegedly an attempted testamentary disposition without compliance with requirements of a valid will, and, when grantor's attorney wrote to grantee, requesting her consent to return of the deed, she demurred and conditioned her consent to agreement by grantor to execute a will devising other realty to her, and grantor agreed to devise such realty to the grantee and not to change the devise without the consent of the grantee, and grantee predeceased grantor, grantee's rights inured to the benefit of her heirs and were not affected by section of the Probate Code providing that if a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place.

Judgment reversed.

1. Appeal and Error ⚷1008(3)

Where there was no conflicting extrinsic evidence, interpretation placed on written agreement by trial court was not binding on reviewing court.

2. Evidence ⚷60

Where grantee probably acquired no interest by deed, because it was allegedly an attempted testamentary disposition without compliance with requirements of a valid will, and when grantor's attorney wrote grantee, requesting her consent to return of the deed, she demurred and conditioned her consent on agreement by grantor to execute a will devising other realty to her, and there was no contention that she acted in bad faith, the presumption was that she acted in good faith.

3. Wills ⚷59

Where grantee probably acquired no interest by deed, because it was allegedly an attempted testamentary disposition without compliance with requirements of a valid will, and, when grantor's attorney wrote to grantee, requesting her consent to return of the deed, she demurred and conditioned her consent to agreement by grantor to execute a will devising other realty to her, and grantee acted in good faith, the release by the grantee of any claim to realty conveyed by the deed was sufficient consideration for promise contained in grantor's agreement to devise other realty to the grantee.

4. Descent and Distribution ⚷8
Wills ⚷58(1)

Where grantee probably acquired no interest by deed, because it was allegedly an attempted testamentary disposition without compliance with requirements of a valid will, and, when grantor's attorney wrote to grantee, requesting her consent to return of the deed, she demurred and conditioned her consent to agreement by grantor to execute a will devising other realty to her, and grantor agreed to devise such realty to the grantee and not to change the devise without the consent of the grantee, and grantee predeceased grantor, grantee's rights inured to the benefit of her heirs and were not affected by section of the Probate Code providing that if a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place. West's Ann. Prob.Code, § 92.

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Joseph A. Bonacina, San Jose, for appellants.

Lakin, Spears & Gullixson, Palo Alto, for respondents.

AGEE, Justice pro tem.

William Henry Barnett and Mary A. Barnett were husband and wife. In June, 1929, they executed deeds of gift, each to the other, of certain real property owned by them. Mary died on May 7, 1935. Her daughter by a former marriage, Helene Cuenin, found the deed from William to Mary among her mother's effects and caused it to be recorded. William later discovered this when making a loan application on the property. He went to an attorney, who advised a quiet title action. Helene was contacted and she agreed to act and appear as administratrix of her mother's estate. The action was uncontested, Helene having filed a disclaimer. A decree quieting title in William was rendered April 20, 1936. On the same day, William executed a deed of gift of two lots, described as 34 and 35, to Helene. He delivered this deed to Egerton D. Lakin, an attorney, with the following written instruction: "Said deed is to take effect only in the event of my death; therefore it is handed to you with instructions that it is to be delivered to Mrs. Cuenin upon my death, and not before." Five years later William requested the return of the deed. Lakin was of the opinion that he was entitled to it but, as a matter of caution, wrote to Helene on June 24, 1941, enclosing a request that she sign the following consent: "Referring to the escrow whereby you are holding a certain deed of gift in my favor from W. H. Barnett, covering lots 34 and 35 in Block 16, Woodland Place, San Mateo County, California, I have no objection to the termination of said escrow, and the return of said deed to Mr. Barnett." Helene, under date of July 23, 1941, replied with the following signed statement: "Referring to the escrow whereby you are holding a certain deed of gift in my favor from W. H. Barnett, covering Lots 34 and 35, Block 16, Woodland Place, San Meteo County, California, I have no objection to the termination of said instrument and the return of the said deed to Mr. Barnett *in consideration of his agreement to make his will and include a clause therein whereby Lot 33, being an adjoining lot to the above described property, is devised to me.*" (Emphasis added.) At the bottom of the same page upon which the foregoing was written appears the following statement, signed by William: "I agree to the above provision regarding my will, and will not change the same without the consent of Helene Cuenin, so far as the same concerns said lot 33, in block 16, Woodland Place." On the same day, July 23, 1941, William executed a formal witnessed will in which he devised Lot 33 to Helene. It is implicit in her signed statement of July 23, 1941, that Helene was giving up any claim as to Lots 34 and 35.

Helene died on November 17, 1949, leaving surviving as her heirs the plaintiffs herein, Constant E. Cuenin, her husband, and Frances C. Sides, her daughter.

Thereafter, Willliam executed two holographic wills, dated July 23, 1950, and August 2, 1950, respectively. Neither will contained a devise of Lot 33 to Helene or her heirs. On March 24, 1953, William sold all of the property herein mentioned, i.e., lots 33, 34 and 35. William died on May 22, 1953. The will of August 2, 1950, was admitted to probate on June 10, 1953.

On December 9, 1953, this action was filed by Helene's husband and daughter to enforce the agreement of July 23, 1941, and impress a trust in their favor for the reasonable value of lot 33.

The position of respondents is that (1) there was no consideration for the agreement of July 23, 1941, and (2), if it was a valid agreement, that agreement was lived up to by the execution of the will of July 23, 1941, and that, upon Helene predeceasing William, the devise lapsed under the provisions of section 92 of the Probate Code.

The trial court concluded that there was no consideration for the agreement of July 23, 1941, because William did not intend to pass immediate title by the deed of April 20, 1936, and the delivery thereof to Lakin in escrow constituted an attempt to make a testamentary disposition without complying with the requirements of a valid will. The trial court also held that the devise lapsed by reason of Helene's death before that of William. Prob.Code, § 92. Judgment was thereupon rendered in favor of defendants and plaintiffs appeal therefrom.

[1-3] There is no conflicting extrinsic evidence and the interpretation placed upon the agreement by the trial court is not binding on an appellate court. Fox v. Fox, 42 Cal.2d 49, 52, 265 P.2d 881; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825. The deeds of 1929 were probably but not necessarily ineffective attempts of a husband and wife to make a testamentary disposition of the property in the event of

the death of either. However, the deed which ran from William to Mary was recorded and constituted a cloud upon William's title. Helene helped to clear it. On the same day that he obtained a quiet title decree, he executed the deed of April 20, 1936, to Helene. Again, there is probably little doubt that Helene acquired no interest in the property thereby and that William had a right to demand the return of this deed. But when William's attorney wrote to Helene, requesting her consent to such return, she obviously demurred and conditioned her consent upon William agreeing to execute a will devising Lot 33 to her. There is no contention that Helene acted in bad faith and the presumption is that she acted in good faith. Hedden v. Waldeck, 9 Cal.2d 631, 636, 72 P.2d 114. It is not necessary, in considering whether there was any consideration for William's promise to devise, to determine whether in fact there was any detriment suffered by Helene or benefit obtained by William. The release by Helene of any claim in or to Lots 34 and 35, such claim being made in good faith, is sufficient consideration for the promise contained in William's agreement of July 23, 1941. Dominguez Estate Co. v. L. A. Turf Club, 119 Cal.App.2d 530, 541–542, 259 P.2d 962; City Street Improvement Co. v. Pearson, 181 Cal. 640, 650, 185 P. 962, 20 A.L.R. 1317; Baker v. Philbin, 97 Cal.App.2d 393, 397, 218 P.2d 119; Fuller v. Towne, 184 Cal. 89, 96, 193 P. 88.

We turn now to a consideration of what was agreed to by William. He not only agreed to devise Lot 33 to Helene but he agreed not to change such devise "Without the consent of Helene Cuenin." He did not, of course, ever obtain such consent. However, respondents urge that even if William's will, dated July 23, 1941, had never been changed, the devise lapsed when Helene predeceased him.

Section 92 of the Probate Code provides that "If a devisee or legatee dies during the lifetime of the testator, the testamentary disposition to him fails, unless an intention appears to substitute another in his place; * * *." The exception as to "kindred," which follows, is not relevant inasmuch as Helene was not related by blood to William.

[4] Respondents contend that, under this section, the devise to Helene would have lapsed in any event because she predeceased William. Helene's rights, however, are based upon contract and, upon her death, such rights inured to the benefit of her heirs and are not affected by the lapse statute. In Potter v. Bland, 136 Cal.App.2d 125, 288 P.2d 569, the decedent agreed in writing to devise certain real property to her nephew and niece. She executed a will so providing but later executed another will leaving all of her estate to another. Prior to her death, the niece died without leaving any lineal descendant. At page 135 of 136 Cal.App.2d, at page 575 of 288 P.2d, this Court said: "The court, among other findings, found that plaintiff was the sole heir at law of his sister who died intestate, and that as such he was entitled to the half interest in testatrix' estate which testatrix had contracted to will to the sister, decreed that defendants held the entire estate as constructive trustees for plaintiff, and ordered defendant executor to deliver to plaintiff such estate after payment of claims and expenses of administration. This finding and decree is correct. The question we are considering here is one of contract rather than of wills. Ordinarily a devise or bequest to a person who dies prior to the death of the testatrix lapses. (See Probate Code, § 92.) But here we have a contract, made upon a consideration in which testatrix agreed to will her property to two people in equal shares. The death of one of them prior to that of the testatrix does not make the agreement void in any sense. The right to half of testatrix' property, although inchoate as to time, belonged to the sister, and on her death remained a property right of her estate." See also Trower v. Young, 40 Cal.App.2d 539, 548–549, 105 P.2d 160.

We conclude that the agreement of July 23, 1941, was for a good and valid consideration and that section 92 of the Probate Code does not apply to or affect said agreement. The judgment is therefore reversed.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

Hearing denied; SHENK, SCHAUER and McCOMB, JJ., dissenting.

146 Cal.App.2d 807

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
Carl E. FIGUIEREDO and William R. Hagan, Defendants.

William R. Hagan, Defendant and Appellant.
Cr. 5466.

District Court of Appeal, Second District, Division 1, California.
Dec. 14, 1956.

Hearing Denied Jan. 10, 1957.

Defendant was convicted of robbery. The Superior Court of Los Angeles County, Fred Miller, J., entered judgment accordingly sentencing defendant under habitual criminal act, and entered order denying motion for new trial. Defendant appealed. The District Court of Appeal, Doran, J., held that the evidence was sufficient to sustain conviction on robbery charge but that it was insufficient to sustain two consecutive life sentences under habitual criminal act and defendant was entitled to new trial on such issue.

Judgment affirmed in part and reversed in part and cause remanded with directions.

1. Robbery ⊂⊃24(1)

Evidence sustained robbery conviction.

2. Criminal Law ⊂⊃633(1)

Record on appeal from robbery conviction revealed that defendant had had fair trial.

3. Criminal Law ⊂⊃1202(3)

In robbery prosecution, evidence on issue of whether defendant was habitual criminal was insufficient to support two consecutive life sentences under habitual criminal act and defendant was entitled to limited new trial on issue. West's Ann. Pen.Code, §§ 644, 669.

◆

William R. Hagan, in pro. per., for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

DORAN, Justice.

This is an appeal from the judgment, and from the order denying motion for a new trial.

Defendant was accused by information with two counts of robbery. Four prior felony convictions were also alleged. The four alleged priors were admitted. Following a jury trial defendant was adjudged guilty of both counts. Defendant, through counsel, moved for a new trial which motion was denied. Judgment was duly rendered whereupon defendant filed in propria persona a notice of appeal from the order denying the motion for a new trial and from the judgment.

The facts are characteristic of such offenses. As to Count I, John H. Lynch was the head clerk for Safeway Markets in Inglewood. Defendant entered armed with a revolver and took $800 from the safe. As to Count II, Joseph Bonelli operated a business in Huntington Park. At the time alleged Bonelli and an employee by the name of Norwood were held up by Hagan and robbed of $250. To describe in detail these robberies would serve no useful purpose. Hagan was identified by the victims.

It is contended by appellant and recited in appellant's brief, "The following grounds of appeal are:

"(1) That the defendant Hagan was improperly sentenced to two consecutive life imprisonments as an habitual criminal;

"(2) That prejudicial testimony was permitted by witnesses and by the remarks of the Deputy District Attorney, and statements made by the Deputy District Attorney at the trial, which prejudiced the defendant's rights and were contrary to the law of the case as decided in the case of People v. Carl E. Figuieredo and William R. Hagan, 130 Cal.App.2d 498 [279 P.2d 200]."

[1, 2] As to the sufficiency of the evidence to support the judgment there is no question. Also the record reveals that the defendant was not denied a fair trial. However, as recited in respondent's brief, "The contention that the defendant was improperly sentenced as an habitual criminal presents a serious question of law in view of the record and respondent will consider this matter last."

Quoting from respondent's brief,

"A sentence of life imprisonment, which follows an adjudication that the defendant is an habitual criminal, is a serious one. The People are required to prove all necessary elements of such an adjudication beyond a reasonable doubt.

"People v. Morton, 41 Cal.2d 536, 539 [, 261 P.2d 523].

"The question now arises as to what disposition should be made of the instant case. It is clear that the judgment, insofar as it sentences the defendant to imprisonment for the robberies of which he was found guilty, should be affirmed. However, in view of the record herein it appears that the trial court erred in adjudging that the defendant is an habitual criminal because of the lack of proof as to service of separate terms of imprisonment. Although it appears that there is little likelihood that proof may be forthcoming that the defendant served separate terms of imprisonment for the priors charged, it would appear that such finding should be made (on proper proof) by the trial court. In such a case the matter should be remanded to the trial court for a limited trial solely concerning proof of this essential requirement of Penal Code Section 644. As was stated in People v. Morton, supra (41 Cal.2d 536, 544–545 [, 261 P.2d 523]):

"'* * * This procedure is the proper one. It carries out the policy of the statutes imposing "more severe punishment, proportionate to their persistence in crime, of those who have proved immune to lesser punishment." (In re McVickers, supra, 29 Cal.2d 264, 270 [, 176 P.2d 40]), and prevents defendants from escaping the penalties imposed by those statutes through technical defects in pleadings or proof. It affords the defendant a fair hearing on the charge, and if it cannot be proved he will not have to suffer the more severe punishment.'

"On such a remand, if it is established that the defendant has been at least twice convicted of felonies named in the statute *and has served separate terms in prison therefor*, he may properly be adjudicated an habitual criminal and the provisions of Penal Code Section 669 should be complied with in sentencing him. In the event that it appears that he has not separately served terms of imprisonment for the prior felonies charged in the information, he should be sentenced as a person who has not served separate terms in state prison within the meaning of Section 644, Penal Code (People v. Sukovitzen, supra (138 Cal.App.2d 159 [, 291 P.2d 107])) and the court, in the exercise of its discretion, may sentence the defendant to serve consecutive or concurrent terms on the two counts of which he was found guilty.

"People v. Morton, supra (41 Cal.2d 536, 545 [, 261 P.2d 523]).

"Respondent respectfully submits the matter to this Honorable Court on the material and authorities herein contained." (Emphasis included.)

[3] The judgment is affirmed as to the convictions. However, that part of the judgment adjudging defendant an habitual criminal and imposing sentence is reversed, and the cause is remanded to the trial court

with directions to resentence defendant after the conclusion of the limited new trial on the issue of the challenged issue and adjudication that he is an habitual criminal.

WHITE, P. J., and FOURT, J., concur.

146 Cal.App.2d 716

Christine ROBAS and Frank Robas, Plaintiffs and Appellants,
v.
O. M. ALLISON, a.k.a. Lum Allison, Zetta Allison, et al., Defendants and Respondents.
Civ. 5281.

District Court of Appeal, Fourth District, California.
Dec. 11, 1956.

Rehearing Denied Jan. 8, 1957.
Hearing Denied Feb. 6, 1957.

Plaintiffs brought action to quiet title to lot and to enjoin defendants from obstructing road shown on subdivision map. The defendants filed a separate defense alleging an open and notorious use of a portion of the plaintiffs' lot as a right of way and road and claimed a prescriptive right to continue that use. The Superior Court, San Bernardino County, Carl B. Hilliard, J., entered judgment in favor of the defendants, and the plaintiffs appealed. The District Court of Appeal, Barnard, P. J., held that evidence sustained finding that defendants were entitled to an easement over a portion of plaintiffs' lot which had been occupied by existing road and which had been used for road purposes for a period of many years.

Judgment affirmed.

1. Easements 🔑36(3)

In action to quiet title to lot, wherein defendants as a separate defense claimed a prescriptive right to use road over plaintiffs' lot, evidence sustained finding that defendants were entitled to an easement over portion of plaintiffs' lot which had been occupied by existing road, and which had been used for road purposes for a period of many years.

2. Dedication 🔑35(1)

Though no formal acceptance was necessary to show a dedication for road purposes, it was necessary that responsible public officials show by their actions that road had been taken over as a public road.

3. Dedication 🔑44

Evidence was insufficient to establish an implied acceptance by county of roadway designated on recorded map.

4. Dedication 🔑41

Burden of proving dedication of strip of land as a public road was on party asserting the dedication.

5. Dedication 🔑44

Fact of dedication of a strip of land as a public road must be proved clearly and unequivocally.

6. Dedication 🔑44

More persuasive evidence of a dedication of a strip of land as a public road is needed when the land in question is in a sparsely settled open country district, especially in a mountain area.

7. Easements 🔑36(3)

Evidence sustained finding that plaintiffs failed to sustain burden resting on them of showing that they had acquired the right to claim an easement for road purposes on part of strip which was designated as a road on subdivision map, but which had never been used for road purposes over the years.

8. Municipal Corporations 🔑671(7)

Where a party does not own to the center of the street an obstruction in the street is a public nuisance, and a private person may seek to enjoin it only if it is especially injurious to him, but not otherwise.

9. Municipal Corporations 🔑671(7)

Where a property owner does not own to center of street, and his use of the street is merely interfered with in the same manner as is the use of the general public, he cannot sue to enjoin the obstruction.

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Tony Geram, Fontana, for appellants.

Henry F. Rager, Fontana, for respondents.

BARNARD, Presiding Justice.

This is an appeal from a judgment giving the defendants a prescriptive right of easement for roadway purposes over a portion of the property of the plaintiffs, and denying the plaintiffs' claim to a different roadway easement. The controversy is as to the location and width of a road in a mountain area.

By an amended complaint filed on December 9, 1953, the plaintiffs sought to quiet their title, as against Mr. and Mrs. Allison and several other defendants, to Lot 16 of a certain tract as shown on a recorded map. In a second cause of action it was alleged that plaintiffs' property abuts upon a right of way or easement which is 20 feet wide, and which is an easement or road known as "Lytle Lane"; that the Allisons own Lot 35 of this tract, which is on the opposite side of Lytle Lane and slightly to the north of plaintiffs' property; that in March, 1951, the Allisons erected a wall extending out into said easement and road, which constitutes an obstruction to the use of the road; that "the defendants in this action have constructed various and sundry obstructions along and upon said Lytle Lane and said easement" which interfere with plaintiffs' use of said easement; and that by reason of these facts the plaintiffs' access to their land has been completely cut off. The prayer was for a decree adjudging that plaintiffs are the owners of Lot 16, that the defendants have no interest therein, and that the defendants be enjoined from maintaining any obstruction to the use of said road, right of way or easement. The defendants answered denying the allegations of the amended complaint and, as a separate defense alleging an open and notorious use of a portion of plaintiffs' property as a right of way and road for more than five years, and claiming a prescriptive right to continue that use.

After a trial, judgment was entered for the defendants. Plaintiffs' motion for a new trial was granted. On the second trial, before a different judge, a judgment was again entered for the defendants. The plaintiffs have appealed from that judgment, the main contentions being that the evidence is insufficient to support the findings to the effect that they had no easement for road purposes over the 20 feet which was designated as "Lytle Lane" on the recorded map, except such part thereof as is included in the existing traveled road; and that since plaintiffs paid the taxes on the full Lot 16, including that portion being used as a part of the traveled road, the defendants are not entitled to a prescriptive easement for roadway purposes over any portion of Lot 16.

A copy of the map showing the subdivision in which Lot 16 is located was introduced in evidence. That map, recorded in 1925, shows on its margin an order of the board of supervisors approving the map and the bond filed as security for the payment of taxes then a lien. It also shows a strip 20 feet wide marked "Lytle Lane" running from north to south through the tract, with lots on both sides, but does not show its connection with any public road. Lot 16, owned by the plaintiffs, is on the east side of that strip. Plaintiffs state that Lytle Lane, a dirt road, is a cul-de-sac and that its only exit and entry is north of their property and onto a roadway known as "Lytle Creek Road."

The Allisons built a house on their lot in 1944. A number of other houses were built on lots in this tract, at various dates before and after 1944. The plaintiffs bought Lot 16 from one of the defendants in May, 1950, built a house, and moved onto the premises in January, 1951.

At the request of the plaintiffs the county surveyor's office made a survey of the premises in question in April, 1951. The map of this survey was introduced in evidence. It shows the 20-foot strip marked on the original subdivision map as Lytle Lane, with the notation "Not dedicated". It shows the "traveled" road as covering the easterly part of the 20-foot strip and extending over on some of the lots on the east side of that strip. The traveled portion of the road is thus shown as 9 feet wide at the south side of Lot 16, and as 12 feet wide at a point some distance to the north of that lot. According to that map the traveled road covers a portion of the west end of Lot 16, which is 9 feet wide at the south side of that lot and 5 feet wide at the north side. It thus appears that the traveled road is a narrow road partly on the 20-foot strip designated on the subdivision map, and partly on the lots to the east of that strip.

The plaintiffs state that this was a slowly developing residential tract, and that as the tract developed the traveled portion of the road "tended to deviate in an easterly direction from the roadway as legally described." They admit that the evidence is conflicting as to when such deviation began and the amount of such deviation, and that the evidence is also conflicting as to whether the traveled road was the same at the time of and prior to plaintiffs' occupancy as it was at the trial. Disregarding the conflicts, there is ample evidence that this road has existed in the same position for many years and since long before the plaintiffs purchased their property. The situation is not unusual for mountain areas, and the evidence justifies the inference that because of the lay of the land the main part of the 20-foot strip designated on the subdivision map could not well have been used for road purposes in front of plaintiffs' property without considerable grading, which was not done. This explains why the road as actually used deviated to the east from the position indicated on the subdivision map. Three witnesses testified that this traveled road, known as "Lytle Lane", has existed in the same location and position from 1926 or 1930 to the present time. Some six other witnesses testified that there had been no change in the road since 1944. The evidence was that the road as traveled has been clearly marked and defined, has been used by people living along that road for about 30 years, and that these persons were able to and did drive up and down the road to and from their homes.

[1] As to plaintiffs' first cause of action the evidence is amply sufficient to support the court's findings and judgment, to the effect that the defendants are entitled to an easement over the westerly portion of Lot 16, being the portion which has been occupied by the existing road and used for road purposes for a period of many years. Van Amersfoort v. Young, 105 Cal.App.2d 22, 232 P.2d 569. The payment of taxes was not necessary to the existence of such an easement. In this connection the court correctly found and adjudged that all of the parties, both plaintiffs and defendants, have a prescriptive right of easement for a roadway and for purposes of ingress and egress over the traveled portion of the land as covered by the existing road.

With respect to the issues raised by their second cause of action, the plaintiffs contend that the court erred in finding that they were not entitled to an easement for road purposes over the 20-foot strip shown on the recorded map and marked "Lytle Lane". It is argued that there was either a publicly dedicated easement as to this strip or at least a private easement arising from an implied acceptance of the subdivider's offer to dedicate.

[2, 3] Under the law as it then existed, the approval of the map was not an acceptance of the road with a corresponding obligation on the part of the county to maintain the same. While no formal acceptance was necessary in order to show a dedication for road purposes, it was necessary that responsible public officials show by their actions that the road had been taken over as a public road. Union Transp. Co. v. Sacramento County, 42 Cal.2d 235, 265 P.2d 10. There was no sufficient evidence of any such action by county officials over a period of 30 years. The only evidence is

that on one occasion a snow plow was run over this portion of the road. The snow plow was run over the traveled road as it had long existed, and not over the westerly portion of the strip which had not been used for road purposes. On that occasion the plaintiffs complained to the driver of the snow plow that he was plowing into the bank on their side. There was no sufficient evidence of an implied acceptance of the roadway on the part of the county. City of Anaheim v. Langenberger, 134 Cal. 608, 66 P. 855.

[4–7] The recording of the subdivision map in 1925 constituted an offer to dedicate the 20-foot strip as a public road. There could, of course, be an implied acceptance of that offer on the part of the public by a sufficient use of the land for that purpose. This would apply, however, only to that part of the strip which was actually so used. Whether such an implied acceptance appears is a question of fact. The burden of proving such a dedication is on the party asserting it. Application of Laurel Hill Cemetery Ass'n, 73 Cal.App. 193, 238 P. 732. The fact of dedication must be proved clearly and unequivocally. Burk v. City of Santa Cruz, 163 Cal. 807, 127 P. 154. More persuasive evidence of a dedication is needed where the land in question is in a sparsely settled open country district. City of Los Angeles v. White, 68 Cal.App.2d 192, 156 P.2d 54. This is especially true with respect to such a mountain area as that involved here, where different conditions prevail which are commonly accepted. This narrow road had existed in the same condition for many years and long before the plaintiffs purchased their property, and the evidence supports the court's findings and conclusions to the effect that they failed to sustain the burden resting upon them to show that they had acquired a right to claim an easement for road purposes on that part of the strip, designated as Lytle Lane on the subdivision map, which had never been used for road purposes during all those years.

[8, 9] Moreover, if this 20-foot strip were to be considered a public road, it has been held that where a party does not own to the center of the street an obstruction in the road is a public nuisance, and a private person may seek to enjoin it only if it is especially injurious to him but not otherwise; and that the property owner cannot sue in such a case where his access to his property is not cut off and where his use of the street is merely interfered with in the same manner as is the use of the general public. Hogan v. Central Pacific R. Co., 71 Cal. 83, 11 P. 876; Bigley v. Nunan, 53 Cal. 403; Hitch v. Scholle, 180 Cal. 467, 181 P. 657.

The plaintiffs further contend that the defendants failed to prove their prescriptive right to the 20-foot strip designated as Lytle Lane on the subdivision map, or any part thereof; and that the court erred in failing to make a finding on the issue as to whether or not the defendants had adversely possessed a part of the land within that strip. No issue was presented by the pleadings as to whether the defendants had a prescriptive right to the strip in question or a part thereof, and no finding thereon was necessary. The judgment did not award any such easement or prescriptive right to the defendants. On the other hand, the effect of the findings and judgment was merely to hold that the defendants were entitled to an easement for road purposes over the western part of plaintiffs' property in accordance with the location of the road as it has long existed, and that the plaintiffs were not entitled to any easement with respect to that part of the 20-foot strip which had not been used as a part of the traveled road.

The findings are supported by the record, and the judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

Hearing denied; SCHAUER, J., dissenting.

147 Cal.App.2d 25

Application of Colleen Lynn McGEHEE, For Change of Name.

Lois Jean McGehee, Petitioner and Appellant.

James R. Beserra, Contestant and Respondent.

Civ. 8954.

District Court of Appeal, Third District, California.

Dec. 17, 1956.

Proceeding for order changing plaintiff's daughter's surname to name by which daughter was known, which was name of plaintiff's former husband, name of plaintiff's son who was residing with plaintiff and daughter and name used by plaintiff after she divorced husband who fathered such daughter. From an adverse order rendered by the Superior Court, Stanislaus County, David F. Bush, J., the plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that trial court abused its discretion in denying change on objection of such former husband who contended that name was his exclusive property and that he did not want child to bear it as she was not his daughter.

Order reversed with directions.

1. Names ⚷20

The common-law right to change one's name has never been abrogated in California, and the purpose of statutory proceeding is simply to have, wherever possible, a record of the change. West's Ann.Code Civ. Proc., §§ 1275–1279.

2. Names ⚷20

Where right to change name has been exercised, some substantial reason must exist for its denial.

3. Names ⚷20

In proceeding for order changing plaintiff's daughter's surname to name by which she was known, which was name of plaintiff's former husband, name of plaintiff's son, who was residing with plaintiff and daughter, and name used by plaintiff after she divorced husband who fathered such daughter, trial court abused its discretion in denying change on objection of such former husband, who contended that name was his exclusive property and that he did not want child to bear it as she was not his daughter.

H. E. Gleason, Turlock, for appellant.

Gilbert Moody, by Lin Griffith, Turlock, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from an order denying appellant's application to have her minor daughter's name changed from Colleen Lynn McGehee to Colleen Lynn Beserra, which is the name she uses and by which she is known.

Appellant is the former wife of respondent James R. Beserra, who now lives in San Rafael. Their six year old son, who resides with appellant and Colleen in Stanislaus County, uses and is registered in school under his father's surname. Colleen, who is three years of age, is the child of appellant's second husband, Seth Thomas McGehee, but has always used the name Beserra, which is the name appellant resumed after appellant divorced Mr. McGehee who had deserted and abandoned her. Appellant testified that when Colleen enters school, it will be confusing and embarrassing for her to have a different last name from that of her mother and half-brother. Therefore, pursuant to Section 1276 of the Code of Civil Procedure, appellant filed an application whereby she sought to have Colleen's surname declared to be Beserra.

Respondent filed no objections to appellant's petition, but appeared at the hearing thereon. He there testified only that he was opposed to Colleen's using his surname as she was not his child and the name Beserra was very "exclusive", being borne only by himself and his immediate family.

[1, 2] The issue presented on appeal from an order denying a change of name is whether on the record it can be said the court abused its discretion. In resolving

this issue we consider that the common-law right to change one's name has never been abrogated in California; that the purpose of the statutory proceeding, Code Civ.Proc. §§ 1275–1279, is simply to have, wherever possible, a record of the change; that where the right to change has been exercised some substantial reason must exist for the denial. In re Useldinger, 35 Cal.App.2d 723, 96 P.2d 958.

[3] We find no substantial reason for the denial of the petition here. Substantial reasons were given for the change that had been made. Mr. Beserra merely objected on sentimental grounds peculiar to himself, and contravening in no sense the reasons for the change. No right of his was threatened. He may consider the name "Beserra" to be "exclusive", but the law does not so consider it.

The order is reversed with directions to the trial court to grant the petition.

PEEK and SCHOTTKY, JJ., concur.

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146 Cal.App.2d 849

Joyce FERRARO, Plaintiff and Respondent,

v.

Edward FERRARO, Defendant and Appellant.

No. 16870.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1956.

Action to have awarded to plaintiff an undivided one-half interest in certain property held in defendant's name, to enjoin defendant from making any disposition of the property other than transfer of such interest to plaintiff, and to obtain award of one-half of money allegedly deposited in bank in defendant's name upon termination of oral agreement whereby parties were to work together with common purpose of pooling their work and earnings in order to accumulate property which they would share equally. The Superior Court, Santa Clara County, M. G. Del Mutolo, J., awarded plaintiff relief sought, and defendant appealed. The District Court, Fred B. Wood, J., held, inter alia, that evidence was not sufficient to sustain trial court's finding that defendant had $2,000 in bank deposit when the enterprise terminated, even though defendant did not produce his bank books.

Judgment reversed with directions.

1. Joint Adventures 🔑1.15

In action to obtain undivided one-half interest in properties to which defendant held title and to have defendant enjoined from making any other disposition of the properties, evidence, which revealed that plaintiff's earnings did not go directly into the properties but were used in part to defray parties' household expenses, was sufficient to sustain trial court's finding that parties had made and carried out their agreement to pool their work and earnings and to share equally in the accumulations thereof.

2. Contracts 🔑315

Where parties agreed that they would work together and save their money, fact that parties did not work together in sense that they shared the same business would not establish nonperformance of the contract, in view of fact that one party continued operation of his trucking business and other party kept house for both parties and worked part time as waitress and contributed her earnings to defray, in part, parties' household expenses, thereby freeing some portion of income from the trucking business for saving and investment.

3. Joint Adventures 🔑5(2)

In action to obtain undivided one-half interest in property held in defendant's name and to have defendant enjoined from making any other disposition of the property, evidence was sufficient to sustain finding that plaintiff was entitled to a one-half interest in house and lot to which defendant claimed to have made down payment on the purchase price and to sustain finding that plaintiff had deeded her interest in the house to defendant at his request to facilitate a sale and that he had later refused to reconvey.

4. Joint Adventures ⚿5(2)

In action to obtain undivided one-half interest in certain property held in defendant's name and to enjoin defendant from making any other disposition of the property, evidence was not sufficient to sustain trial court's finding that defendant had $2,000 in bank deposit when enterprise between parties to pool their work and earnings, sharing equally in the accumulations, terminated, even though defendant did not produce his bank books. West's Ann.Code Civ.Proc., §§ 1963, subds. 5, 6, 2061, subds. 6, 7.

5. Joint Adventures ⚿5(2)

Where parties had entered into oral agreement to work together with common purpose of pooling their work and earnings in order to accumulate property which they would share equally, for one party to have other party required to transfer to her one-half interest in such property and to have other party enjoined from making any other disposition of the property and to recover from other party one-half of sum allegedly deposited in bank, it would be necessary that party show, inter alia, date on which the agreement was made, amount of party's interest in certain property, and amount of money on hand in deposit in bank upon termination of their joint venture.

6. Joint Adventures ⚿5(1)

Where, in action to obtain an award to plaintiff of an undivided one-half interest in certain property to which defendant had title, to enjoin defendant from making any other disposition of the property, and to obtain part of money allegedly on deposit in defendant's name in bank when joint enterprise terminated, neither party requested adjustment of equities arising subsequent to termination of the enterprise, court's failure to make such adjustment was not error.

◆

George H. Barnett and Martin S. Walsh, San Jose, for appellant.

Boccardo, Blum & Lull, San Jose, Edward J. Niland, San Jose, of counsel, for respondent.

FRED B. WOOD, Justice.

Defendant has appealed from a judgment awarding plaintiff an undivided one-half interest in certain properties, directing him to execute and deliver documents to effectuate the transfer of said interest to her, enjoining him meanwhile from making any other disposition of the property, and awarding her the sum of $1,000 and costs of suit.

The judgment is predicated upon these findings: (1) Commencing in May, 1948, the parties "entered into an oral agreement, whereby they would work together with the common purpose of pooling their work and earnings in order to accumulate property, money and other assets, and they would share equally in all such property, money or other assets accumulated thereby"; (2) Commencing in May, 1948, and until about June 21, 1954, they worked together for said purposes; (3) The property thus accumulated consists of (a) certain improved residential real property, (b) furniture, furnishing, and appliances thereat, (c) undivided two-thirds interest in an auto-car Diesel truck trailer and Freuhauf Van Trailer, (d) a 1949 Cadillac convertible automobile, (e) a flatrack trailer, and (f) $2,000 on deposit in defendant's bank account at the time of the separation of the parties; (4) The real property was conveyed to the parties as tenants in common; in June, 1953, defendant represented that he intended to sell and requested plaintiff to execute a deed to him to facilitate the sale; in reliance thereon she executed a deed; and although she demanded reconveyance of her undivided one-half interest he refused to do so; (5) Plaintiff demanded conveyance of her interest in the property but defendant refused to convey and has threatened to dispose of the property and will do so unless restrained; and (6) Beginning May 18, 1948, and until June 21, 1954, the parties lived together as husband and wife.

Appellant claims the evidence does not support the findings and that the trial court erroneously failed to determine certain equities of the parties.

[1] The finding as to the making and carrying out of the agreement to pool their work and earnings, sharing equally in the accumulations, is amply supported by the evidence. Defendant cites plaintiff's testimony, upon direct examination, that "we both came to an agreement * * * that we would work together, save our money and maybe later on get married and have something to start on." He claims an agreement to save their money was not an agreement to pool their work and earnings. That is taking a too narrow view of saving "money," which conceivably might be by investment in real and personal properties, not alone by deposit in a bank. Moreover, upon cross-examination defendant asked plaintiff when the agreement described in her complaint (the same as found by the court) was made. She could not remember the date exactly but said about a month and one-half after May 18, 1948, they began talking about their future together. Defendant then asked, "the agreement, then, was that both of you were to work and that for the common purpose you would pool your earnings in order to accumulate property?" and she replied, "That is correct." Defendant would discount the latter testimony as inconsistent with plaintiff's testimony on direct, a question which the trial court in the exercise of its function as trier of the facts decided adversely to defendant.

Defendant claims the agreement was not carried out because as he says, "plaintiff contributed no money toward the acquisition of any of the properties listed." That is essentially the same argument as that which we have already discussed.

[2] He next claims nonperformance because they did "not work together in the sense that they shared the same business * * *." That is placing too narrow an interpretation upon the terms of the agreement as found by the court. He continued in the operation of his trucking business. She kept house and part of the time worked as a waitress. Her earnings, it is true, did not go directly into the properties they acquired but were used in part to defray household expenses. Those services, it would appear, operated to free for saving and investment some portion of the income derived from the trucking business. It is apparent that the trial court considered that by such conduct the parties did "work together with the common purpose of pooling their work and earnings" within the meaning of those words as used in the agreement. We think that is a fair inference and perceive no basis upon which a reviewing court could undertake to disturb it.

Defendant argues, somewhat obliquely, that the parties' meretricious relationship (living together as husband and wife though unmarried to each other) infected the entire transaction with illegality. He does not claim that the agreement depended upon the meretricious relationship. He argues, in effect, that the agreement proven was not performed and, therefore, her rights, if any, in the property depended upon proof of the amount of her contributions to its acquisition. This, in substance, is the same argument (nonperformance) in still another form.

In summary upon this branch of the case we endorse and quote from an opinion rendered by Honorable M. S. Del Mutolo, the judge who tried and decided this case:

"On the authority of Bridges v. Bridges, 125 Cal.App.2d 359 [270 P.2d 69], I am of the opinion that the plaintiff is entitled to judgment

"As it is stated in the case of Garcia v. Venegas, 106 Cal.App.2d 364 [235 P.2d 89], tried by this court, '* * * But where, as here, they entered into a contract to pool their work and earnings and share equally in the property accumulated therewith, and the illicit relationship was not so involved in the contract as to render it illegal, the law recognizes the contract and enforces the rights arising out of it.'

"I am of the opinion that the parties hereto entered into such a contract as that mentioned in the two cases cited above. They bought property in their joint names and made an income tax return in their joint names. The plaintiff was known by defendant's name. It would be the most grievous injustice if this man, after using plaintiff as a dependent, to defraud the government on his income tax was allowed to keep everything that was accumulated by their joint efforts.

"It is defendant's contention that he contributed considerably more than she did. This may be true in a material way. The plaintiff, however, kept house, cooked his meals, and washed his clothes, the value of which cannot be measured in dollars and cents. She was also employed most of the time."

[3] Defendant claims it was error to find plaintiff has a one-half interest in the house and lot because, he says, the $1,000 down payment came from moneys he saved prior to the period of the agreement. The portion of his testimony he cites is simply that he made the down payment with "money that I saved with the truck," which could have been money saved after the commencement of their joint enterprise, especially as this down payment was made three years and some months after. Also, he admitted borrowing $4,700 to pay off the balance of the purchase price of his automotive equipment, over two years before making the down payment on the residence. This plus the fact that the real property was conveyed to and received by plaintiff and defendant as joint tenants, support the finding under discussion. He also testified that in May, 1948, he had $1,800 to $2,000 in bank and no other property except his equity in certain automotive equipment. He testified he could get from the bank the amount of that deposit on that date in 1948 and undertook to do so but failed to produce it. In that connection, he did say he had close to $2,000 in bank on that date and "That is what it took to put down on the house and buy the Buick." Even this statement falls short of testimony that he still had and used some part of the May, 1948, deposit in making the November 15, 1951, down payment on the house and lot. The finding that plaintiff deeded her interest in the house to him at his request to facilitate a sale and his refusal later to reconvey is amply supported by her testimony.

Some of the furniture came with the house and he paid off the balance due on the furniture after that.

In 1952 he bought the flatrack trailer for $800 with money that he had accumulated during the previous 3 or 4 years.

The Diesel truck trailer and Freuhauf Van Trailer (defendant described this equipment as "a semi, a tractor and a semivan") defendant said he bought in March, 1948, for $12,500. As of May 7, 1948, he still owed $8,685.18; on June 5, $8,271.60; July 13, $7,858.02; and on August 3, 1948, $7,444.44. By March 5, 1949, it was fully paid for. It would appear that in finding that plaintiff has a half-interest in a two-thirds interest in this equipment the court took the May 7, 1948, figure; correct if May 18, 1948, was the date of the agreement. But, as we have seen, plaintiff's own testimony shows that the agreement was made and their joint enterprise launched about one and one-half months later, which would increase the amount of his equity at the beginning of the enterprise and decrease the amount of her present interest in the property.

[4] The evidence does not support the finding that defendant had $2,000 on deposit in bank when the enterprise terminated on June 21, 1954. Defendant testified that he had $42 or $48 in bank at that time; $200 at the time of trial; and that several friends owed him various amounts, such as

$10, $12, or $15 each. True, he did not produce his bank books but that would not (contrary to plaintiff's suggestion) by use of the presumptions expressed in the Code of Civil Procedure, §§ 2061(6), 2061(7), 1963(5) and 1963(6), support a finding of $2,000, upon which the award of $1,000 to plaintiff was based.

[5] It will be necessary to remand the cause for redetermination of the date of the making of the agreement, the amount of plaintiff's interest in the Diesel and Freuhauf equipment, and the amount of money on hand upon termination of their joint venture.

[6] Defendant urges that the court committed error in not adjusting equities arising subsequent to the termination of the enterprise. That was not error. Neither party requested it and no one furnished evidence on the subject. However, inasmuch as the cause must be remanded for consideration of certain limited issues, it is desirable that the parties be permitted to present for adjudication such claims as each may have against the other in respect to the common property, including but not necessarily limited to expenditures, if any, he has made for preservation of the property since the termination of their joint enterprise and for which he may have a right of contribution, and compensation to her for loss of use of the property subsequent to such termination.

From what has been said it is apparent that the findings of fact, conclusions of law and judgment are correct and amply supported by the evidence and the law and should be affirmed, except those portions thereof which declare that the parties' joint enterprise commenced in May, 1948, and that plaintiff has had "an undivided one-third interest in and to that certain 1938 Auto-Car Tractor and that certain 1941 Freuhauf Van Trailer," and awards plaintiff judgment against defendant in the sum of $1,000, which excepted portions only are erroneous and should be reversed. It is, therefore, ordered that the judgment be reversed, with directions that the trial court revise the findings of fact and conclusions of law, take such further steps and proceedings in the action as may be meet and proper, and render judgment, all in accordance with the views herein expressed. Each party will bear his or her own costs of this appeal.

PETERS, P. J., and BRAY, J., concur.

146 Cal.App.2d 545

R. C. TAGGART, Plaintiff and Appellant,

v.

CAL-LINDA PACKING CO., a copartnership composed of Vincent C. Giordano, Alma Robba and Pasquale Ferrera, Vincent C. Giordano, Alma Robba, Pasquale Ferrera, C. I. Wolfley, as Trustee in Bankruptcy of the Cal-Linda Packing Co., a bankrupt, and Lawrence Curtola, Defendants and Respondents.

Civ. 8757.

District Court of Appeal, Third District, California.

Dec. 3, 1956.

Action was brought to foreclose a chattel mortgage. The Superior Court, San Joaquin County, Thomas B. Quinn, J., entered judgment adverse to the plaintiff, and the plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence sustained finding of Superior Court that mortgagors had no interest in the property covered by the mortgage at the time they executed the mortgage and that therefore the mortgage should not be foreclosed.

Judgment affirmed.

1. Sales 🔑467

On execution of conditional sales contract for the sale of cannery property and equipment, and on entry of buyers into possession thereof, title to the property purchased was in the buyers, except that legal title remained in the sellers, to be retained by them by way of security against failure of buyers to complete contract of purchase.

2. Sales ⚷458

It was competent for sellers and buyers of cannery property and equipment to provide in conditional sales contract that additional property acquired by the buyers should be held by the sellers as security for payment of the obligation due them from the buyers, and formal documents of transfer were not necessary when buyers acquired additional property.

3. Chattel Mortgages ⚷278

In action to foreclose chattel mortgage, evidence sustained trial court's findings that when mortgagors executed the mortgage they had no interest in the property covered by the mortgage because of a prior execution by them of an assignment, and that therefore the mortgage should not be foreclosed.

Samuel C. Shenk, San Francisco, for appellant.

Joseph L. Alioto and Walter F. Calcagno, San Francisco, for respondent Curtola.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment refusing to foreclose a chattel mortgage.

Under date of September 1, 1950, a group of seven people entered into a contract for the sale to Pasquale Ferrero and Alma Robba of certain real property upon which there was situated a cannery. In addition to the real property, the group agreed to sell certain personal property consisting of cannery equipment. The buyers agreed to purchase and install in the cannery premises additional cannery equipment. Concerning this additional machinery and equipment, the contract provided as follows: "It is understood and agreed that this additional property shall be covered by this Agreement, and shall be treated as the other items of personal property hereinabove set forth so that said items of personal property shall be held by Sellers as security for the payment of the obligation due them from the Buyers herein." The buyers further agreed that if they breached the agreement, they would redeliver possession of the real property and of all the personal property either upon the premises at the time of sale or which they had under the terms of their contract placed thereon; that the title to the personalty covered by the contract and all personal property placed thereon by the buyers or obtained from the sellers during the existence of the contract should remain in the sellers until the sellers should deliver to the buyers a bill of sale covering the same; and that in the interim the buyers could place no liens thereon. It appears that the buyers did place a large amount of cannery equipment and other personal property on the premises and for a time operated the cannery but had ceased to do so prior to the execution of appellant's mortgage.

On August 29, 1951, the buyers, together with one Vincent C. Giordano, who in the meantime had become interested with the buyers, executed an instrument called "Assignment of Contract" wherein they assigned "to Lawrence Curtola that certain contract dated September 1, 1950," (the purchase and sale agreement above discussed), and in addition promised "to sell to Lawrence Curtola the fixtures of the Cal-Linda Cannery" upon which there was an indebtedness of $11,500 which Curtola agreed to assume. As to just what passed under this assignment considerable testimony was taken, but ignoring conflicts the testimony of Mr. Curtola satisfactorily establishes the following: Just before the assignment was made, he entered into negotiations with the cannery property buyers, Mr. Giordano conducting negotiations for Ferrero and Robba. The three operating the cannery as Cal-Linda Cannery had gotten into financial difficulties. Some of the property they had placed upon the cannery premises had not been paid for and the sellers were about to repossess the same. They were greatly indebted for their canning operations and were financially distressed. They wanted to sell their interests under the purchase and sale contract together with all machinery and equipment they had placed thereon, save only certain machinery and equipment and supplies which were pointed out and designated as not going into the proposed deal with him and which the record shows we are not here further concerned with. He entered into the contract of assignment for the purpose of thus taking over all of the interest of the three constituting the Cal-Linda Cannery. It is a fair summation of his testimony that by the contract of assignment he became the owner of all the right, title and interest of Giordano, Ferrero and Robba in the cannery property, including all their right and interest in the machinery and equipment they had placed thereon. After the execution of the assignment, Curtola, as lessor, leased the cannery property for operation to an operating group separate and apart from any that we have mentioned thus far.

After executing the assignment and on November 29, 1951, Giordano, Ferrero and Robba purported to mortgage to one Davis, predecessor in interest and assignor of plaintiff and appellant, an extensive amount of cannery equipment, then on the cannery premises, as security for the payment of a promissory note of $3,980.13. The loan was not repaid; the mortgagee, W. L. Davis, assigned the note and mortgage to appellant who had guaranteed the payment of the note. Respondent, as a John Doe defendant herein, filed an answer to the complaint, wherein he asserted that at the time the mortgage was executed, the mortgagors had no title to the property which they purported to mortgage; that he was the owner thereof, and that the court ought not to permit the mortgage to be foreclosed as against him.

The trial court found that through the assignment contract, Giordano, Robba and Ferrero had sold to Curtola all their interest in the real property and the equipment of the cannery subject to contracts payable; that they executed the note and chattel mortgage but that the equipment covered by the mortgage was the equipment which had been sold to Curtola through the assignment and that when they executed the note and mortgage, Giordano, Robba and Ferrero did not have title to the property which they purported to mortgage. The court, by its judgment, decreed that the appellant have no relief against Curtola.

[1, 2] It is familiar law that upon the execution of the purchase and sale contract whereby the cannery property and the equipment mentioned in that contract were conditionally sold to Ferrero and Robba, and upon the buyer's entry into possession thereof, the interests of the parties were to be considered as being that the title to the property being purchased was in the buyers, except that the legal title remained in the sellers, to be retained by them by way of security against the failure of the buyers to complete the contract of purchase. Sherman v. Quinn, 31 Cal.2d 661, 192 P.2d 17; Elliott v. McCombs, 17 Cal.2d 23, 31, 109 P.2d 329. It is a fair construction of that portion of the contract which referred to the equipment which the buyers agreed to install in the cannery that by the purchase and installation thereof the legal title vested in the sellers under the purchase and sale contract and the relationship of the parties thereto was the same as though that personal property had been originally a part of the subject matter of the contract. The contract is very specific upon this and declares, as above stated, that whatever title came into the ownership of the buyers when they purchased and installed the added property, that title was to be thereafter in the sellers of the cannery. It was competent to the parties to make such arrangements concerning the added equipment to be placed in the cannery and for-

mal documents of transfer were not necessary.

[3] The evidence supports the trial court's findings of fact that, by the execution of the assignment, the buyers of the cannery property transferred to Curtola all their right, title and interest in both the real property and the personal property which was in the cannery when they agreed to purchase, as well as the personal property which, under the terms of the contract, they thereafter installed therein; that when they executed the mortgage to Davis they had no interest in such property except possibly a reverting interest if Curtola failed to pay. It is not in evidence that he ever did.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

146 Cal.App.2d 630

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

George E. RUIZ and Jose B. Delgado, Defendants and Appellants.

Cr. 5570.

District Court of Appeal, Second District, Division 3, California.

Dec. 5, 1956.

Defendants were accused of the unlawful possession of heroin and charged with prior convictions. Judgment of convictions in the Superior Court of Los Angeles County, H. Burton Noble, J., and the defendants appealed. The District Court of Appeal, Shinn, P. J., held that search of an apartment was not unreasonable; that defendant's confession was properly admitted and that the evidence sustained the conviction as to such defendant.

Judgment affirmed.

1. Criminal Law 🔑394

Where evidence justified a reasonable belief that a felony was being committed inside an apartment and from statement an officer overheard while listening at the door and from what he saw while looking through a hole in the door it could be inferred that defendant was in possession of narcotics and that a sale was being consummated, evidence of what officer heard and observed while outside the apartment was admissible and was not obtained by an unreasonable search notwithstanding officers were led to the apartment through suspicion that the woman there was engaged in prostitution and where it could not be said that the officer had drilled a hole in the door.

2. Searches and Seizures 🔑7(20)

Where evidence justified reasonable belief that a felony was being committed inside an apartment through the possession of heroin, forcible entry into the apartment was justified where if officers had identified themselves and waited to be admitted the occupants would have had an opportunity to secrete the heroin. West's Ann.Health & Safety Code, § 11500.

3. Arrest 🔑71

Where evidence justified a reasonable belief that a felony was being committed inside an apartment, that officer neither saw nor heard anything indicating that defendant was committing a crime did not bear upon the reasonableness of the search of the apartment where the arrest of a codefendant was valid and was based upon reasonable cause, so that a reasonable search of the apartment was also proper. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law 🔑517(4)

Poisons 🔑9

In prosecution for possessing heroin found in an apartment where several persons were congregated, to sustain a conviction all that was required was prima facie proof of the illegal possession of a narcotic by someone within the room and it was not necessary to show defendant's connection with the possession before his confession could be introduced. West's Ann.Health & Safety Code, § 11500.

5. Criminal Law ⚿517(1)

In prosecution for unlawful possession of heroin, confession of defendant was properly admitted.

6. Poisons ⚿9

In prosecution for the unlawful possession of heroin evidence disclosing that defendant threw narcotics under a chair in fear of apprehension after the officers broke into an apartment was sufficient to sustain conviction since the defendant had dominion and control over the heroin. West's Ann.Health & Safety Code, § 11500.

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Albert C. Garber, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

George E. Ruiz and Jose B. Delgado were accused of violating Section 11500 of the Health and Safety Code in that they wilfully, unlawfully and feloniously had in their possession a preparation of heroin. Defendant Ruiz was charged with two prior felony convictions; defendant Delgado was charged with one prior felony conviction. (All three previous convictions were for offenses involving narcotics.) Defendants pleaded not quilty and denied the priors. Trial was to the court. The evidence consisted of that received at the preliminary hearing and additional evidence introduced at the trial. The court found defendants guilty and found the prior convictions to be true. Defendants appeal from the judgment.

There was evidence of the following facts. Jack Gerson, a Los Angeles police officer testified that about 10:15 p. m. Gerson and his partner observed a woman named Alvarado approach and talk to three or four men who were standing on the sidewalk at the corner of Seventh and Figueroa Streets in Los Angeles. Suspecting that she might be a prostitute, the officers followed her in their car. She stopped in front of a hotel on North Flower Street, where she met Florence Carreon and Robert Morales on the sidewalk. After a short conversation they entered the hotel, walked down the hall, and entered an apartment.

The officers approached the apartment and listened outside the door. They overheard bits of conversation. Someone inside the apartment said: "O.K., give me the * * * now." This indicated to the witness that a narcotics transaction was taking place. Gerson then discovered a small hole in the door of the apartment about two feet above the floor. He denied having drilled the hole himself, although he admitted having drilled such holes in the past. He looked through the hole and saw defendant Ruiz squatting on the floor. Ruiz was holding a rubber fingerstall in his right hand. In his left hand, he was holding up two small balloons. Gerson testified that narcotics are often concealed in rubber balloons. He then saw Ruiz put the balloons in the fingerstall and hand them to someone. He was unable to see the face of the person to whom they were given, but was sure that the recipient was a man. He saw a hand give Ruiz a number of bills, which Ruiz folded and placed in his pants pocket.

The officers then broke into the room, identified themselves, and placed its occupants under arrest. They had no search warrant and no arrest warrant. (Charges against Morales, Carreon and Alvarado were dismissed at the preliminary hearing.) As he entered, Gerson saw Ruiz throw a small object on the floor in the doorway leading from the living room into the kitchen. He found an eyedropper and a hypodermic needle on the floor where he had seen Ruiz throw the object. The other officer found the fingerstall and balloons under an overstuffed chair inside the kitchen doorway. Gerson searched Ruiz and found $80 in the same pants pocket into which he had previously seen him place the bills. All the occupants of the room denied having had any narcotics in their possession, though Florence Carreon told the officer later that Delgado was buying narcotics from Ruiz.

William G. Penprase, a police chemist, testified that he examined the balloons which Officer Gerson had found under the chair. They each contained capsules of heroin.

John R. Sprankle, one of the investigating officers on the case, testified that Delgado wrote and signed a confession in his presence, and that it was freely and voluntarily made. It was introduced into evidence over an objection that the corpus delicti had not been established. The substance of Delgado's confession was that he brought the heroin to Ruiz' apartment with him for his own use and threw it on the floor when the officers broke in.

Defendant Ruiz, testifying in his own behalf, stated that he had lived in the apartment for several days prior to his arrest. There was no hole in the door when he moved in. He admitted having the fingerstall and balloons, but said that Delgado was only showing them to him and that he returned them immediately to Delgado. He admitted knowing that the balloons contained narcotics. He said that he saw the heroin on the floor but did not know who threw it there.

Defendant Delgado, testifying in his own behalf, stated that he brought the heroin to Ruiz' apartment and threw it on the floor when the police entered. He had no money with him and did not pay any to Ruiz; he did not see a hole in the door when he came into the apartment.

At the close of the testimony, defendants moved to suppress the evidence on the grounds that it had been obtained as a result of an unlawful arrest and search. The motion was denied.

The first assignment of error to be considered is that the court erred in admitting in evidence the capsules of heroin and the other narcotics paraphernalia. Defendants argue, in this connection, that the officers entered the apartment without reasonable or probable cause, that their forcible entry was a trespass, that Delgado was arrested without reasonable or probable cause, and that the evidence was obtained through an unlawful search and seizure. These related contentions are without merit.

[1] There was evidence which would have justified a reasonable belief that a felony was being committed inside the apartment. From the statement which Officer Gerson overheard while listening at the door and from what he saw while looking through the hole in the door, it could be reasonably inferred that Ruiz was in possession of narcotics and that a sale was being consummated. What Gerson heard and observed while outside the apartment was admissible in evidence, and was not obtained by an unreasonable search. People v. Chin, 145 Cal.App.2d 583, 303 P.2d 18; People v. Martin, 45 Cal.2d 755, 762, 290 P.2d 855. There was no evidence of any illegal activity on the part of the officers. We attach no significance to the fact that they were led to Ruiz' apartment through a suspicion that the Alvarado woman was engaged in prostitution. Had Officer Gerson drilled the hole in the door so as to observe what was going on inside the room, it would have been a flagrant violation of the constitutional rights of defendants. But it cannot be said from the evidence that Gerson drilled the hole. He denied doing so, and the testimony of defendants that the hole was not previously there merely created a conflict in the evidence on this point.

[2] The forcible entry was justified. Had the officers knocked on the door, identified themselves, and waited to be admitted, the occupants would have had an opportunity to secrete the heroin. The officers had reason to believe that if they did not gain immediate access to the evidence, it might be destroyed. Their belief was confirmed by the unsuccessful attempt to hide the heroin.

[3] Defendants urge that the officers neither saw nor heard anything which would indicate that Delgado was committing a crime. Although Officer Gerson saw Ruiz hand the balloons to a man and accept money in exchange, he did not know who was dealing with Ruiz. But the reasonableness of the search did not depend upon the legality of Delgado's arrest. Since the arrest of Ruiz was valid and based upon reasonable cause, a reasonable search of the apartment was also proper. People v. Boyles, 45 Cal.2d 652, 655, 290 P.2d 535; People v. Coleman, 134 Cal.App.2d 594, 286 P.2d 582.

[4, 5] The next assignment of error is that Delgado's signed confession was erroneously admitted in evidence. Defendants argue that the corpus delicti had not been established. But all that was required was prima facie proof of the illegal possession of a narcotic by someone within the room. It was not necessary to show Delgado's connection with the crime before his confession could be introduced. People v. Salinas, 129 Cal.App.2d 565, 568, 277 P.2d 931; People v. Bigelow, 104 Cal.App.2d 380, 385, 231 P.2d 881. Delgado contends that if the evidence establishing the corpus delicti were illegally obtained, his confession would be inadmissible. But as we have decided that the evidence was not obtained through a violation of constitutional guarantees, it follows that the confession was properly admitted.

[6] The final assignment of error is the insufficiency of the evidence to show that Delgado was in possession of narcotics. But he confessed that he brought the heroin with him to Ruiz' apartment and testified to that fact. His codefendant, Ruiz, testified that Delgado had the heroin. When the officers broke into the apartment, Delgado admittedly threw the narcotics under a chair in fear of apprehension. We are of the view that the court was justified in determining, from these circumstances, that Delgado had dominion and control over the heroin. The adjudications that appellants had suffered the prior convictions are not questioned.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

146 Cal.App.2d 142

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Leon HARRIS, Defendant and Appellant.

Cr. 3188.

District Court of Appeal, First District, Division 2, California.

Nov. 20, 1956.

Rehearing Denied Dec. 5, 1956.

Hearing Denied Dec. 19, 1956.

Prosecution for possession of marijuana. The Superior Court, City & County of San Francisco, John B. Molinari, J., entered judgment and defendant appealed. The District Court of Appeal, Kaufman, J., held that evidence was insufficient to sustain conviction.

Reversed.

1. Searches and Seizures 🔑3(1)

Search of defendant's person may be justified if he was attemping to commit an offense in officer's presence or if officer had reasonable cause to believe that defendant had committed a felony. West's Ann.Pen. Code, § 836, subds, 1, 5.

2. Searches and Seizures 🔑3(1)

A search cannot be justified by what it produces.

3. Arrest 🔑63(4)

Where officers observed defendant only four or five minutes while defendant was standing in corner entrance of liquor store a few minutes past closing time for bars and was talking to another man at intersection at which two municipal railways passed and while defendant twice left entrance and looked down street and returned to person in doorway, there was no reasonable cause for arrest on vagrancy charge.

4. Criminal Law 🔑304(5)

In prosecution for possessing marijuana, court would take judicial notice of fact that two municipal railway lines passed corner at intersection of McAllister and Fillmore streets in San Francisco. West's Ann.Health & Safety Code, § 11500.

5. Searches and Seizures 🔑7(10)

In prosecution for possessing marijuana, evidence was insufficient to show that search of defendant's person was reasonable. West's Ann.Health & Safety Code, § 11500.

6. Poisons 🔑9

Evidence was not sufficient to sustain conviction for possession of marijuana. West's Ann.Health & Safety Code, § 11500.

7. Criminal Law 🔑394

Where officer has reasonable cause to make arrest, violation of statute providing that person making arrest must inform person arrested of cause of arrest does not render inadmissible evidence secured by search incident to arrest. West's Ann.Pen. Code, § 841; West's Ann.Health & Safety Code, § 11500.

8. Criminal Law 🔑303

Trial court had power to dismiss proceeding as to prior conviction in order to avoid sentence to state prison upon conviction for possession of marijuana. West's Ann.Pen.Code, § 1385.

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Allan L. Sapiro, San Francisco, for appellant,

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Arlo E. Smith, Deputy Atty. Gen., for respondent.

KAUFMAN, Justice.

This is an appeal from a judgment of conviction after trial by the court. Appellant Leon Harris was found guilty as charged of a violation of Section 11500, Health and Safety Code, possession of marijuana. The allegation of a prior conviction in the State of Texas for possession of narcotics was found to be true.

Appellant was found guilty on June 3, 1955, and on July 26, 1955, a motion for new trial was granted. The case was again tried by the court without a jury and appellant again found to be guilty as charged.

Leon Harris was arrested by Officer Giannini at approximately 2:15 or 2:20 a. m., April 17, 1955. Officers Giannini and Hess were on foot patrol duty when they observed appellant in the doorway of a liquor store at the corner of Fillmore and McAllister Streets. He was talking with another person, and every few moments would leave the doorway, look down the street and return to the doorway. The officers testified that he was acting very suspiciously.

Prior to this occasion, Officer Giannini had been told by an informant, that Harris was a known thief, that he was a possible booster, and dealt in narcotics. Giannini had first seen appellant about two months prior to the arrest, just walking around on the street talking to different people. About a month prior to the arrest he saw him sitting in an automobile talking to a known narcotic's addict, James Pitts. Within the next three weeks he observed appellant on the streets after midnight or after 2:00 a. m. Approximately one week before the arrest Giannini observed appellant standing on the corner of Ellis and Fillmore Streets at about 2:00 a. m., and asked him what he was doing out, and where he was working. Appellant said he was working in a hospital, that he was on his way home, that he wasn't doing a thing, that he was a working man. On this occasion the officer warned appellant that if he saw him at late and unusual hours again, he would be booked for vagrancy.

There was testimony by Officer Hess who accompanied Giannini, that there was a couple of minutes of conversation with appellant before he was placed under arrest. Hess was standing next to Giannini questioning other persons on the street near appellant. Hess said that when Giannini asked appellant what he was doing he answered that he was waiting for a friend, that he didn't know where his friend was, but that he was supposed to meet him on the corner. Shortly after the foregoing conversation, Giannini told appellant to take his hand out of his pocket as he had been keeping the left hand concealed. When he refused to do so Giannini grabbed his hand, reached in his pocket and found the marijuana cigarette.

Appellant testified that the officer when he approached him asked him where he was going and what he was doing. He told him that he had been at the Blue Mirror across the street and that he was on his way home. He said he had been on the corner talking to two fellows when the officers approached. Again appellant testified, "He didn't say anything; he didn't say anything; He begin to search me, you know, asked me what I was doing on the corner this hour of the night. I told him I just left the bar; I am going home. He said, 'Take your hands out of your pockets.' I had my hands in my pants pockets. He said 'Take your hands out of your pocket.' I take my hands out and he began searching me. Grabbed me here; I mean he didn't see a cigarette. I didn't see—he found one in my pocket." Appellant said the officer didn't tell him that he was under arrest, that he assumed that he had him on a vagrancy charge. Appellant admitted a prior contact with Officer Giannini, but said that he hadn't warned him not to loiter on the streets but had just asked him his name and where he was working. On cross-examination he admitted prior vagrancy arrests in 1954.

Officer Giannini testified that after he had placed appellant under arrest, intending to book him for vagrancy, he noticed that he was keeping his left hand in his pocket, and wanting to make sure as to whether or not he had a weapon, he ordered him to remove his hand from his pocket. When he refused, the officer pulled his hand from his pocket, reached in and found the marijuana cigarette. Appellant was taken to the station and booked as a vagrant and for violation of Section 11500, Health and Safety Code.

[1] It is urged by appellant that the marijuana cigarette was obtained by an unlawful search and seizure and was therefore inadmissible in evidence. A search of defendant's person may be justified if he was committing or attempting to commit an offense in the officer's presence. Penal Code, Sec. 836, subd. 1, or if the officer had reasonable cause to believe that defendant had committed a felony. Penal Code, § 836, subd. 5. Appellant maintains that there is no evidence that he was committing or attempting to commit a public offense in the officer's presence. He relies on People v. Simon, 45 Cal.2d 645, 651, 290 P.2d 531, which held that an arrest and search is not justified solely on the ground that defendant was seen at late and unusual hours. Here, appellant's answers to the question asked him showed that he was on lawful business, that he had been to a bar, that he was on his way home and was waiting for a friend. The other persons with whom appellant had been talking, were merely questioned by the officers and told to move on.

[2] In People v. Simon, supra, it is said that there is nothing unreasonable in the questioning of persons outdoors at night by police officers, and that under some circumstances a refusal to answer would in the light of other evidence justify an arrest. Here, appellant did not refuse to answer the questions, and gave answers concerning his presence on the street consistent with a lawful purpose. In People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17, it was held that while officers were justified in stopping the driver of an automobile and

questioning him because of the damaged condition of the vehicle, when the questioning elicited answers consistent with innocence no basis was established for arresting him and searching him and his car. The narcotics discovered in the search of the vehicle were held to be inadmissible in evidence. A search cannot be justified by what it produces. People v. Brown, 45 Cal.2d 640, 643, 290 P.2d 528; People v. Gale, 46 Cal.2d 253, 294 P.2d 13.

[3, 4] It appears that there was not reasonable cause for an arrest on a vagrancy charge at the time the officers crossed the street to where appellant was standing, for at that time they had observed him for only four or five minutes while he was standing in the corner entrance of a liquor store talking to another man at the intersection of McAllister and Fillmore Streets. It was then only a few minutes past closing time for the bars in the neighborhood. The court may take judicial notice of the fact that two municipal railway lines pass this corner. Appellant had twice left the entrance of the store on the corner of a well lighted street, looked down the street and returned to talk to the person in the doorway. Up to this point, then, there was no conduct to justify an arrest. He might have been looking for a bus, a taxi, or a person. Officer Giannini testified that "I decided as soon as I walked across the street I was going to book him for vagrancy" that the first words he said to appellant "may not have been 'you are under arrest' but within the first few sentences I did place him under arrest." If this evidence was uncontradicted in the record, then the case would appear to be similar to People v. Harvey, 142 Cal.App.2d 728, 299 P.2d 310, recently decided by this court in which the arrest was held to be unlawful, and hence the search incident thereto, unjustified. In that case, plain clothes officers who had information that defendant dealt in narcotics, hid behind a tree in the vicinity of his home. They observed him talking to another person who parked for awhile behind defendant's car and then drove off. They waited while he went into his apartment and came outside again with his hands in his pockets. He then walked back and forth on the street, looking up and down. It was about 8:30 at night. When defendant crossed the street, the officers accosted him, flashed their badges, told him he was under arrest. They ordered him to take his hands out of his pockets and he refused. A struggle ensued, and the officers found narcotics in a search of his person. It was argued that the fact that he kept his hands in his pockets was a suspicious circumstance, that the officers had a right to investigate a person on the street at night and that defendant's keeping his hands in his pockets was suspicious conduct justifying the officers in searching and seizing him. See People v. Martin, 46 Cal.2d 106, 293 P.2d 52; People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57. This court stated that the "difficulty with this argument is that the police officers were not interrogating the defendant, but by their own unqualified testimony they were arresting him." It was held that the demand to take his hands from his pockets was a step in his arrest which the officers had already determined upon, for they said to each other as they had approached him, "Let's place him into custody." They had no intention of interrogating him.

[5, 6] In the present case there is no substantial conflict as to what took place when the officers approached appellant. At one point Giannini testified that he intended to arrest appellant for vagrancy when he crossed the street toward him, and that he told him almost immediately that he was under arrest. Officer Hess who accompanied him, however, testified that there was a couple of minutes of conversation before the arrest in which Giannini was interrogating appellant. Appellant himself testified that he was questioned as to his reason for being where he was, and that he was ordered to take his hand from his pocket. We are of the view that the evidence is insufficient to show that the search was reasonable and that the judgment must be reversed on this ground.

[7] Appellant contends that the officers did not comply with section 841 of the Penal Code, requiring the person making the arrest to inform the person to be arrested of the reason therefor, except where defendant is engaged in the commission of or attempt to commit an offense. It has been held, however, that where the officer has reasonable cause to make the arrest, a violation of the above section is "unrelated and collateral to the securing of the evidence by a search incident to the arrest, for what the search turns up will in no way depend on whether the officer informed 'the person to be arrested of the intention to arrest him, of the cause of arrest, and the authority to make it'." People v. Maddox, 46 Cal.2d ——, 294 P.2d 6, 9.

[8] For the first time, on oral argument, counsel for appellant has directed the attention of this court to People v. Burke, 47 Cal.2d 45, 301 P.2d 241, decided by the Supreme Court on September 21, 1956, wherein it was held that the trial court has the power to strike or dismiss a proceeding as to a prior conviction under Penal Code, § 1385. The court may do this of its own motion.

The record herein shows that the trial court, having found the prior conviction of appellant to be true, was greatly disturbed because he was unable to grant appellant probation. He stated that the law had made it mandatory that he sentence appellant to State Prison, that he had no alternative, and that he could only recommend to the Adult Authority a minimum sentence, and the earliest parole.

The transcript shows that the trial judge was in error in concluding that he had no alternative except to sentence appellant to State Prison. He apparently was not aware of the power to dismiss the prior conviction in order to avoid that sentence. Since the Supreme Court in People v. Burke, supra, has now made the law clear in this respect, the trial court in future cases will not fall into this error at the time of sentence.

Judgment reversed.

DOOLING, Acting P. J., and DRAPER, J. pro tem., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

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146 Cal.App.2d 868

Louis L. COLLINS and Jean M. Collins, his wife, Plaintiffs and Respondents,

v.

Henry G. KOBOLD and Ferne E. Kobold, his wife, Defendants and Appellants.

Civ. 17027.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1956.

Action by tenants against landlords for landlords' failure to disclose a material fact as to realty leased under written lease containing an option to purchase. The Superior Court, Contra Costa County, Norman A. Gregg, J., entered judgment for tenants, and landlords appealed. The District Court of Appeal, Agee, J. pro tem., held that measure of damages would be difference between rent called for unde lease and the reasonable rental for full term of lease.

Judgment modified and, as modified, affirmed.

1. Fraud ⚷**31**

Tenants would have right of action for landlords' failure to disclose defects of which landlords had knowledge, at time of execution of lease covering house and other buildings concerning use of leased house as a residence, and tenants could elect to stand on the contract and sue for damages.

2. Landlord and Tenant ⚿97

Where lease contained option to purchase the leased premises, effect of tenants' valid exercise of such option would be to terminate the lease and create a contract of sale as of date of such exercise.

3. Fraud ⚿59(3)

In action for fraud and deceit in execution of a three year lease at $55 per month rental on ground that reasonable rental was only $25 per month, proper measure of damages would be difference between such amounts for full term of lease.

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Matthew S. Walker, Martinez, for appellants.

John L. Garaventa, Concord, for respondents.

AGEE, Justice pro tem.

Defendants appeal from a judgment awarding damages to plaintiffs for a failure to disclose a material fact as to real property leased by them to plaintiffs under a written lease containing an option to purchase.

The property consists of approximately one acre and is located on Port Chicago Highway near the Town of Concord, Contra Costa County. Appellants bought it in December, 1948. It had no buildings on it at that time. Thereafter appellant Kobold constructed a house and a few buildings on the property and had one small building moved on. No permit was ever obtained for any of the building operations.

In March, 1952, Kobold sold the property to one Cooper under a contract of sale. Cooper did not keep up the payments required and reassigned his interest to Kobold in January, 1953. During the time he was on the property. Cooper constructed an additional room onto the house. In January or February, 1953, one Olsen, a deputy building inspector of Contra Costa County, told Kobold that Cooper had left the house in a bad condition and not in accordance with the building code. He stated that he had ordered any further work stopped and had cited Cooper to appear before the District Attorney. He further told Kobold that the original part of the house, which Kobold had constructed, was "absolutely far below code, * * *. There was no plumbing in it; the electric work was not even electric work that was inside." Olsen testified to many other defects and stated that it would cost more to rectify them than the house then would be worth. However, he did not tell this to Kobold at that time.

In March, 1953, Kobold listed the property for sale with one Nichols, a real estate broker. On April 18, 1953, appellant Collins went into Nichols' office and stated he was looking for a suitable place to live and operate a nursery. Nichols showed him the property. The doors of the house were locked and they were unable to view the inside. Collins and Nichols then returned to the latter's office and Collins made an offer to lease for three years at a rental of $55 per month, with an option to purchase at any time during such period for $5,500. This was put into a printed form lease which contained the standard provision as to the use of the premises. As completed, this clause read as follows: "That lessee shall use the premises for * * * Residence and Nursery * * * and for no other purpose * * *." Respondents signed the lease as prepared and Nichols took it to Kobold. Kobold read it over and he and his wife signed their acceptance. He said nothing to Nichols or to respondents about the condition of the house, despite his knowledge that one of the two uses of the premises was to be as a "residence."

On May 19, 1953, respondents arrived at the property, ready to take over its occupancy. They discovered that the house had been officially condemned as being unfit for human habitation. This knowledge was first acquired through two signs which had been posted on the house the day before by the authorities, each reciting "Unsafe" and "Do Not Enter."

Respondents nevertheless went ahead and took over possession of the premises.

They rented quarters nearby for $30 per month and later rented a trailer in which they lived and which was parked on the property. This action for damages followed.

The trial court found that the house had been built in violation of the existing ordinances of the County of Contra Costa and without the permits or inspection required by law; that the house was wholly unsafe and unfit for human habitation and could not be lawfully occupied for such purpose; that appellants knowingly concealed this from respondents and respondents did not learn thereof until May 19, 1953, the day upon which they entered into possession under the lease; that respondents could not have by exercising reasonable care and diligence discovered these facts; that a material consideration to respondents for the entering into of the lease was their use of the house as a residence.

[1] There can be no question that respondents have a right of action for appellants' failure to disclose the defects which they had knowledge of concerning the use of the house as a residence. See Milmoe v. Dixon, 101 Cal.App.2d 257, 225 P.2d 273; Barder v. McClung, 93 Cal.App.2d 692, 209 P.2d 808; Unger v. Campau, 142 Cal.App.2d 722, 298 P.2d 891. They can elect to stand on the contract and sue for damages. Rothstein v. Janss Investment Corp., 45 Cal.App.2d 64, 69, 113 P.2d 465; 12 Cal.Jur. 781, 782; Bagdasarian v. Gragnon, 31 Cal.2d 744, 192 P.2d 935.

Here, both Collins and Nichols testified that the reasonable value of the property, if the house had been inhabitable, was $5,500, but that, because the house had to be demolished and removed, the property was worth only $2,500. They also testified that the reasonable rental value of the property, if the house was inhabitable, was $55 per month and that, without the house, it was $25 per month.

The trial court reached the conclusion that respondents were entitled to damages in the sum of $3,000 less unpaid rental at $25 per month for the period up to November 30, 1954. The trial court computed the total rental up to November 30, 1954, at $25 per month, as being $509.63 and gave credit for the $385 paid by respondents, leaving a balance of $124.63. This amount was deducted from $3,000, leaving a balance of $2,875.37, and judgment was rendered in favor of respondents in this amount.

The action was tried in one day, November 9, 1954. At the end of the trial the judge suggested that respondents should exercise their option to purchase and that in order to do so they need tender only the difference between the option price, $5,500, and the judgment which he intended to render in their favor.

In a memorandum decision dated December 17, 1954, the trial judge states that on November 30, 1954, respondents exercised their option to purchase. There is nothing in the record to support this statement and apparently the judge was advised of this fact informally.

[2] While the lease was pleaded in haec verba in the complaint and the lease contains the option clause, there is otherwise nothing in the pleadings to indicate that this clause was in any way involved in the issues. If respondents did exercise the option validly, the effect would be to terminate the lease and create a contract of sale as of the date of such exercise. State v. Agostini, 139 Cal.App.2d 909, 914, 294 P.2d 769; Murfee v. Porter, 96 Cal.App.2d 9, 18, 214 P.2d 543. This would probably explain the trial court's computation of rental up to but not beyond November 30, 1954. Another effect of the exercise of the option, if done on November 30, 1954, might well be a waiver by respondents of all damages for fraud and deceit because by that time they were fully aware of the condition of the property. Schied v. Bodinson Mfg. Co., 79 Cal.App.2d 134, 142, 179 P.2d 380.

[3] However, whatever rights or issues arose upon the attempted exercise of the option on November 30, 1954, should be made the subject of supplemental pleadings or a new action. California Farm and

Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 742, 91 P. 593; Yager v. Yager, 7 Cal.2d 213, 217, 60 P.2d 422, 106 A.L.R. 664. The situation at the conclusion of the trial on November 9, 1954, was that the trial court had before it an action for damages for fraud and deceit in the execution of a lease for 3 years at $55 per month rental when the reasonable rental was only $25 per month. Under such circumstances the measure of damages is for the difference between these amounts for the full term of the lease. Noble v. Tweedy, 90 Cal.App.2d 738, 203 P.2d 778. The lease called for a total rental of $1,980. The reasonable rental was $900. The difference is $1,080, which is the amount of damages sustained. This, of course, is upon the premise that the respondents have elected to stand upon the lease and are therefore bound to pay the agreed rental.

The foregoing method of computing damages was followed in Noble v. Tweedy, supra. There the defendants leased certain real property to plaintiffs to be used as a bowling recreation center. Defendants agreed to erect a building thereon according to certain plans and specifications. The rental was for $500 per month and the term was for ten years. Defendants did not complete the building as required by their contract but plaintiffs moved in anyway and within a few months thereafter sued for damages. The testimony was that the reasonable rental value of the property, if the building had been completed according to specifications, was $500 per month but that it was only $425 per month "as is." The trial court computed damages at $75 per month for the entire ten years. Despite the fact that plaintiffs' complaint alleged loss of profits, loss of earnings, prepaid rent, cost of equipment, etc., and there was no allegation as to the difference in rental value of the building as agreed to be constructed and as actually constructed, the court said, 90 Cal.App.2d at page 743, 203 P.2d at page 781: "The authorities uniformly hold that a proper measure of the tenant's general damages for a breach of the landlord's covenant to construct or repair is the difference between the reasonable rental value of the premises 'as is' and as contracted to be. [Citing numerous authorities.]" In the instant case the appellants contracted in the lease to provide "a residence" for respondents and in this there was a complete failure to perform. It follows that in an action for damages on the lease the method of computing damages as outlined above is the proper one.

The record shows that, up to the time of trial, respondents had paid to appellants a total sum of $385 as rent. This would satisfy the rent for the first seven months of the term of the lease, which commenced on May 15, 1953. The trial was held on November 9, 1954, and by that time an additional eleven months, or $605, had accrued. This amount should have been allowed as an offset to the damage award. Accordingly, the judgment should have been for $1,080 minus $605, or $475.

We wish to state that we are not passing upon the legal effect of whatever it was that respondents did after the trial concerning the option. The undisputed testimony is that the property was worth $5,500 if the house had been inhabitable. Respondents had an option to purchase for that same amount. It may be that the reason why respondents did not contend at the trial for any damages based upon the option was because of this. If the option price had been for less than $5,500, then respondents would undoubtedly have contended for the difference between $5,500 and the option price as an additional item of damages.

The judgment is modified by reducing the amount thereof to $475, and, as so modified, affirmed in all other respects. The parties are to bear their own respective costs on appeal.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

146 Cal.App.2d 800

HOLBROOK & TARR, a co-partnership, consisting of Leslie R. Tarr and W. Sumner Holbrook, Jr., and Freda B. Walbrecht, Plaintiffs and Respondents,

v.

Walter P. THOMSON, Defendant and Appellant.

Civ. 21866.

District Court of Appeal, Second District, Division 1, California.

Dec. 14, 1956.

Action to recover attorneys' fees. The Superior Court of Los Angeles County, Wallace L. Ware, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, White, P. J., held that defendant had waived right to trial by jury and that record did not disclose any abuse of discretion by trial court in denying his motion to be relieved of his neglect in failing to make timely demand for jury trial.

Judgment affirmed.

1. Jury ⚷25(6)

In action to recover attorneys' fees, defendant's right to jury trial was waived, where no demand for jury trial was made until months after action had been set for trial without a jury. West's Ann.Code Civ.Proc., § 631; West's Ann.Const. art. 1, § 7.

2. Appeal and Error ⚷1031(1)

Prejudice cannot be presumed from the fact that case was tried before a judge instead of jury.

3. Appeal and Error ⚷964

Denial of defendant's motion to be relieved of his neglect in waiving trial by jury cannot be disturbed on appeal unless it is established that defendant made timely application to be relieved of such neglect and that trial court grossly abused its discretion in denying such application. West's Ann.Code Civ.Proc., § 631; West's Ann.Const. art. 1, § 7.

4. Jury ⚷25(11)

Record on appeal from judgment for attorneys' fees disclosed no abuse of discretion by trial court in denying defendant's motion to be relieved of his neglect in failing to make timely demand for trial by jury. West's Ann.Code Civ.Proc., § 631; West's Ann.Const. art. 1, § 7.

◆

Walter P. Thomson, in pro. per., for appellant.

Holbrook, Tarr, Carter & O'Neill, and Freda B. Walbrecht, Los Angeles, for respondents.

WHITE, Presiding Justice.

Defendant appeals from a judgment requiring him to pay $3,250 to his attorneys for work done by them for him from 1950 to 1954 in the case of Crowley v. Thomson, No. 579,764 in the Superior Court of Los Angeles County, in representing him as defendant and cross-complainant. They represented him from the time of service of the complaint upon him, through the trial, motions for new trial, appeals to the District Court of Appeal and the Supreme Court, tried the case again in the Superior Court, and collected the judgment in his favor.

The only ground for reversal urged by appellant upon this appeal is that the court was in error in denying him a jury trial. Large portions of the briefs are discussions of matters outside the record. The following is a fair summary of the record on the instant appeal.

Hildebrand, Bills & McLeod represented appellant by filing and arguing his demurrer to the complaint, filing his answer December 23, 1954, by filing on July 6, 1955, his "Notice of Motion for Demand for Jury Trial", together with an affidavit of Sheridan Downey, Jr. "That he is one of the attorneys for the defendant in the above entitled matter; that the attorneys for defendant maintain two offices, one in the City of Oakland and one in the City of Los Angeles; that the matter of demanding a jury, payment of jury fees, and setting of this case is handled through the office in Oakland; that there has been a change in calendar clerks in the Oakland office, and that due to the great number of cases being handled by that office, and due to the change-over from one clerk to another, through inadvertence and mistake demand for a jury trial was overlooked, and no demand for a jury has been filed in the above action." Said attorneys also appeared for defendant at the hearing of the motion, which was denied July 26, 1955.

Defendant, representing himself in pro. per., appeared at the trial September 7, 1955, filed objections to the findings September 23, 1955, filed notice of intention to move for a new trial October 5, 1955.

The record also contains a substitution of Thomas G. Baggott, as attorney for plaintiff, dated November 1, 1955, signed by defendant but not showing the consent of said attorney.

An affidavit of defendant filed November 7, 1955, contains averments that when defendant's then attorney was preparing his answer defendant told his said attorney that he wanted a jury trial and the attorney, "in defendant's presence, instructed his calendar clerk to demand a jury trial for him * * * that failure to make timely demand for jury trial was not the fault of the defendant and prevented defendant from having a fair and impartial hearing of his cause".

Defendant's motion for new trial was made for him by attorneys Vaughn & Brandlin, by John Howard, and was denied November 7, 1955.

Defendant, in pro. per., filed notice of appeal and notice to prepare reporter's and clerk's transcripts for appeal on December 6 and 15, 1955, respectively; and on March 26, 1956, amended notice to clerk to "delete entirely from the original notice the request for reporter's transcript" and to "prepare transcript of the following named records only * * *".

November 26, 1956, Arthur S. Loveland was substituted as attorney for defendant, and November 27, 1956, an affidavit of Clifton Hildebrand, was filed in this court at the time of oral argument. Said affidavit reads as follows:

> "That he is an attorney at law and many months ago was consulted by a prospective client, to wit defendant, Walter P. Thomson, with reference to representing him in the above entitled cause. That your affiant agreed to represent the defendant and further specifically agreed that a jury trial was advisable and that he would take the necessary steps to secure a jury trial. That due to inadvertence and mistake and the fact that the calendar clerk in your affiant's Oakland office suddenly left her position, a timely request for jury was not made. Your affiant further states that defendant personally asked affiant that a jury trial be had and that it is no part of defendant's fault that a jury was not properly requested."

[1] From the affidavits of defendant and his attorneys, Sheridan Downey, Jr., and Clifton Hildebrand, it appears without conflict that no demand for jury trial was made until months after the action had been set for trial without a jury. It is not suggested that any act or omission of the plaintiffs caused defendant's failure to demand a jury. Nor is there anything in the record before us to indicate that the trial of the action was not fair to the defendant in every respect. No instances of unfair treatment or erroneous rulings by the trial judge are cited. Clearly it was not any error or abuse of discretion on the part of the court which prevented appellant's having a trial by jury. Appellant's right to jury trial was waived by him under the provisions of Section 631 of the Code of Civil Procedure.

[2] Prejudice cannot be presumed from the fact that appellant's case was tried before a judge instead of a jury. On the contrary, it is presumed that the trial was fair and impartial. Harmon v. Hopkins, 116 Cal.App. 184, 188, 2 P.2d 540; Glogau v. Hagan, 107 Cal.App.2d 313, 318, 237 P.2d 329.

Appellant urges that the court was without power to deny him a jury trial in spite of his failure to make timely demand. He cites in support of that claim the California Constitution, Article I, § 7; Hertter v. Addis, 89 Cal.App. 160, 165, 265 P. 298; and Cowlin v. Pringle, 46 Cal.App.2d 472, 476, 116 P.2d 109.

In the Hertter case, supra, 89 Cal.App. at page 164, 265 P. at page 300, it is said that Article I, § 7, of the Constitution gives to the Legislature the sole power to declare "'what shall constitute a waiver of trial by jury'"; that the power has been exercised "'by the enactment of section 631 of the Code of Civil Procedure'"; and that it was "apparent that appellants' rights to a trial by jury were not waived in any of the manners provided by the section * *". In the instant action, it is not disputed that there was a waiver under the provisions of said section.

Cowlin v. Pringle, 46 Cal.App.2d 472, 476, 116 P.2d 109, 111, is easily distinguished from the instant action. There the action was partially tried before a jury demanded and partially paid for by a party other than appellant or respondent. The party who had so demanded and paid for the jury was granted a nonsuit. Appellant (plaintiff) then demanded that the trial continue before the jury and paid the balance of the fees of the jury. The trial proceeded before the jury until all the evidence was in, then the jury was dismissed upon motion of respondent (defendant), appellant's motion for a mistrial was denied, and the court alone heard the arguments, made findings, conclusions and judgment. On appeal the judgment was reversed and it was held that where the jury fees had been paid by one party it was not necessary for the other "to also tender another jury fee for the first day of trial".

[3] In the instant action, the motion of appellant to be relieved of his neglect in waiving trial by jury was denied by the trial court in the exercise of its discretion. On appeal appellant cannot obtain such relief unless it is established that he made timely application to be so relieved and that the trial court grossly abused its discretion by denying his application. Glogau v. Hagan, 107 Cal.App.2d 313, 318, 237 P.2d 329, and cases there cited.

[4] The record on the appeal now engaging our attention shows no abuse of discretion.

The judgment is affirmed.

DORAN and FOURT, JJ., concur.

146 Cal.App.2d 732

Julius PROTZ, also known as J. Protz, and John McFarland, Plaintiffs and Appellants,

v.

Lewis E. REYNOLDS and Burnlece W. Reynolds, his wife, et al., Defendants and Respondents.

Civ. 8848.

District Court of Appeal, Third District, California.

Dec. 12, 1956.

Rehearing Denied Jan. 8, 1957.

Hearing Denied Feb. 6, 1957.

Suit for damages and injunctive relief against defendants who had allegedly caused flooding of public road running through defendants' lands and furnishing only means of access to plaintiffs' property. The Superior Court, Butte County, Dudley G. McGregor, J., rendered judgment adverse to plaintiffs, and they appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that drainage provided by defendants constituted an improvement over the previously existing situation and that plaintiffs had not been damaged.

Affirmed.

1. Highways ⚷87

In suit for damages and injunctive relief against defendants who had allegedly caused flooding of public road running through defendants' lands and furnishing only means of access to plaintiffs' property, evidence sustained finding that drainage provided by defendants constituted an improvement over the previously existing situation and that plaintiffs had not been damaged.

2. Injunction ⚷13

Mere technical invasion of right does not compel issuance of injunction where, in judgment of chancellor, same is not necessary to protect such right.

◆

Laughlin, McKalson & Crable, Chico, for appellant.

Millington & Millington, Gridley, for respondent.

SCHOTTKY, Justice.

Julius Protz, as owner, and John McFarland, as tenant, of 55 acres of land, commenced an action for an injunction and damages against Lewis E. Reynolds, his wife, Burniece, and their son, Jere, all of whom are owners of land adjoining that of the plaintiffs. Muller Lane, a public road approximately one-half mile in length, runs in a generally northerly and southerly direction from Watson Road on the north to the northerly line of the Protz property, and the southerly boundary line of the real property owned by defendants Reynolds as its southerly terminus. The lane is entirely bounded on the east by the properties of the Reynoldses and is also bounded on the west by properties owned by Jere Reynolds, for a portion of its course, from a point on its southerly terminus northerly approximately 700 feet to the northerly boundary of the land owned by defendants Reynolds lying on the west side of said lane. The latter land is designated the Reynolds west 20 acres and the former land includes a corresponding Reynolds east 20 acres which is directly opposite on the east side of the lane. The remaining land which borders the lane on the west is occupied by one Raynor.

In 1947 Reynolds leveled the east 20. In 1949 he leveled the west 20. In leveling the west 20 he leveled it to drain from east to west. In order to irrigate this parcel be constructed a pad or mound of earth along the entire east end of the west 20 on the top of which he ran his irrigation ditch.

On April 28, 1950, Protz and McFarland filed this action against the Reynoldses, in which among other things they alleged (1) that in leveling the west 20, and in constructing the ditch pad along the east end of the west 20 the defendants had caused flooding of the lane by cutting off the natural drain which had theretofore run through the northeast corner of the west 20 (the plaintiffs claimed damages for the flooding of the lane, which was the only means of access to the Protz property, and sought an injunction to enjoin further damming of waters in the lane); (2) that in leveling the west 20 the defendants had filled in another natural drain which ran from a low spot around the Protz buildings northwesterly across the west 20 and across the northeast corner of the Reynolds far west 90 acres, through Gosselin's property and into the drain running under the Sutter-Butte Canal far to the west.

The defendants cross-complained, alleging (1) that in 1947 Protz had put in a fill on the east end of the Protz property which stopped a natural drain which ran along the east edge of the large parcel on the east of the lane belonging to the Reynoldses and which continued along the Protz easterly line, and down through Butte Farms to the south; and (2) that Protz had let his irrigation water escape from the southwest corner of his property onto the southerly part of the Reynolds far west 90 acres. Reynolds claimed damages against Protz and asked for an injunction in respect to the Protz irrigation water, and for damages and an injunction in respect to the damming of the natural drain on the east.

The court rendered judgment, (1) that plaintiff Protz be authorized to connect the low spot on Muller Lane with the Raynor drain at his own expense; (2) that plaintiff McFarland recover $300 damages from defendants Reynolds; (3) that plaintiff Protz open up the swale along the east boundary of his property so that said swale would take care of the natural rainfall and surplus waters arising on the lands of defendants Reynolds; (4) that plaintiff Protz be enjoined from permitting his surplus irrigation and artificial waters to flow across the lands of defendants Reynolds; (5) that plaintiff Protz be authorized to connect the so-called pothole lying west of his barn with the drain of defendants Reynolds; (6) that plaintiff Protz have judgment for $300 against defendants Reynolds for damages caused by inconvenience in blocking off a portion of the drainage of said Muller Lane; (7) that defendants Reynolds have judgment against plaintiff Protz for $600 for damages to trees on the easterly portion of their land due to the filling in of the swale, and the further sum of $500 for damages to their lands lying westerly of the land of plaintiff Protz.

Plaintiffs Protz and McFarland have appealed from the judgment and attack the findings, contending that they are in many respects contradictory, inconsistent, ambiguous, and unsupported by the evidence. Appellants argue that if the court found that the defendants, in leveling the west 20 obstructed the drainage from the lane, and if the court found that this obstruction damaged the plaintiff Julius Protz, and that the defendants should be compelled to provide drainage in the future, then as a conclusion of law it would follow that Protz is entitled to an injunction compelling Reynolds to restore the drainage in such a manner as to carry the water off of the lane and enjoining Reynolds from further interference with the drainage. However, the finding of the court as to this issue was as follows:

"That it is true that there was drainage in a westerly direction from the lane over a portion of the lands of defendants, when the land was in its original, natural condition; that this original drainage was not adequate to flooding conditions, but did relieve such flooding conditions to a considerable extent; that the plaintiffs in leveling the west twenty-acre piece of their said land, did obstruct this drainage for three winter seasons until the summer of 1952, but that the defendants then provided an outlet for the drainage water from the ditch on the westerly side of the land into the Raynor ditch, and should be compelled to provide in the future for such outlet, through said Raynor ditch, but the maintenance of the said ditch on the westerly side of said lane, and the connection therewith the Raynor drainage ditch should not be an obligation of the defendants. That the Winter season of 1949–50, 1950–51, and 1951–52, were exceptionally wet years, and, had the original natural drainage been in existence, there would still have been flooding of the said road for considerable periods of time; that the damage claimed by the plaintiff in this connection are out of all proportion to the facts of the case, and that the plaintiffs were not damaged in their business and use of their property, except to a minor extent amounting to inconvenience, by the actions of the defendants, and that the plaintiffs should be allowed no more than nominal damages for said inconvenience."

[1,2] The record supports this finding and the conclusion of the trial judge, who viewed the properties involved, that the drainage provided by the defendants through the Raynor ditch was an improvement over the previously existing situation and did not damage plaintiffs. It must be borne in mind that this was an equitable proceeding and that in such an action the mere technical invasion of

a right does not compel the issuance of an injunction where in the judgment of the chancellor it is not necessary to protect that right. As was stated in the case of Wright v. Best, 19 Cal.2d 368, at page 386, 121 P.2d 702, at page 713:

> "* * * Despite a proper showing in other respects of a right to injunctive aid, if a plaintiff is merely seeking to protect a technical and unsubstantial right, and the issuance of the injunction will bring no actual advantage, it may be properly refused where to do otherwise would result in unusual hardship to the defendant or the public."

And as stated in Clough v. W. H. Healy Co., 53 Cal.App. 397, at page 400, 200 P. 378, at page 379:

> "* * * Mandatory injunctions have been awarded directing that a closed or obstructed way be cleared and opened for the owner; but it is not in every case of a permanent obstruction that such relief will be granted. Each case is determined according to the particular circumstances; and it rests in the sound discretion of the court whether or not a mandatory injunction will issue. To entitle the complainant to equitable relief the right must be clear, and an injunction of the character here in question will be denied when the obstruction does not constitute a material interference with the right of the owner of the easement, or where the damage sustained by him is merely nominal."

Also applicable to the instant case is the following statement from Frost v. City of Los Angeles, 181 Cal. 22, at page 32, 183 P. 342, at page 346, 6 A.L.R. 468:

> "In this case the right of the plaintiff, such as it is, is wholly technical and unsubstantial, and to enforce it would produce very great mischief, both public and private, not only to himself, but to many of his fellow citizens within the city, and to the municipality as well. The court in its discretion was fully authorized to deny the injunction under such circumstances."

With the foregoing well settled principle in mind and in view of the situation as shown by the record in this case we are unable to agree with appellants that they were entitled to an injunction restoring the drainage to its former condition.

Appellants also argue that the findings are inconsistent in that, whereas, on one hand the court found that in leveling the west 20 the defendants did obstruct drainage from the lane, on the other hand the court found: "That it is not true that in the leveling of said lands by defendants that the defendants caused the surface of the lands of defendants immediatelv adjacent to said lane on the easterly side thereof, to be elevated approximately one to two and one-half feet above the traveled surface of said lane, or that any act of these defendants caused said lane to become a receptacle for the collection of surface waters and/or storm waters, caused by rainfall falling on the lands of the defendants adjacent to the Easterly side of said lane, but on the contrary it is true that the defendant hauled dirt and gravel into said lane and raised the surface elevation of said lane at all low points, and that the relation of elevation of the lands of defendants to said lane, was such that after the filling by the defendants of dirt and gravel that the lane was raised to a higher point than it had been previously, and that said lane at the point where said culvert existed was raised to such a degree that it became higher than the surrounding land." Appellants also contend that the finding that the defendants raised the surface elevation of the lane where it became higher than the surrounding land is against the evidence in that the exhibits show otherwise. Further, appellants contend, a finding that no act of the defendants caused the land to become a receptacle for the collection of surface waters and/or storm waters is indisputably denied by the exhibits. Appellants allege further inconsistencies in Finding X in that the court found that the defendants did nothing wrongful in leveling their lands, but in the same sentence found that the defendants did interfere with natural drainage, that the court found that the defendants interfered with natural drainage and then found that "there were no complete natural drains or watercourses on said westerly portion of said defendants' lands," and that the court found that the defendants did not cause the land on the westerly side to be raised over the surface of the lane, which is shown by the evidence to be to the contrary.

However, a reading of the findings attacked by the appellants, and particularly Finding X, fails to support the construction placed upon it by appellants. Finding X reads in part: "* * * it is not true that the land on the westerly side of said lane was caused by defendants to become a levy or that any act of theirs prevented surface and/or storm waters caused by natural flowing into said lane from the lands of defendants or otherwise to flow in a westerly direction, excepting that the leveling of said land did prevent the flowing of excessive waters that fell in times of heavy precipitation from flowing westward, but did no interference with normal precipitations or the drainage of said lane from such normal precipitation; that no act of defendants caused said lane to become a receptacle for the collection of surface waters, without drainage, but only prevented the drainage of large amounts of water in a period of excessive rainfall. * * *" On the same page, the court further found that by reason of the leveling of the lands to the west it was true that in times of abnormal precipitation in December, 1949, and January, 1950, water did become impounded on said lane, and the court further found the lane was not impassable to vehicular traffic, but rather found that the plaintiffs were merely inconvenienced for a brief period of time during that one season for which the court awarded $300 to each plaintiff. The court further stated in Finding XV that: "* * * a portion of the water that fell on said lane during periods of extreme precipitation was delayed in running off," and goes on to find: "* * * but that said matter of drainage of said road has now been entirely corrected by the construction of the so-called Raynor drain. * * *"

In support of the findings the record shows that several witnesses testified that the condition of the lane was better since Reynolds worked on it and there were only the normal puddles that followed a heavy rain. There was also testimony of Jere Reynolds, one of the respondents, that he built a drain that connected the Toe ditch on the side of the road to the Raynor drain and that the drainage now on the road is better than ever before. He further testified that there was no natural drainage to the west from the road. A former owner, Henry Muller, also testified that there was no drainage to the west. Ed Raynor testified that there was a culvert on the road that drains the water from the road into the Raynor drain. He also testified that there was no objection to draining the road water into the drain which first crosses Reynolds' land to the final outlet. He further stated that the drain which flows over his land and Reynolds' land was there for anyone's use.

Appellants contend also that upon the issue of the flooding around the Protz buildings the findings are contradictory and unsupported by the evidence and that the conclusions of law are not correctly drawn from the findings. Finding II on the fourth cause of action finds that there was no such natural drain running from the low spot around the Protz buildings across the west 20 and that in the leveling of the west 20 no natural drain was interfered with and no surface waters and/or storm waters caused by rainfall on the Protz land flowed over and/or across the west 20, "but it is true that there were a series of potholes" that in times of excessive rainfall some of the rainfall passed over the top of the barriers between potholes, and to some extent took off natural waters. Appellants complain that although the finding recognizes that the leveling blocked off drainage from this area when there were "sufficiently heavy rains" the court, in the same paragraph, finds "That it is not true that the leveling of said lands by defendants has been and/or is a nuisance * * *" and appellants submit that as a matter of law, the blocking off of natural drainage to the injury of another constitutes a nuisance, and thus that appellants are entitled to an injunction requiring Reynolds to correct the situation, not merely the following judgment: "* * that * * * Protz * * * is * * * authorized to connect the so-called pothole lying west of his said barn, with the drain of the defendants * * * at the cost and expense of the plaintiff. * * *" Appellants further contend that the finding as to the nonexistence of a drain from the low spot west of the Protz buildings across the west 20 prior to the leveling is wholly against the evidence as shown by the exhibits.

However, a reading of the finding attacked by appellants fails to support the construction placed upon it by the appellants. The court found that the pothole had *no* drainage except when excessive rainfall overflowed its banks. It would thus seem that appellants were given more than they were entitled to when the court authorized Protz to connect this pothole with the drain over the Reynolds land, but respondents agree to take this drainage.

There was also testimony of Henry Muller, Jere Reynolds, Walter Gosselin and Ed Raynor to the effect that the pothole back of the Protz house was always under water after a rain and that there was no natural drainage to the west. It would appear, therefore, that appellants' claimed exhibits to the contrary at most merely raise a conflict in the evidence which has been decided in respondents' favor upon sufficient evidence.

Appellants attack other findings, but as in the case of the findings hereinbefore discussed there is ample support in the record for such findings. Appellants have ably marshalled the evidence in support of their contentions but have failed to give due consideration to the evidence in conflict therewith.

Appellants contend also that the court erred in excluding evidence of the changes made in the lands below the Protz land when the court did not require Jere Reynolds to answer the question: "Q. Do you know if the land that lies on down south of Butte Farms has a slough through them so water will drain from your father's property here * * *." However, the record shows that Jere Reynolds had already answered that question just previously.

"Q. Now do you know, Mr. Reynolds, what would have happened if Protz took this fill out here as far as water collecting on the Butte Farms and Protz's land along in here is concerned, do you know what would happen to it? A. Sure, it would run right out.

"Q. It would run right on out? A. Sure, you go down to Butte Farms, they leveled it a few years back, you go down there today and they know what happened up here, and they keep it cut down—they dug a deeper drain and that water has to go on, and the people down below here opened a drain there too, and it goes on down here, almost the original depth of that slough (indicating)."

No other contentions made require discussion.

A careful reading of the record convinces us that the trial court as a court of equity was faced with the difficult problem of working out a solution of the various problems presented by the pleadings in the instant case, and that the court endeavored to and did render a judgment that is not only amply supported by the evidence and the law, but is a judgment that is in the best interest of all parties to the action.

We are satisfied that the amount of damages awarded appellants is adequate to compensate them for any damage they may have sustained by reason of the acts of respondents and that the judgment of the court provides for an improved method for the drainage of the lane and also of the lands of the parties. To hold that appellants are entitled to an injunction under such circumstances would be unrealistic and contrary to the principles of equity.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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146 Cal.App.2d 698

Jack M. BROWN et al., Plaintiffs and Respondents,

v.

Frank M. JEROME et al., Defendants and Appellants.

Civ. 21922.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1956.

As Modified on Denial of Rehearing Jan. 3, 1957.

Hearing Denied Feb. 6, 1957.

Action by purchasers of land for return of down payment and damages for anticipatory breach. The Superior Court of Los Angeles County, Frederick F. Houser, J., rendered judgment for plaintiffs and defendants appealed. The District Court of Appeal, Doran, J., held that evidence supported trial court's findings.

Affirmed.

1. Appeal and Error 🔑1011(1)

Appellate court will not disturb a disputed finding where record discloses any substantial evidence in support thereof, and will not attempt to weigh or re-evaluate the evidence.

2. Vendor and Purchaser 🔑341(3)

Evidence authorized recovery by purchasers of land of down payment together with damages for breach of contract on ground that vendors waived time limit in contract and were guilty of anticipatory breach.

3. Vendor and Purchaser 🔑57

A contract for sale of land, providing for down payment which would be returned if purchasers should have entered into contract for construction of building on land before specified time, but otherwise could be retained by vendors, did not merely give purchasers an option to purchase together with right to occupy land during option period for agreed consideration of $10,000.

4. Vendor and Purchaser 🔑322

Where contract for sale of land merely provided that if purchasers should produce offal on the land it should be sold to vendors, purchasers were not required to produce offal and hence vendors were not entitled to damages for loss of offal in absence of showing that offal was not available elsewhere.

5. Appeal and Error 🔑1012(1)

Proof of purchasers' ability to perform contract for sale of land by constructing improvements, which would cost more than their own resources, related to weight of evidence and was not open to appellate review in view of evidence that purchasers had access to additional funds from a brother.

Macbeth & Ford, Norman Macbeth, Moira D. Ford, Los Angeles, for appellants.

Henry A. Fox, Los Angeles, for respondents.

DORAN, Justice.

As stated in the appellants' brief, "There is remarkably little dispute about the facts in this case". On September 15, 1954, the parties entered into a written agreement whereby appellants Jerome agreed to sell and respondents agreed to buy certain unimproved land at a price of $1.25 per square foot, or a total of $27,630, payable in four annual installments commencing

May 1, 1955, conveyance of the land to be made on final payment.

Paragraph 6 of the agreement, reads as follows:

"6. Security. Immediately upon the execution hereof, Purchasers shall pay $10,000 to Sellers. If, on or before February 1, 1955, Purchasers have entered into a contract for the construction on said land of a building containing approximately 5,000 square feet of floor space and the second foundation of such building is formed in and ready for the pouring of concrete, Sellers shall return such $10,000 to Purchasers; but, if this does not occur, Sellers may retain such $10,000 and the rights and obligations of both parties hereto shall immediately terminate".

Paragraph 9 provided that purchaser should do no rendering on the land for a period of 20 years. Paragraph 10 provided that the purchasers would sell to appellant Baker Rendering Corporation all offal produced by purchasers at the slaughter house on packing plant to be erected by purchasers on said land.

The purchasers took possession of the land, proceeded to have plans drawn, and on December 27, 1954, entered into a cost-plus construction contract with a contractor. On February 7, 1955, respondents had trenches dug on the land for foundation purposes. On the same day appellants received notice from Jerome to get off the land and to stop work, followed by a letter, dated February 7, 1955, purporting to terminate the contract and stating that appellants were keeping the $10,000 deposited as security under the contract. The respondents offered to pay appellants the full purchase price, which offer was refused. Thereafter, respondents instituted the present action for breach of contract and to recover the money paid plus damages. The trial court gave judgment for the return of the $10,000 with interest, together with $1,990.74 damages.

It is appellants' contention that "The trial court's interpretation of the contract is erroneous"; that the findings are inconsistent and contradictory, and that there is no support in the record for the findings relating to waiver and estoppel. Appellants also complain that the court erred in the exclusion of evidence of damages offered by appellants; and that respondents failed to prove ability to perform the contract.

[1, 2] As stated in the respondents' brief, it is the rule that an appellate court will not disturb a disputed finding where the record discloses any substantial evidence in support thereof, and in such a situation will not attempt to weigh or re-evaluate the evidence. That the record herein does disclose such evidence in support of the trial court's decision cannot be doubted.

The court's finding that there was a waiver by appellants of the February 1, 1955 time limit, and that Jerome extended such limit "for a reasonable length of time" finds support in the respondents' testimony that in December, 1954, Jerome made such statements as, "Well, don't worry about time. I am going to work with you boys. I like you boys. I want to see you get that building up.", and "Jack, (Brown) don't worry about the time if it takes you a little longer, I know that you will be happy with your building and so will I."

On February 1, 1955, the time limit specified in the contract, Jerome asked respondent Brownstein "How are you coming and when do you figure you will get started?", to which respondent replied, "I hope to get started by next week", and Jerome then said, "Fine, fine". Mr. Jerome testified that up to February 7th, appellant had never "told either Mr. Brown or Mr. Brownstein that if they didn't get their work done on time, that you would declare the agreement at an end", and that "if they didn't complete on that date that they would forfeit their $10,000".

There is also evidence to the effect that the respondents relied upon Jerome's statements and proceeded with the work to the extent of digging foundation trenches so that the foundation could have been formed within one to three days after February

7, 1955. The findings that appellants, by declaring a termination were guilty of an anticipatory breach of the contract, and that the respondents had never breached the agreement, are likewise supported by the record.

[3] The appellants' contention that "the only logical interpretation of Paragraph VI (security provision) is that it gave Respondents an option to purchase the property together with the right to occupy the land during the option period for an agreed consideration of $10,000", is untenable. As said in the respondents' brief, "This interpretation not only violates the plain language of said paragraph but is clearly unsupported by the evidence". In this connection it may well be noted that the contract was prepared by Jerome's attorney.

[4] There is no merit in appellants' claim that the trial court erred in excluding evidence concerning appellants' alleged damages. The court ruled that in the absence of a showing that the offal mentioned in the agreement was not available elsewhere, evidence of damages to appellants for loss thereof was inadmissible. As noted in respondents' brief, "The agreement does not require purchasers to produce offal but merely provides that in the event offal is produced by respondents * * * it should be sold to appellant, Baker".

[5] The appellants' argument that "Respondents failed to prove their ability to perform" the contract, in that their total resources were shown to be only $40,000 whereas the projected enterprise would cost in excess of $104,000, again relates to the weight of evidence, a matter not open to appellate review where there is any substantial evidence in support of the findings. There was evidence showing that the respondents had access to additional funds from a brother which could be obtained upon request.

A survey of the findings, considered as an entirety, discloses no vital inconsistencies or contradictions, and the record reveals no reversible error of any nature. The agreement between the parties means exactly what it says; no further interpretation is required.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

146 Cal.App.2d 704

Matter of the ESTATE of Harry E. GOOD, deceased.

Mary G. YOUNG, Petitioner and Appellant,

v.

Clinton J. TRUMP et al., Defendants and Respondents.

Civ. 21850.

District Court of Appeal, Second District, Division 3, California.

Dec. 11, 1956.

Rehearing Denied Dec. 27, 1956.

Proceeding in probate wherein contestants sought to deny probate to witnessed will of deceased on ground that it was procured by the undue influence of petitioner. The Superior Court of Los Angeles County, Maurice C. Sparling, J., denied probate to witnessed will, and admitted holographic will and petitioner appealed. The District Court of Appeal, Shinn, P. J., held that trial court's finding of undue influence, which, because petitioner's appeal brief failed to set forth evidence concerning undue influence and contained meager statement of facts not supported by transcript references, must stand as if not challenged for insufficiency of evidence to support it, supported judgment denying probate to witnessed will and, therefore, even if trial court's finding of lack of testamentary capacity was unsupported by the evidence, the error would not warrant reversal.

Judgment affirmed.

1. Appeal and Error ⚿757(3), 760(2)

The District Court of Appeal will disregard claims of insufficiency of the evidence to justify findings, consisting of mere assertions without a fair statement of the evidence with transcript references in the brief, when it is apparent that a substantial amount of evidence was received in trial court.

2. Wills ⚿334, 384

In probate proceeding for probate of witnessed will, trial court's finding of undue influence, which, because petitioner's appeal brief failed to set forth evidence concerning undue influence and contained meager statement of facts not supported by transcript references, must stand as if not challenged for insufficiency of evidence to support it, supported judgment denying probate to witnessed will and, therefore, even if trial court's finding of lack of testamentary capacity was unsupported by the evidence, the error would not warrant reversal.

◆

Lillian J. McQuitty, Hollywood, William E. Swiney, Bakersfield, for appellant.

Birger Tinglof, Los Angeles, for respondents.

SHINN, Presiding Justice.

We have an appeal by Mary G. Young from a judgment in a non-jury case, denying probate to a witnessed will of Harry E. Good, dated June 29, 1954, and admitting to probate a holographic will of the decedent dated May 7, 1953. The court found in accordance with the allegations of the contest that on June 29, 1954, deceased was suffering from serious illness, was in a weakened physical condition, with impaired mental faculties, was under the undue influence, duress and dominion of Mary G. Young and that execution of the will was procured through the exercise of said undue influence. It was also found, as alleged in the contest, that decedent was not of sound and disposing mind and memory and was by reason of age and infirmity of body and mind mentally incompetent to make the will and that he did not know what he was doing when he signed it. The court found that the will of May 7, 1953, was duly, legally and properly executed and was a valid holographic will.

The sole ground of appeal is insufficiency of the evidence to support the court's findings upon the issues of unsoundness of mind and undue influence. In presenting the contention as to the finding of undue influence appellant's opening brief devotes somewhat less than four pages to what is called a statement of facts. Less than one page of this statement has any relation to the evidence pertinent to the issue of undue influence and this consists of a sketchy recital of the circumstances under which the will was prepared by an attorney selected by Mrs. Young, following the written request of decedent that she take the matter up with a particular lawyer whom she was unable to interest in the matter. It appears from the statement the will was written in Los Angeles and taken to Sacramento by Mrs. Young's brother, where it was executed by decedent in a rest home in which he was then hospitalized. No reply brief was filed by appellant. The brief of the appellant generates not even a faint idea respecting the evidence that caused the court to find for contestants on the issue of undue influence. And the meager statement of facts is not supported by transcript references. The brief concludes with the request that appellant "nevertheless respectfully prays that all evidence in this case be examined as a measure of what is substantial evidence."

The trial lasted for four days. The transcript of the oral proceedings comprises 453 pages; the contestants produced the testimony of 9 witnesses and they introduced into evidence 20 or more exhibits.

[1] We have had occasion to remark before in a similar situation that a claim of insufficiency of the evidence to justify findings, consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration, when it is apparent, as it is here, that a substantial amount of evi-

dence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondents to prove that the court was right. And it is an attempt to place upon the court the burden of discovering without assistance from appellant any weakness in the arguments of the respondents. An appellant is not permitted to evade or shift his responsibility in this manner. In re Palmer's Estate, Cal.App., 302 P.2d 629. And upon more than one occasion we have called attention to our statement to the same effect in Goldring v. Goldring, 94 Cal.App.2d 643, 645, 211 P.2d 342, and we have said we must either abide by our former statements or tolerate practices which are contrary to first principles of appellate procedure and which place undue burdens upon the court. See, also, Jiral v. Day, 95 Cal.App.2d 214, 212 P.2d 275; Morrell v. Clark, 106 Cal.App.2d 198, 234 P.2d 774; People v. Shannon, 110 Cal.App.2d 153, 241 P.2d 1007; Tesseyman v. Fisher, 113 Cal.App.2d 404, 248 P.2d 471; Kruckow v. Lesser, 111 Cal.App.2d 198, 244 P.2d 19; Eisendrath v. Bank of America, 118 Cal.App.2d 434, 258 P.2d 13; McCosker v. McCosker, 122 Cal.App.2d 498, 265 P.2d 21; People v. Johnson, 136 Cal.App.2d 665, 289 P.2d 90; Elliott v. Rodeo Land & Water Co., 141 Cal.App.2d 404, 297 P.2d 129.

We do not express ourselves again on the subject only because of any inconvenience or unnecessary labor to which we would be subjected if we undertook to do for litigants the duties which are theirs to perform. The problem is one of concern to all reviewing courts. Such extreme inadequacy of the briefs evidences a misconception of the respective duties of counsel and the courts. The reviewing courts have no time to spare. It can be fully occupied in the consideration of appeals that are properly presented in the briefs. All courts need the competent and diligent assistance of counsel and are entitled to it. The fact that they too frequently do not receive it accounts for the greater part of time that is wasted in litigation. This is true at least in our own court. Where it is claimed that a finding of the exercise of undue influence is without support in the evidence the court must familiarize itself with all the relevant and material evidence in the record. But apart from any inconvenience we may occasionally be put to in our study of the oral proceedings is the fact that each day we are required to spend in research and analysis of records, where counsel have failed to render the assistance which is due the court, means a day lost for every litigant who awaits decision of an appeal. It is in their interest, not merely for our own convenience, that we refuse to consider a claim of insufficiency of the evidence when there has been no pretense of compliance with the requirements for an adequate presentation.

We have slight hope that our repeated admonitions will bear fruit. Unfortunately, they will come to the attention of those practitioners, alone, who are accustomed to reading law, and for them our remarks are not intended.

[2] For the reasons stated we decline to consider the claim that the finding of the exercise of undue influence was without support in the evidence. That finding must stand as if it were not challenged at all. It supports the judgment and, therefore, even if the finding of lack of testamentary capacity is unsupported by the evidence, the error would not warrant a reversal of the judgment.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

146 Cal.App.2d 499

Archie H. DANKERT, Plaintiff and Respondent,

v.

LAMB FINANCE COMPANY, a corporation, and L. L. Poyet, Defendants, L. L. Poyet, Appellant.

Civ. 21553.

District Court of Appeal, Second District, Division 2, California.

Dec. 3, 1956.

Rehearing Denied Dec. 31, 1956.
Hearing Denied Jan. 30, 1957.

Action on promissory note against corporate maker and officer who also signed note. The Superior Court, Los Angeles County, Louis H. Burke, J., entered judgment against corporation and officer and officer appealed. The District Court of Appeal, Moore, P. J., held that where issue was presented as to whether individual signing corporate note without any designation of corporate office signed as an officer or as accommodation maker, denial of new trial on ground of newly discovered evidence by such individual of instrument purporting to be a copy of original note but on which the signatures were typewritten and showed individual signing as an officer, was not an abuse of discretion.

Affirmed.

1. New Trial ⚷99

Newly discovered evidence entitling a person to a granting of a new trial must be material to the issue of the litigation and must be of such a nature that were it presented at a retrial of the action a different result would be probable. West's Ann. Code Civ.Proc., § 657, subd. 4.

2. Appeal and Error ⚷981
New Trial ⚷108(1)

Whether the newly discovered evidence if presented at a retrial of action would probably produce a different result is a question addressed to the sole discretion of the trial judge whose action will not be disturbed in absence of a manifest showing of abuse of discretion. West's Ann. Code Civ.Proc., § 657, subd. 4.

3. New Trial ⚷105

Newly discovered evidence tending to impeach or discredit witnesses does not compel the allowance of a new trial. West's Ann.Code Civ.Proc., § 657, subd. 4.

4. New Trial ⚷108(2)

In action upon promissory note involving issue as to whether individual signing corporate note without designation as a corporate office signed as an officer of corporation or as an accommodation maker, denial of new trial on ground of newly discovered evidence by such individual of instrument purporting to be a copy of original note but on which the signatures were typewritten and showed individual signing as an officer was not an abuse of discretion. West's Ann.Code Civ. Proc., § 657, subd. 4.

5. Evidence ⚷99

Trial court is vested with considerable discretion in determining relevancy of evidence and weighing that relevancy against undue prolongation of trial by the consideration of extraneous issues.

6. Appeal and Error ⚷1056(1)

In action upon promissory note involving issue as to whether individual signing corporate note without any designation of corporate office signed as an officer of corporation or as an accommodation maker, while exclusion of evidence that it was a custom of corporation to require the signature of two officers on all company obligations would not have been error, no reversible error was committed in excluding same on ground it was outside the issues of the case. West's Ann.Code Civ. Proc., § 475.

7. Bills and Notes ⚷534

Where promissory note provided for reasonable attorney fee in event of commencement of suit to enforce the same, payee who obtained judgment that was sustained on appeal was entitled to attorney's fees for appeal.

◆

J. W. Ehrlich, San Francisco, N. E. Youngblood, Beverly Hills, and Robert M.

Maslow, Hollywood, for defendants and appellant.

Max E. Gilmore, Los Angeles, for respondent.

MOORE, Presiding Justice.

Appeal from judgment on a promissory note.

Respondent Archie H. Dankert sued the Lamb Finance Company and its vice president L. L. Poyet on a ninety-day promissory note in the principal sum of $10,000 signed in the following manner:

Lamb Finance Co.
By (W. A. Angione)
(L. L. Poyet)

As may be seen, the form of the signatures creates an ambiguity as to whether Mrs. Poyet signed in her capacity as an officer of the finance company only or as an individual comaker of the note. The trial court heard evidence of the circumstances surrounding the signing of the instrument in order to clarify this ambiguity and found that Mrs. Poyet signed the note in her individual capacity as an accommodation maker. Although Mrs. Poyet appeals, she does not contend that the evidence is insufficient to support the findings.

Following the judgment, appellant moved for a new trial primarily on the grounds that (1) certain evidence had been newly discovered; and (2) there had been "error in law occurring at the trial and excepted to by said defendant." The motion was denied.

In an affidavit supporting her motion for a new trial, Mrs. Poyet alleged that in preparing for other litigation she had discovered for the first time "what purported to be a copy of [the] promissory note * * * payable by Lamb Finance Co., to Archie H. Dankert, and signed by Lamb Finance Co., by W. A. Angione as president and L. L. Poyet as vice-president; that across the face of said promissory note written in red pencil appears the word 'copy' in handwriting which appears to affiant to be that of * * * F. J. McFarland;

"That during the trial of said action, F. J. McFarland testified that the word 'renewed' also written in red pencil across the face of [a prior note by the finance company in favor of respondent upon which Mrs. Poyet had no personal liability] * * * was written on there by him"; that he admitted this fact after previously denying that he had any recollection of the prior note; that the "copy" could not have been discovered earlier in the exercise of due diligence.

The newly discovered "note" is obviously not a true copy of the instrument upon which respondent sued. Its contents differ in many material particulars. Pre-eminently, it was not subscribed, but at the bottom of the instrument was typed:

Lamb Finance Company
By W. A. Angione, President
By L. L. Poyet, Vice Pres.

Appellant's affidavit does not suggest who typed this "copy"; who directed that it be made; who had seen it; or any other fact relative to its origin save that Mr. McFarland may have written "Copy" across its face.

[1, 2] A new trial may be granted upon a showing of "newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial." Code of Civ.Proc. § 657, subd. 4. The "newly discovered evidence" certainly must be material to the issues of the litigation, and in fact must be of such a nature that were it presented at a retrial of the action a different result would be probable. Brannock v. Bromley, 30 Cal.App.2d 516, 520, 86 P.2d 1062; Brea v. McGlashan, 3 Cal.App.2d 454, 468, 39 P.2d 877. Whether a different conclusion would be probable upon retrial is a question addressed to the sole discretion of the trial judge whose action will not be disturbed in the absence of a manifest showing of abuse of discretion. Baker v. Floto, 122 Cal.App.2d 573, 575, 265 P.2d 158; Peterson v. Geltz, 118 Cal.App.2d 794, 798, 258 P.2d 875.

[3, 4] Appellant's affidavit does not indicate how this purported "copy" of the promissory note would in any way change the outcome of this litigation. In fact, had it been discovered in time to be presented at the trial, it would not have been admissible into evidence without a much more comprehensive foundation for its admission than is contained in the affidavit. As it stands, it is merely an unverified hearsay expression of the sort of note Mrs. Poyet should have prepared had she intended to avoid personal liability. Appellant contends that if she were allowed to prove that the witness McFarland wrote "Copy" across the face of the document, the latter's somewhat meager testimony would in some way be impeached. Newly discovered evidence to impeach or discredit witnesses does not compel the allowance of a new trial. Peterson v. Peterson, 121 Cal.App.2d 1, 11, 262 P.2d 613; Wilson v. Kopp, 114 Cal.App.2d 198, 206, 250 P.2d 166.

The "error in law" specified by appellant was the exclusion of proof that it was the business custom and usage of the Lamb Finance Company to require the signatures of two officers on all company obligations. The offer was made on cross examination of W. A. Angione, former president of the company and a signatory of the note. The court excluded the evidence largely on the ground that the custom of the company in the case of other notes made at different times and occasions could not prejudice respondent, the payee of the note before the court. Furthermore, any inference sought to be drawn in favor of the nonliability of the finance company was outside the issues of the case since that company had stipulated to liability.

The proffered evidence could well have been admitted to shed some further light upon the intention of the parties at the time the note was executed. For example, it might support an inference that Mrs. Poyet supposed that she was signing the note solely in her official capacity. This inference would provide some conflict with respondent's testimony that appellant expressly indicated her intent to be personally liable. Also, W. A. Angione had testified that he directed the preparation of the note, that his signature alone was intended to bind the Lamb Finance Company, and that all present understood that Mrs. Poyet was signing as a comaker. If appellant had been allowed to extract from the president that he was aware of the custom and usage of the company requiring two signatures on company obligations, the inference might have been that he did not secure the drafting and signing of this note with the idea in mind that appellant was to be personally liable. This inference would cast some doubt upon his testimony that the parties had expressly provided for personal liability.

[5, 6] However, a trial court is vested with considerable discretion in determining the relevancy of evidence and weighing that relevance against undue prolongation of the trial and the consideration of extraneous issues. Spolter v. Four-Wheel Brake Service Company, 99 Cal.App.2d 690, 698, 222 P.2d 307. Although the admission of the offered evidence would not have been error, the court was at liberty to rule that the inference it would raise would not be worth the time expended. Also, even were error conceded, it is required that "a different result would have been probable if such error * * * had not occurred or existed." Code Civ.Proc. § 475. Considering the trial court's statement that "the evidence strongly preponderates in favor of the plaintiff", it is extremely unlikely that a different result would have accrued from admission of the evidence. Several persons present at the execution of the note testified the appellant expressly stated her intent to be personally obligated on the instrument.

[7] The promissory note provides for reasonable attorney fees "in the event of commencement of suit to enforce this note." "A contract for a reasonable attorney's fee in enforcing its provisions embraces an allowance for legal services rendered upon appeal as well as during the trial." Cirimele v. Shinazy, 134 Cal.App.2d 50, 52, 285 P.2d 311. Therefore, re-

spondent is entitled to his attorney's fee for this appeal. The parties have stipulated that this court determine the amount of the fee.

The judgment is affirmed and appellant is directed to pay respondent's attorney's fee on this appeal in the sum of $300.

FOX and ASHBURN, JJ., concur.

Hearing denied; GIBSON, C. J., and CARTER and SCHAUER, JJ., dissenting.

146 Cal.App.2d 627

John ROBERSON, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION OF the State of CALIFORNIA; County of Los Angeles; Bethlehem Pacific Coast Steel Corporation, a corporation, Respondents.

Civ. 21996.

District Court of Appeal, Second District, Division 1, California.

Dec. 5, 1956.

Proceeding by workmen's compensation claimant on his petition for writ of review of an adverse award by the Industrial Accident Commission. The District Court of Appeal, Nourse, J. pro tem., held that where claimant filed a request with the Industrial Commission that his claim be set down for further hearing for the purpose of cross-examination of the Commission's rating expert, and simultaneously with filing such request claimant requested an extension of time in which he might show cause why his claim should not be submitted for decision upon the report of the rating expert, there was nothing inconsistent in claimant's demands, and he did not waive his right to cross-examine the rating expert, and the Commission's denial of such right deprived claimant of procedural due process.

Award annulled.

1. Estoppel 🔑53

A waiver of a right cannot be established without a clear showing of an intent to relinquish such right, and doubtful cases will be decided against a waiver.

2. Estoppel 🔑58

A waiver will not be presumed or implied contrary to the intention of a party whose rights would be injuriously affected, unless by his conduct the opposite party has been misled to his prejudice into the honest belief that such waiver was intended.

3. Constitutional Law 🔑318
Workmen's Compensation 🔑1703

Where workmen's compensation claimant filed a request with the Industrial Commission that his claim be set down for further hearing for the purpose of cross-examination of the Commission's rating expert, and simultaneously with filing such request claimant requested an extension of time in which he might show cause why his claim should not be submitted for decision upon the report of the rating expert, there was nothing inconsistent in claimant's demands, and he did not waive his right to cross-examine the rating expert, and the Commission's denial of such right deprived claimant of procedural due process.

◆

Arthur Garrett, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, Edward A. Sarkisian, Los Angeles, for respondent Industrial Accident Commission.

NOURSE, Justice pro tem.

Petitioner, in the course of his employment by Bethlehem Pacific Coast Steel Corporation, sustained an injury to his back. In due course he made application for compensation for temporary disability, and upon the employer's petition to reopen the commission took further medical evidence and an independent medical examiner was appointed by the commission. Upon his report having been received, and he having been cross-examined by applicant, petitioner here, the matter was referred by the referee who heard the matter to the commission's rating expert. The rating expert filed a written report, and within the time allowed by law petitioner filed a request with the commission that the matter be set down for further hearing for the purpose of cross-examination of the rating expert.

Simultaneously with filing this request, petitioner requested an extension of time in which he might show cause why the matter should not be submitted for decision upon the report of the rating expert. These two documents were filed with the commission on May 5, 1956; and on May 14, 1956, applicant filed a request for a further extension of time within which "to show good cause why the above case should not be submitted for decision upon the instructions and report of the Permanent Disability Rating Specialist." On May 21 applicant filed written objections to the report of the rating expert, and after stating his objections prayed that the matter be resubmitted to the rating expert with certain specified instructions.

Immediately thereafter the referee filed his report recommending that applicant's objections be denied, but in this report did not mention applicant's request for cross-examination of the rating expert; and on May 29 the referee filed his formal findings of fact and award. Thereafter, and within the time required by law, applicant filed his petition for reconsideration, asserting as one of the reasons therefor that he had been denied the right to cross-examine the rating expert. This petition for reconsideration was denied by the referee, and his decision was affirmed by Panel II of the commission upon the ground that by filing the applications for extension of time to show cause why the matter should not be submitted for decision upon the instructions and report of the rating expert and by filing objections to that report, applicant abandoned and waived his right to cross-examine the rating expert.

The respondent commission here concedes that unless petitioner waived his right to cross-examine the rating expert, the commission's denial of that right deprived petitioner of procedural due process, and that the award must therefore be annulled.

While petitioner, by his original petition here, presented several questions, at the oral argument he expressly abandoned all of them other than the question as to whether or not he was deprived of due process by the commission's failure to grant him the right to cross-examination of the rating expert. The sole question presented here is, therefore, did petitioner waive that right? We have reached the conclusion that he did not.

[1, 2] "A waiver of a right cannot be established without a clear showing of an intent to relinquish such right, and doubtful cases will be decided against a waiver", Greninger v. Fischer, 81 Cal.App.2d 549, 554, 184 P.2d 694, 697; nor will a waiver be presumed or implied contrary to the intention of a party whose rights would be injuriously affected, unless by his conduct the opposite party has been misled to his prejudice into the honest belief that such waiver was intended. Craig v. White, 187 Cal. 489, 498, 202 P. 648.

[3] We find no factual basis from which a waiver of the right of cross-examination of the rating expert, which applicant had demanded, can be implied. There was nothing inconsistent in his asking an extension of time in which to apply to submit the matter upon the report of the rating expert, with his demand to cross-examine that witness. It might very well be that after cross-examination he would desire to accede to the report of the rating expert and ask that an award be made upon the basis of the report. Nor do we find anything inconsistent between his making timely objection to the report as filed and his request for cross-examination. The purpose of his objections was to have the matter resubmitted to the rating expert, which if granted would necessarily defer the time of cross-examination until a further report was filed. If such report was filed then he might no longer desire cross-examination, or might desire to request examination upon the basis of the second report. But, his objections being

overruled, his right to cross-examination which he had asserted remained; and as we have heretofore said there is nothing inconsistent in the actions that he took, and certainly his adversary, the employer, was not misled to its detriment by any act of petitioner.

The award is annulled.

WHITE, P. J., and FOURT, J., concur.

146 Cal.App.2d 557

Barney HOLDER, Plaintiff and Appellant,
v.
John POPERADEN, Lorraine Reber, Barbara Jacobs, et al., Defendants and Respondents.
No. 16941.

District Court of Appeal, First District, Division 1, California.
Dec. 4, 1956.

Action for injuries sustained by passenger in an automobile driven by the defendants wherein the owner was joined as a defendant upon theory that his parking the automobile in a public street unlocked and with the key in the ignition was an act of negligence that concurrently with the negligence of the other defendants who allegedly stole the car proximately caused plaintiff's injuries. The owner's general demurrer to the complaint was sustained without leave to amend in the Superior Court, County of Alameda, Thomas J. Ledwich, J., and the plaintiff appeals. The District Court of Appeal, Fred B. Wood, J., held that the owner was not liable for the plaintiff's injuries and that the principles enunciated in a prior opinion had not been modified.

Judgment affirmed.

1. Automobiles 🔑192(11)

In absence of a statute imposing a duty by motorist to protect others from damages caused by thieves driving stolen automobiles, the owner is under no duty to injured persons to keep the automobile out of hands of a third person in absence of facts putting the owner on notice that the third person is incompetent to handle the automobile.

2. Automobiles 🔑173(8)

An owner parking his automobile in a public street unlocked and with key in the ignition was not responsible for the negligence of defendants who allegedly stole the car and proximately caused injuries of a passenger therein.

Todd & Todd, San Francisco, Frank J. Baumgarten, San Francisco, for appellant.

Berry, Davis & Channell, Oakland, Herbert Chamberlin, San Francisco, of counsel, for respondents.

FRED B. WOOD, Justice.

In this action for personal injuries caused by a passenger car driven by defendants Reber and Jacobs, Poperaden as owner of the car was joined as a defendant upon the theory that his parking the car in a public street unlocked and with the key in the ignition, was an act of negligence that, concurrently with the negligence of the defendants who allegedly stole the car, proximately caused plaintiff's injuries.

Poperaden's general demurrer to the complaint was sustained without leave to amend. Plaintiff has appealed.

[1] Plaintiff does not claim that his complaint presents facts essentially different from those involved in Richards v. Stanley, 43 Cal.2d 60, 271 P.2d 23,[1] which

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[1] Plaintiff in his opening brief (he filed no reply brief) said, "The appeal herein presented involves facts similar to those in Richards v. Stanley, 43 Cal.2d

holds that in the absence of a statute imposing "a duty on the part of motorists to protect persons on the streets from any damage caused by thieves driving stolen automobiles" (as by prohibiting the leaving of a key in an unattended vehicle on a public street) the "owner of an automobile is under no duty to persons who may be injured by its use to keep it out of the hands of a third person in the absence of facts putting the owner on notice that the third person is incompetent to handle it", 43 Cal.2d at page 63, 271 P.2d at pages 25, 26, especially when the recognition of such a duty, in the absence of such a statute, "would result in imposing greater liability than is now provided by statute when the owner voluntarily entrusts his car to another." 43 Cal.2d at page 65, 271 P.2d at page 26.[2]

[2] Plaintiff does claim that the principles enunciated in the Richards case have been modified by the holding in the later case of Richardson v. Ham, 44 Cal.2d 772, 285 P.2d 269. We do not so read the Richardson case. It involved a 26-ton bulldozer (not a mere passenger car) which had been left on a mesa at the close of a day's work, unattended and imperfectly locked, with the result that it could be started by pushing the compression lever in and stepping on the starter. The following evening two young men were attracted to it, succeeded in starting it, drove around the mesa causing considerable damage and then, being unable to stop it, headed it toward a canyon and abandoned it. It went off the mesa, down the hill, across a freeway and traveled about a mile before it was halted by a retaining wall and a utility pole. During its course it traveled through a house and seriously injured the occupants. The Supreme Court held that these and other relevant facts supported a judgment against the operators of the bulldozer.

In distinguishing the Richards case the court said in part: "Since * * * the kinds of foreseeable intervening conduct by third parties as well as the risks created by such conduct in this case are materially different from those considered in the Richards case, that case is not controlling here. Automobiles do not arouse curiosity, and ordinarily the only appreciable risk

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60 [271 P.2d 23]," but that the ruling in that case "has been materially extended" by recent cases.

Certain allegations of the complaint were potentially ambiguous.

After alleging that Poperaden carelessly left his car in the condition described, the complaint averred that "by reason of the * * * negligent conduct of * * * Poperaden as aforesaid, he was obliged to, should have, *and did foresee* that his said vehicle * * * would induce" the other two defendants to take the car (emphasis added).

The term "as aforesaid" could be interpreted as modifying or qualifying the expression "did foresee." However, if the pleader, in saying "did foresee," intended to plead special circumstances (such as knowledge of the presence nearby of two drunken irresponsible minors) then it might be a case for the granting of permission to amend, adequately to plead special circumstances which would bring it within the exception recognized in the Richards case (facts putting the owner on notice that the third person is incompetent to handle it).

Accordingly, at oral argument plaintiff's counsel was asked if plaintiff desired to enlarge the allegations to plead special circumstances. Counsel fairly and frankly replied that he knew of no special circumstances that he could plead, such as whether Poperaden knew of the presence nearby of the other two defendants; that the facts are in the legal sense essentially the same as those in the Richards case; that he disagrees with the majority opinion in the Richards case, believes it has been overruled or modified by the Richardson case, and seeks a judicial declaration to that effect.

[2] We observe that in the Richards case two of the three justices who concurred with the writer of the majority opinion did so without reservation and that the third concurred in the judgment "on the ground that defendant was not bound to anticipate that any person would steal her car or commit any other crime in respect to it, and, accordingly, defendant owed no duty to anyone growing out of the unlawful taking and operation of the vehicle." At page 69 of 43 Cal.2d, at page 29 of 271 P.2d.

that they will be set in motion if they are left unattended arises from the possibility of their being stolen. The record in the present case, on the other hand, shows that defendants' bulldozers aroused curiosity and attracted spectators, while they were in operation as well as while they were parked for the night." 44 Cal.2d at pages 775–776, 285 P.2d at page 271. "The evidence is therefore sufficient to justify the conclusion that there was a reasonably foreseeable risk that defendants' bulldozers might be tampered with when left unattended. Given this foreseeable risk of intermeddling, the question is presented whether defendants were under a duty to exercise reasonable care to prevent intermeddlers from putting their bulldozers in operation. In the Richards case it was concluded that even if theft was reasonably to be foreseen, the owner was under no duty to persons on the highway to exercise reasonable care to keep his car out of the hands of a thief. It was pointed out that the owner will ordinarily have no reason to foresee that a thief will be an incompetent driver, that the risk of negligent driving arising from possible theft is less than the risk that the owner might intentionally create without negligence by lending his car to another, and that it would be anomalous to impose greater liability when the car was being driven by a thief than that provided by statute when the owner voluntarily entrusts his car to another. The risks arising from intermeddling with bullldozers, however, are entirely different from those arising from the driving of an automobile by a thief. Bulldozers are relatively uncommon, and curious children or others attracted by them ordinarily will not know how to operate them. An intermeddler who starts a bulldozer accidently or otherwise may not be able to stop it, and the potentialities of harm from a 26 ton bulldozer in uncontrolled motion are enormous, particularly when it is left on top of a mesa from which it can escape and injure persons and property located below. The extreme danger created by a bulldozer in uncontrolled motion and the foreseeable risk of intermeddling fully justify imposing a duty on the owner to exercise reasonable care to protect third parties from injuries arising from its operation by intermeddlers." At page 776 of 44 Cal.2d, at page 271 of 285 P.2d.[3]

The conclusion seems irresistible that the principles enunciated in the Richards case have not been modified.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

146 Cal.App.2d 622

Earl MONTGOMERY, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR the COUNTY of ALAMEDA, and the Honorable William J. McGuiness, Judge pro tem. thereof, Respondents.

Civ. 17411.

District Court of Appeal, First District, Division 2, California.

Dec. 5, 1956.

Proceeding to prohibit further proceedings in the trial of petitioner on ground that marijuana found on the person of petitioner was result of an illegal search. The District Court of Appeal, Dooling, J., held that the evidence did not disclose that the search was unreasonable.

Alternative writ heretofore issued discharged, and petition denied.

1. Searches and Seizures 🔑3(1)

"Reasonable or probable cause" for search means such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion, that the person accused is guilty.

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[3] Three justices concurred with the writer of the majority opinion in the Richardson case without reservation of any kind.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable or Probable Cause".

2. Searches and Seizures ⚷7(10)

Where officer was informed shortly before three men arrived together in an automobile that one of them had asked to have a quantity of narcotics delivered to him at that location and such other arrived at the rendezvous with two other persons shortly after making the arrangement, the officer had reasonable ground to believe that the two others were such other's confederates and a search of person of the petitioner who was sitting in the automobile bringing the persons to the rendezvous in which a partly smoked marijuana cigarette was found was not unreasonable.

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George Nye, Public Defender of Alameda County, R. Donald Chapman, Asst. Public Defender, Oakland, for petitioner.

J. F. Coakley, Dist. Atty., of Alameda County, R. Robert Hunter, Chief Asst. Dist. Atty., Robert H. McCreary, Asst. Dist. Atty., Albert E. Hederman, Jr., Deputy Dist. Atty., Oakland, for respondents.

DOOLING, Acting Presiding Justice.

The petitioner has been charged with possession of marijuana. Health and Safety Code, section 11500. He seeks to prohibit further proceedings in his trial on the ground that the marijuana in question was found on his person as a result of an illegal search.

Officer Ingram, who conducted the search, testified that he and other officers were directed by Sergeant Hilliard to go to a public lavatory in a park at 11th and Jefferson Streets. The sergeant told him that another officer had just telephoned to the sergeant from the residence of one J. D. Kirk, a known peddler of narcotics, and had said that he had just had a conversation on Kirk's telephone with one Charles Brown in which Brown had asked for the delivery to him of some heroin near this lavatory. The officers went immediately to the place of rendezvous and in approximately six or seven minutes an automobile stopped at the corner of 11th and Jefferson Streets and a man, whom Ingram recognized as Brown from a description furnished by Hilliard, got out and walked over to the lavatory "and was hanging around the lavatory for a couple of minutes." Two other men, one of whom was the petitioner Montgomery, remained seated in the parked automobile from which Brown had alighted. While other officers approached Brown, Ingram and a partner went to the parked automobile and after a conversation in which petitioner denied any connection with narcotics Ingram made a search of his person and found a partly smoked marijuana cigarette in the pocket of his jacket.

Petitioner relies upon such cases as People v. Simon, 45 Cal.2d 645, 290 P.2d 531, and People v. Schraier, 141 Cal.App. 600, 297 P.2d 81, to support his contention that the officer had no reasonable ground to search his person. Without detailing the facts of those cases they may be said to hold that the mere fact that one is in the company of another who is known or reasonably believed to have committed a felony, standing alone, is not enough to justify the police in making a search of his person. The facts in this case go beyond such mere association. Here the officer was informed that only a few minutes before the three men arrived together in an automobile one of them, Brown, had asked to have a quantity of narcotics delivered to him at that location. When Brown arrived at the criminal rendezvous with two other persons so shortly after making the arrangement to commit a crime we cannot say that the officer did not have reasonable grounds to believe that the two others were Brown's confederates.

[1] "Reasonable or probable cause has been discussed in many cases. Generally speaking, it means 'such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously en-

tertain a strong suspicion, that the person accused is guilty.'" People v. Soto, 144 Cal.App.2d 294, 298, 301 P.2d 45, 48, and cases there cited.

[2] While petitioner's mere association with Brown might be innocent the fact that he arrived in his company so shortly after Brown had arranged for a purchase of narcotics is a factor strongly indicating that he was a party to Brown's criminal purpose, and in our judgment satisfied the rule just stated. Cf. People v. Hickman, 143 Cal. App.2d 79, 299 P.2d 389.

The alternative writ heretofore issued is discharged and the petition denied.

KAUFMAN, J., and DRAPER, J. pro tem., concur.

146 Cal.App.2d 444

The PEOPLE of the State of California, Plaintiff and Appellant,

v.

Anna MILLER, Defendant and Respondent.

Cr. 5713.

District Court of Appeal, Second District, Division 3, California.

Nov. 30, 1956.

Defendant was charged with bookmaking upon the result of horse racing and occupying a residence for the purpose of recording bets. Defendant's motion to set aside the information was granted in the Superior Court of Los Angeles County, Herbert V. Walker, J., and the People appealed. The District Court of Appeal, Parker Wood, J., held that the evidence established sufficient probable cause for arresting officer to believe prior to entering the house where alleged activities were carried on that a felony was being committed therein and that hence search thereof was not invalid and that the trial judge erred in setting aside the information where the transcript showed that defendant was committed with reasonable and probable cause.

Order setting aside information reversed.

1. Criminal Law 🔑322

Where officer knocked on door and it was opened by an unknown male and the officers identified themselves and walked in and no force was used, and no evidence was introduced that the entry was against the will of the person opening the door, in absence of evidence to the contrary, presumption obtained that the officers acted legally in entering the premises.

2. Criminal Law 🔑394

In prosecution for bookmaking, evidence did not establish that evidence of defendant's alleged illegal activities was obtained by unlawful search and seizure where there was evidence to show probable cause for arresting officers to believe prior to entering house that a felony was being committed therein. West's Ann.Pen.Code, §§ 337a, subds. 1, 2, 4, 995; Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

3. Criminal Law 🔑386

In prosecution for bookmaking and for recording bets testimony of stenographer who answered telephone in house which officers entered to obtain evidence of activities therein as to what was said to her by persons who called by telephone was admissible. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4.

4. Telecommunications 🔑495

The Federal Communications Act providing that no person unless authorized by sender shall publish the contents of the intercepted communication to any person was not violated by testimony of a stenographer answering telephone in house where bookmaking activities were allegedly carried as to what was said to her by persons who called by telephone, since defendant charged with bookmaking activities was not a "sender" with the act. Communications Act of 1934, § 605, 47 U.S.C.A. § 605.

See publication Words and Phrases, for other judicial constructions and definitions of "Sender".

5. Gaming ⚷97(1)

In prosecution for bookmaking, evidence regarding slips of paper, scratch sheet, book, telephone, and other things on table in front of defendant in house where activities were allegedly carried on was admissible. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4.

6. Indictment and Information ⚷137(4)

In prosecution for bookmaking, the trial judge erred in setting aside the information where the transcript thereof showed that defendant was committed with reasonable and probable cause. West's Ann.Pen.Code, § 337a, subds. 1, 2, 4.

◆

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., S. Ernest Roll, Dist. Atty., and Jere J. Sullivan, Deputy. Dist. Atty., Los Angeles, for appellant.

G. Vernon Brumbaugh, Los Angeles, for respondent.

PARKER WOOD, Justice.

By an information defendant was charged, in three counts, with violating section 337a, subdivisions 1, 2, and 4 of the Penal Code. Count I charged violation of subdivision 1 (bookmaking upon the result of horce racing). Count II charged violation of subdivision 2 (occupying a residence with books, papers and paraphernalia for the purpose of recording bets). Count III charged violation of subdivision 4 (recording bets).

Defendant's motion to set aside the information, under section 995 of the Penal Code, was granted. The People appeal from the order granting the motion.

Said section 995 provides that an information must be set aside by the court, upon defendant's motion, if the defendant has been committed without reasonable or probable cause.

The question is whether the transcript of the preliminary examination shows that defendant was committed without reasonable or probable cause.

Counsel for defendant (respondent) states that his motion to set aside the information was based upon the ground that the evidence was obtained by unlawful search and seizure and in violation of section 605 of the Federal Communications Act [47 U.S.C.A. § 605].

Officer Diero, one of the arresting officers, testified as follows: They arrested defendant on March 22, 1956, about 1:50 p. m., in a single-story residence in Los Angeles. They knocked at the front door of the residence. The door was opened by an unknown male. They identified themselves as police officers, and then they walked into the kitchen where they saw the defendant sitting in a chair with a table in front of her. On the table there were a telephone (Webster 15425), a National Daily Reporter of March 22, numerous slips of paper with ink notations, a clock, radio, pencil, and a book entitled "Parlays at a Glance." They did not have a search warrant or a warrant for arrest, and they did not "verbally" ask for permission to enter. Before going into the residence they had information from an informant that the telephone number Webster 15425 was being used for bookmaking purposes. He (witness) had talked personally (face to face) with the informant just before noon. He (witness) had received information from that informant previously, and the information had proved to be reliable—three or four arrests had been made as a result of that information. After receiving the information about the telephone, he (officer) made a check of the number with the telephone company through a liaison officer, and the report was that the number was registered to James A. Harvey. Other information he (officer) had before going into the residence was that about 1:40 p. m. he and Officer Jackson had the premises under surveillance, and then Officer Walter went to a pay telephone about half a block away and called the number Webster 15425, and an unknown female voice answered and Officer Walter said: "This is Jack. Have Larry call me. By the way, who won the first at Gulfstream?" The female voice replied, "Military Trail."

It was stipulated that Officer Diero is an expert as to the custom and manner in which bookmaking is conducted in Los Angeles County.

Officer Diero testified further that he first saw Exhibit 2 (for identification) on the table in front of defendant. (That exhibit is a slip of paper [bank deposit slip] with pencil and ink writing on it.) He made a comparison of the writing on Exhibit 2 with Exhibit 3 for identification. (Exhibit 3 is a National Daily Reporter scratch sheet dated March 22, 1956.) In the second (third) line on the slip of paper (Exhibit 2) are the numerals 521222, and to the right thereof are the numerals 12.10, and to the right of that is the numeral 6. He compared that line with the scratch sheet (Exhibit 3) and in his opinion the slip refers to a horse listed to run in a race on March 22, and the slip is a wager on the horse. In his opinion the 5 (in the number 521222) indicates Gulfstream Park, the 2 indicates the second race there, and the 1 indicates the first number 1 handicap position which is a horse named Bit O'Mama. The 222 indicates $1.00 win, $2.00 place, $2.00 show. The 12.10 indicates a payoff on the horse and the 6 indicates the total wager. In his opinion the word Leo at the top of the slip indicates the agent; and the word Kay indicates the bettor. He checked said third line of the slip with a National Daily Reporter scratch sheet of March 23 (Exhibit 4 for identification), and he found that in the second race at Gulfstream on March 22 a horse named Bit O'Mama won the race; and the payment was $5.00 to win, $3.80 to place, and $3.30 to show, making a total of $12.10 on a wager of $2.00 to win, place, and show. He made similar comparisons of other numbers on the slip (Exhibit 2) with the scratch sheet of March 22 (Exhibit 3) and he formed the opinion that the numbers were bets on horses running on March 22. In his opinion the slip of paper (Exhibit 2) is a betting marker.

It was stipulated that two handwriting cards (Exhibit 1 for identification), upon which the name Anna Miller appears, were signed and filled out by the defendant in the presence of Officer Diero.

It was also stipulated that Mr. Woodward is an expert in the comparison of handwriting. He testified that he compared Exhibits 1 and 2, and in his opinion the same person wrote both documents (exhibits).

Officer Diero testified further that, after the arrest, he asked defendant if she had made the notations on Exhibit 2; and she replied, "Yes." He asked her if those were all the bets she had taken that day; and she replied, "Yes." He asked her how long she had been making book there; and she replied, "Since yesterday." She said she was hired by a person named "Charlie."

A stenographer for the police department testified that she went into said residence on said March 22 about 1:50 p. m. She was in the residence about an hour and during that time she answered the telephone, Webster 15425, about a dozen times. She made notes while she was talking on the telephone, and when she returned to her office she reduced the notes to typewriting. While testifying she was reading from the typewritten notes. In the first telephone call a male voice said, "This is Leo for Izzy. These are all on Tan. 771 for 1. For David 61, 1 and 1, 471 and 1, 58, 1. For Sol, 611, 3 and 3. Paul E, E and Ed in Edward, 41 to 71, 20 and 2, and call me back." In the next telephone call a female voice said, "This is Corinne for Perry. Have I got time for the second?" The witness replied, "No you just missed it. How about the third?" The caller said, "Give me Lighten Dawn, two." The witness said, "Two to win, is that all?" The caller replied, "Yes. What position is that?" The witness said, "Third." The caller said, "Three, Okay, bye." The other telephone calls were of a similar nature. On cross-examination she said that the officers told her to answer the telephone.

She did not inform the callers who she was. She used the telephone for the purpose of ascertaining what was said.

The Exhibits 1, 2, 3, and 4 for identification were received in evidence.

The evidence before the committing magistrate was sufficient to show there was probable cause for the arresting officers to believe, prior to entering the house, that a felony was being committed therein. There was evidence that Officer Diero had received information personally from a reliable informant that said telephone number was being used for bookmaking. In addition thereto he had information that his partner, Officer Walter, had called said number, a few minutes before the officers entered the house, and asked "[W]ho won the first at Gulfstream?" and the reply was "Military Trail." In People v. King, 140 Cal.App.2d 1, 294 P.2d 972, the charges were the same as the charges herein, and the facts with reference to probable cause for entering the house were similar to the facts herein as to probable cause for entering. In that case one of the arresting officers received information from an informant that defendant King was using two certain telephone numbers for bookmaking. The officer therein had received correct information on previous occasions from the informant. In that case, the officer observed the informant while the informant dialed one of the telephone numbers, and the officer listened to the telephone conversation wherein the informant said, "Give me ten dollars to win on Rover Bill in the sixth race at Golden Gate," and a voice answered, "O.K., I got your bet." Also, in that case the officer was told by another officer that he (other officer) had called that number on two occasions and obtained race results. The facts in that case as to actually entering the house were different from the facts in the present case as to entering, in that, in the cited case force was used to open the door—the officer knocked on the door and identified himself, and after waiting about two minutes and receiving no response he forced the door open by kicking it in. It was held in that case, 140 Cal.App.2d at page 7, 294 P.2d at page 975, that the entry was lawful.

[1, 2] In the present case, after the officer had knocked on the door and it had been opened by an unknown male, the officers identified themselves as officers and walked in. There was no evidence that force was used, and no evidence that the entry was against the will of the person who opened the door. In the absence of evidence to the contrary, it is presumed the officers acted legally. See Badillo v. Superior Court, 46 Cal.2d 269, 272, 294 P.2d 23, 25. "[T]he information should not be set aside on the ground that essential evidence was illegally obtained if there is any substantial evidence or applicable presumption to support a contrary conclusion [citations], and in such cases the ultimate decision on admissibility can be made at the trial on the basis of all of the evidence bearing on the issue." (Ibid.) The evidence before the committing magistrate did not show that the entry was unlawful.

[3, 4] The testimony of the stenographer, who answered the telephone in the house, as to what was said to her by the persons who called by telephone was admissible. In People v. King, supra, it was said, 140 Cal.App.2d at page 9, 294 P.2d at page 977: "'It is the established rule that the court may properly receive the evidence of such conversations, not for the purpose of establishing the truth of what was said over the telephone, but for the purpose of establishing that the room was being occupied for placing bets on horse races.'" The evidence as to the telephone conversations was not obtained in violation of section 605 of the Federal Communications Act. Said section provides: "* * * no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; * * *." The defendant was not a "sender" within the meaning of that section. See People v. Kelley, 22 Cal.2d 169, 175, 137 P.2d 1; People v. Vertlieb, 22 Cal.2d

193, 196, 137 P.2d 437; People v. Onofrio, 65 Cal.App.2d 584, 588, 151 P.2d 158.

[5] The evidence regarding the slips of paper, scratch sheet, book, telephone, and other things on the table in front of defendant was admissible.

[6] The trial judge erred in setting aside the information. The transcript of the preliminary examination shows that defendant was committed with reasonable and probable cause.

The order setting aside the information is reversed.

SHINN, P. J., and VALLÉE, J., concur.

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146 Cal.App.2d 422

Ira Lee BURCH, Plaintiff-Appellant,

v.

The HIBERNIA BANK, Richfield Oil Corporation, Hancock Oil Company, Joseph H. Russell, Henrietta S. Russell, Joseph H. Russell, Jr., Trustee, Harvey A. Russell and Hubbard S. Russell, Defendants-Respondents.

Civ. 21497.

District Court of Appeal, Second District, Division 3, California.

Nov. 30, 1956.

Rehearing Denied Dec. 27, 1956.

Hearing Denied Jan. 23, 1957.

Action for restitution of leasehold, for one billion dollars as damages for withholding of leasehold, and for one hundred million dollars as damages for value of petroleum removed by defendants. From a judgment of the Superior Court of San Luis Obispo County, Ray B. Lyon, J., entered after sustension of defendants' demurrers, plaintiff appealed. The District Court of Appeal, Vallée, J., held that even if judgment quieting title as against owner of oil and gas leasehold had been obtained by perjury, false evidence, and concealment of other evidence, such lessee could not recover damages for fraud.

Affirmed.

1. Judgment 🔑948(2)

Defense of res judicata may be raised by demurrer where facts which give rise to it appear in complaint.

2. Judgment 🔑117

Rule, that default judgment in excess of prayer of complaint is void, had no application where defendant had notice of judgment that would be taken against him and affirmatively consented to judgment that was entered. West's Ann.Code Civ. Proc., § 580.

3. Quieting Title 🔑52

Generally, judgment in suit to quiet title takes effect on rights and titles of parties to suit as they exist at time of rendition of judgment and not as they existed at commencement of suit or before that time.

4. Evidence 🔑208(1)

Denials and allegations of defendant's answer to codefendant's cross-complaint constituted admissions against interest which court had right to consider in rendering judgment for plaintiff in suit to quiet title.

5. Quieting Title 🔑50

Even though oil and gas lease had not yet expired when quiet title suit was filed and even though prayer therein was merely that defendant be debarred from asserting any claim except that under lease, court had jurisdiction to enter judgment declaring lessee to have no interest in property, where lease had expired prior to date of judgment and lessee had, after expiration of his lease, filed a verified answer, to cross-complaint of another defendant, alleging that he (the lessee) had no interest in property involved.

6. Judgment 🔑443(1)

A court of equity will, under proper circumstances, set aside a judgment obtained by fraud, but fraud must have been extrinsic and collateral.

7. Judgment ⚷443(1)

Concealment by a party of evidence which, if disclosed, would tend to overthrow his case is not extrinsic fraud and cannot be made basis for attack upon judgment.

8. Judgment ⚷443(1)

Rule requiring extrinsic fraud as predicate for setting aside judgment is same whether judgment sought to be set aside is a default judgment or one rendered after answer and contested trial.

9. Judgment ⚷443(1)

To be "extrinsic", within rule requiring fraud justifying setting aside of judgment to have been extrinsic, fraud must have been collateral to matter which was tried and determined by court.

See publication Words and Phrases, for other judicial constructions and definitions of "Extrinsic".

10. Fraud ⚷28

Even if judgment quieting title as against owner of oil and gas leasehold had been obtained by perjury, false evidence, and concealment of other evidence, such lessee could not recover damages for fraud.

Carl Hoppe and James M. French, San Francisco, for appellant.

Richard Raoul-Duval, Tobin & Tobin, Moses Lasky, Brobeck, Phleger & Harrison, San Francisco, for respondent Hibernia Bank.

Marlon F. Schade, O'Melveny & Myers, Sidney H. Wall and Everett B. Clary, Los Angeles, for respondents Richfield Oil Corp. and Hancock Oil Co.

Twitchell & Rice and W. C. Rice, Santa Maria, for respondents Joseph H. Russell, Henrietta S. Russell, Joseph H. Russell, Jr., Trustee, Harvey A. Russell and Hubbard S. Russell.

VALLÉE, Justice.

Appeal by plaintiff from a judgment of dismissal entered after an order sustaining defendants' demurrers to his complaint as amended without leave to amend. The action is for restoration of a leasehold, and for damages for alleged fraud arising out of an oil lease acquired by plaintiff in 1934 covering Cuyama Rancho in San Luis Obispo and Santa Barbara counties.

The complaint as amended alleges:

In 1930 Edward and Ralph Cebrian were the owners of Cuyama Rancho, to be referred to as Cuyama. On August 23, 1930 they executed to I. E. Martin an oil and gas lease covering 3,100 acres.[1] Martin assigned his interest in the lease to plaintiff.

On September 24, 1930 the Cebrians executed a mortgage covering Cuyama to defendant Hibernia Bank, to be referred to as Hibernia. On December 27, 1932 they executed a second mortgage covering Cuyama to Hibernia. On April 11, 1934 the mortgages were in default, and on that date Hibernia gave notice of the breach and of its election to sell.

On May 29, 1934 the Cebrians executed to plaintiff an oil and gas lease of all of Cuyama except the 3,100 acres. The lease was for 20 years and so long thereafter as oil or gas could be produced in paying quantities.[2]

On June 23, 1934 Hibernia, in order to induce plaintiff to prospect Cuyama, excepted from the operation of the liens of its mortgages all petroleum produced on condition that petroleum in paying quantities be produced prior to May 29, 1937.

On August 18, 1934, during the pendency of the foreclosure proceedings, Ralph Cebrian conveyed his interest in Cuyama to Edward Cebrian. On August 23, 1934 Edward Cebrian filed a petition and schedule for a composition of creditors in the United States District Court, pursuant to the farmer-debtor provisions of the federal bankruptcy law. On August 23, 1934 the United States District Court entered an order restraining Hibernia from selling Cuyama under the power of sale contained in the mortgage of September 24, 1930 or under any other authority at all until further order of the court.

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[1] All documents relevant to this action were duly recorded.

[2] Plaintiff does not assert any rights under the lease of August 23, 1930. He asserts rights solely under the lease of May 29, 1934.

On January 3, 1935 Hibernia concluded a composition with Edward Cebrian and with certain creditors of his in which:

1. Hibernia agreed to accept $450,000 in satisfaction of its claim and lien against Cuyama.

2. In lieu of $450,000 in cash, Hibernia agreed to accept a deed from Edward Cebrian conveying clear title to Cuyama subject only to taxes, and Edward Cebrian agreed to convey it to Hibernia.

3. Hibernia agreed to execute and deliver to Edward Cebrian a lease of Cuyama for the term of three years, with an option to purchase at any time during the term of the lease for $450,000 plus interest and taxes.

4. Hibernia, Edward Cebrian, and the creditors agreed that the farmer-debtor proceedings be dismissed.

On January 17, 1935 the United States District Court entered an order confirming the foregoing arrangement and dismissing the farmer-debtor proceeding on the condition, among others, that "no action be taken by any person, firm or corporation * * * to attach or execute upon the property of Edward Cebrian, real or personal, nor to enforce any liens thereon during the operation of the lease executed by Hibernia to Edward Cebrian."

Hibernia cancelled its mortgage notes and satisfied the debts due to it, and on January 1, 1935 granted Edward Cebrian the 3-year lease and the option to purchase the property at any time during the term of the lease for $450,000.

On March 11, 1935 Hibernia caused to be executed to itself a deed purporting to foreclose the mortgage of September 24, 1930 under the power of sale contained therein. On March 15, 1935 Edward Cebrian executed a quitclaim deed conveying Cuyama to Hibernia.

From May 29, 1934 until May 29, 1937 plaintiff fully performed all of the terms and conditions of the leases of August 23, 1930 and May 29, 1934 without locating petroleum in paying quantities on or before May 29, 1937.

On May 11, 1937 Hibernia represented to plaintiff it had foreclosed the mortgage, that the May 29, 1937 termination date recited in its subordination of June 23, 1934 was in effect, and plaintiff's interest in the petroleum would be lost if he did not locate oil in paying quantities within the time provided therein. At the time Hibernia made the representations it knew the mortgage foreclosure deed was void because the federal court order prohibited such foreclosure and because it had satisfied the debt secured by the mortgage. Plaintiff relied on the representations and at all times between May 29, 1937 and January 9, 1950 he believed his interest in the petroleum located on Cuyama had been lost except for the extensions granted by Hibernia; he did not know and had no reason to know the federal court had entered any order prohibiting the enforcement of any liens against Cuyama or that the debt secured by the mortgage had been satisfied.

Plaintiff was confident that with further prospecting he would be able to locate petroleum on Cuyama and he entreated Hibernia to give him more time. By threats of cancellation, termination, and eviction, Hibernia persuaded plaintiff to quitclaim his interest and to permit it to quiet the title in exchange for its promise to permit plaintiff to prospect until March 9, 1938 for petroleum in paying quantities. Plaintiff relied on the representations and accepted the offer. On June 17, 1937 plaintiff executed a quitclaim deed to Hibernia which he delivered in escrow with the understanding that it was to be delivered to Hibernia in the event he did not discover petroleum in paying quantities on or before March 9, 1938.

Hibernia commenced a suit to quiet title, naming plaintiff and others as parties defendant. Plaintiff permitted a default to be entered against him and "cooperated with Hibernia to make possible the successful completion of the action to quiet title."

Plaintiff continued to prospect for petroleum but failed to locate any in paying quantities by March 9, 1938. Immediately thereafter Hibernia advised him that his interest in Cuyama was irretrievably lost. Again plaintiff asked for further time to locate petroleum. On March 11, 1938 Hibernia advised him it would not extend the lease and it recorded the quitclaim deed.

After March 9, 1938 Hibernia negotiated a new lease with plaintiff covering 6,000 acres included in Cuyama and in exchange extracted from plaintiff an acknowledgment that Hibernia was sole owner of Cuyama in fee simple and that possession was to be surrendered to it, and it required plaintiff and his wife to execute a quitclaim deed dated May 21, 1938. At all times after December 1938 Hibernia refused to permit plaintiff to prospect on Cuyama for petroleum.

On June 10, 1940 Hibernia obtained a decree of the superior court of Santa Barbara County quieting title to the property against plaintiff and others. In order to obtain the judgment, Hibernia offered in evidence the foreclosure deed and the quitclaim deed of June 17, 1937, and the court relied on them in entering its judgment. Hibernia concealed from the court that the United States District Court had prohibited execution of the foreclosure deed and the fact that it had obtained the quitclaim deed from plaintiff by means of the representations, promises, and acts alleged.

By deed dated October 2, 1940 and by a correction deed dated December 12, 1941, Hibernia conveyed Cuyama to defendant Hubbard S. Russell. In January 1948 one George Hadley, acting for defendant Norris Oil Company, located petroleum in paying quantities on Cuyama. On information and belief, the remaining defendants thereafter caused petroleum having a value in excess of $100,000,000 to be removed therefrom. On information and belief, the value of the petroleum remaining on Cuyama is $1,000,000,000.

Plaintiff never at any time prior to January 9, 1950 suspected that Hibernia misrepresented the status of the title of Cuyama. At that time one Charles J. Colville, then a stranger to plaintiff, called on him and advised him that he thought plaintiff had a continuing interest in the petroleum located on Cuyama. Plaintiff told Colville some of the facts pleaded in the complaint and the two commenced a detailed investigation. On May 3, 1950 plaintiff for the first time learned that the debts secured by the mortgages had been satisfied prior to May 29, 1937 and that there was in existence a court order which prohibited the foreclosure of the mortgage. It was not until after that date that plaintiff learned for the first time that his oil and gas leases were in full force and effect on May 29, 1937, the date which Hibernia had falsely represented to be the termination of his interest in the lease of May 29, 1934.

Plaintiff has at all times since May 29, 1934 been ready, willing, and able to perform his obligations under the lease of that date and his performance has been prevented only by the acts of defendants.

Plaintiff prays for possession and restitution of his leasehold on Cuyama; for $1,000,000,000 damages for withholding the leasehold; and for $100,000,000 damages for the value of the petroleum which defendants have removed.

Defendants' demurrers were sustained without leave to amend on the ground the complaint does not state facts sufficient to constitute a cause of action in that it shows on its face plaintiff's claims are barred as res judicata by the judgment entered June 10, 1940 by the superior court of Santa Barbara County in the suit to quiet title brought by Hibernia against plaintiff and others. The ground on which the trial court sustained the demurrers is fatal to plaintiff's case.

[1] The complaint in the present action identifies the suit to quiet title brought by Hibernia. The complete judgment roll in the latter suit is included in the briefs and the parties agree it is to be considered a part of the complaint in the present action. The defense of res judicata may be raised by demurrer where the facts which give rise to it appear in the complaint. Weil v. Barthel, 45 Cal.2d 835, 837, 291 P.2d 30; Willson v. Security-First Nat. Bk., 21 Cal. 2d 705, 710, 134 P.2d 800; Freeze v. Salot, 122 Cal.App.2d 561, 266 P.2d 140.

Hibernia filed its suit to quiet title on September 21, 1937. It named plaintiff and one D. G. Donahue, among others, as parties defendant. The complaint in that suit alleged Hibernia was the owner in fee simple and in possession of Cuyama; in subparagraph A of paragraph III, that each defendant claimed some interest therein but that such claim was unfounded, and no defendant had any interest except by lease dated May 29, 1934 executed by Edward and Ralph Cebrian, Burch is lessee of Cuyama for the purpose of mining and operating for oil and gas; Hibernia gave its written consent to the lease; the consent was given on the condition "that the said lease should cease and terminate if oil in paying quantities was not produced within three years from the date of said lease, to-wit: within three years from the 29th day of May, 1934;" on August 20, 1937 Hibernia by a written instrument granted Burch an extension of the lease of May 29, 1934 until March 9, 1938, wherein Burch agreed that Hibernia "shall, on the 10th of March, 1938, be the owner of the real property * * * said lease dated May 29, 1934, shall terminate and end on said 9th day of March, 1938, unless oil or gas in paying quantities * * * shall on or before said 9th day of March, 1938, be produced"; and Burch was the lessee "under a valid and subsisting lease" of the property covered by the lease of May 29, 1934 "subject, however, to termination without notice on the 9th day of March, 1938, in the event * * * that oil or gas in paying quantities * * * shall not have" been produced by that date. The complaint prayed that: 1. Each defendant be required to set forth the nature of his claim and that all adverse claims be determined. 2. It be decreed none of the defendants had any right, title, interest or estate in any part of Cuyama "except the rights, title, interest and estate of the defendants specifically named in subparagraphs (A), (B) and (C) of paragraph III of this complaint, all as particularly set forth in said Paragraph III." 3. It be decreed Hibernia was the owner of Cuyama in fee simple and each defendant be enjoined and debarred from asserting any claim whatsoever in or to the property and premises adverse to Hibernia "except only the rights, title, interest or estate of the defendants specifically named in subparagraphs (A), (B) and (C) of paragraph III of this complaint, all as in said paragraph III particularly set forth." Burch did not answer the complaint.

The defendant Donahue filed a cross-complaint in the Hibernia suit to quiet title. On June 24, 1938 Burch, after the time in which he had to locate oil or gas on Cuyama had expired, filed a verified answer to the cross-complaint of Donahue in which he alleged he had "no right, title, interest, equity or estate in or to said real property or any part or parcel thereof under said lease dated the 29th day of May, 1934." [3]

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[3] Burch's answer to the cross-complaint read: "denies that he claims or asserts any estate or interest in or lien upon the property and premises described in the said cross-complaint, or any part thereof, adverse to said defendant and cross-complainant, said D. G. Donahue, and in that behalf alleges that by a lease dated the 29th day of May, 1934, from Edward Cebrian and Ralph J. Cebrian, the then record owners of a parcel of real property which included the property and premises described in said cross-complaint, was leased to this defendant and cross-defendant and said lease was consented to by said The Hibernia Savings and Loan Society, the then holder of a mortgage upon said real

The findings in the suit to quiet title recite that the case came on for trial on the complaint and various answers, including plaintiff's answer to Donahue's cross-complaint. The court found and concluded that each and every lease to Cuyama, and to any portion thereof, "and each and every renewal or extension thereof, has lapsed, and that none of the said lessees * * * have any right, title, claim or interest in or to said property, or any portion thereof." The judgment, dated June 15, 1940, was that Hibernia was the owner in fee simple and in possession of Cuyama and that none of the defendants "has" any right, title, claim, or interest therein, or any part thereof. The judgment became final.

[2–5] Plaintiff asserts the judgment in the suit to quiet title was a nullity because the relief granted was not identical with the prayer of the complaint. He argues the court had no jurisdiction to enter a judgment speaking as of the date of its entry; that its only jurisdiction was to enter a judgment in the identical language of the complaint, speaking as of the date of the filing of the complaint.

The rule that a default judgment in excess of the prayer of a complaint is void has no application to the Hibernia suit to quiet title. Burtnett v. King, 33 Cal.2d 805, at page 808, 205 P.2d 657, at page 658, 12 A.L.R.2d 333, states the reason for the rule:

> "The essence of the policy underlying section 580 of the Code of Civil Procedure, supra, is that in default cases, defendant must be given notice of what judgment may be taken against him—a policy underlying all precepts of jurisprudence and protected by our constitutions. If a judgment other than that which is demanded is taken against him, he has been deprived of his day in court—a right to a hearing on the matter adjudicated."

Hart v. Richardson, 134 Cal.App.2d 242, 285 P.2d 685, is in point. A default judgment in a divorce case included a provision that certain property was the plaintiff's separate property. The defendant in the divorce action later sued the plaintiff in that action with respect to title to his property, arguing the property provision of the divorce judgment was void because there had been no prayer to declare the property to be separate property. The contention was rejected and the former judgment was held res judicata because a stipulation had been filed in the divorce action that the property was separate. The court held, 134 Cal.App.2d at page 246, 285 P.2d at page 687:

> "The situation was changed by the stipulation, and this plaintiff was not without notice of the form of judgment that might be expected. In effect, he consented to the judgment which was entered. He should be estopped from questioning the effect of his stipulation."

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property, and that the said consent of said bank to said lease was upon the condition that oil in paying quantities should be discovered upon said property within three years from said date, to-wit: Within three years from the 29th day of May, 1934, and that by an agreement in writing said bank subsequently extended the time of the operation of said lease to the 9th day of March, 1938, upon condition that oil in paying quantities should be discovered upon said property by said named date; that oil in paying quantities was not so discovered upon said property by said date and that in accordance with the written agreement of this defendant and cross-defendant and said The Hibernia Savings and Loan Society, this defendant and cross-defendant and his wife, Fay Burch, made, executed and delivered to said The Hibernia Savings and Loan Society a quit claim, quitclaiming and conveying to said The Hibernia Savings and Loan Society, all their right, title, interest, equity and estate in and to said land, which included the said property and premises described in the said cross-complaint of said cross-defendant D. G. Donahue, and that this cross-defendant has no right, title, interest, equity or estate in or to said real property or any part or parcel thereof under said lease dated the 29th day of May, 1934."

Burch had until March 9, 1938 in which to discover oil or gas. The judgment in the suit to quiet title was entered long after March 9, 1938. The fact that at the date of the judgment Burch had not discovered oil or gas in paying quantities by March 9, 1938 was not disputed. At the date of the judgment the record before the court affirmatively showed Burch had no interest in Cuyama. Burch had notice of the judgment that would be taken against him. He was not misled into believing that no judgment decreeing his lease at an end would be entered. He affirmatively consented to the judgment that was entered.

The judgment in the Hibernia suit to quiet title speaks of the date of entry. Generally a judgment in a suit to quiet title takes effect on the rights and titles of the parties to the suit as they exist at the time of the rendition of the judgment and not as they existed at the commencement of the suit or before that time. Barstow San Antonio Oil Co. v. Whitney, 205 Cal. 420, 421, 271 P. 477; 49 C.J.S., Judgments, § 446, p. 876.

Plaintiff claims that as between Hibernia and himself the court could not look to the denials and allegations in his answer to Donahue's cross-complaint. The denials and allegations of the answer constituted admissions against interest which the court had the right to consider in rendering judgment. 19 Cal.Jur.2d 147, § 407. Cf. Dolinar v. Pedone, 63 Cal.App.2d 169, 176, 146 P.2d 237.

[6–10] Plaintiff contends the complaint states facts sufficient to constitute a cause of action in fraud. The fraud alleged is that Hibernia represented to plaintiff it had foreclosed its mortgage and that the May 29, 1937 termination date recited in its subordination of June 23, 1934 was in effect, and his interest in the petroleum would be lost if he did not locate oil in paying quantities within the time provided therein, when it knew at the time that the mortgage foreclosure was void because the order of the United States District Court had prohibited such foreclosure and because it had satisfied the debt secured by the mortgage.

The complaint also alleges that in order to obtain judgment in the suit to quiet title, Hibernia offered in evidence the foreclosure deed and the quitclaim deed of June 17, 1937, and the court relied on them in entering judgment; and that Hibernia concealed from the court the United States District Court had prohibited execution of the foreclosure deed and the fact that it had obtained the quitclaim from plaintiff by means of the representations, promises, and acts alleged.

Plaintiff argues the composition destroyed Hibernia's lien; that it obtained title under a void foreclosure deed and in turn conveyed title on the void deed to the remaining defendants; that the use of the deed to his "detriment constituted the lever by which [he] was defrauded." Defendants argue the fraud alleged was intrinsic, not extrinsic; that the complaint shows the foreclosure sale of 1935 was not enjoined by the United States District Court but, on the contrary, was ordered; that the injunctive part of the order confirming the composition was not to go into effect until after the composition had been consumated; in any event the alleged facts do not constitute fraud at all. Plaintiff replies that the facts constitute fraud and that it was extrinsic.

A court of equity under proper circumstances will set aside a judgment obtained by fraud. (29 Cal.Jur.2d 106, § 157.) The fraud must be extrinsic and collateral. Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105; Huron College v. Yetter, 78 Cal.App.2d 145, 149, 177 P.2d 367. Gale v. Witt, 31 Cal.2d 362, at page 365, 188 P.2d 755, at page 757, defines extrinsic fraud:

> "The fraud which will justify the setting aside of a final judgment by a court of equity must be of such character as prevents a trial of the issues presented to the court for determination. [Citations.] Where the fraud practiced is collateral to and outside

> of court so that a party is, because of such fraud or concealment, effectively deprived of presenting his case or all of his defense, it is extrinsic and equity will give relief. * * * [T]o constitute extrinsic fraud, there must have been some representation or concealment by the defendant which prevented the plaintiff from having his day in court. * * * These decisions follow the long established principle that the use of forged documents or perjured testimony constitutes intrinsic fraud and cannot be made the basis for an attack upon the judgment by way of relief in equity."

The concealment by a party of evidence which, if disclosed, would tend to overthrow his case is not extrinsic fraud. Hogan v. Hogan, 131 Cal.App.2d 281, at page 284, 280 P.2d 64, at page 66, says:

> "It is settled in this state that a judgment will not be set aside because it is based upon perjured testimony or because material evidence is concealed or suppressed, that such fraud both as to the court and the party against whom judgment is rendered is not fraud extrinsic to the record for which relief may be had."

Hibernia's alleged failure to introduce in evidence in the suit to quiet title the order of the United States District Court, or to make any reference to it, does not constitute extrinsic fraud. The allegations as to what it did and did not do in that suit are in effect that the judgment was obtained by perjury, false evidence, and concealment of other evidence. The alleged concealment went to the merits of the cause submitted for judgment. If there was fraud it was intrinsic, not extrinsic. See In re Griffith's Estate, 84 Cal. 107, 112–113, 23 P. 528; 24 P. 381; McLaughlin v. Security-First Nat. Bk., 20 Cal.App.2d 602, 606, 67 P.2d 726. The rule is the same whether the judgment sought to be set aside is a default judgment or rendered after answer and contested trial. Horton v. Horton, 18 Cal.2d 579, 585, 116 P.2d 605; Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105; Harvey v. Griffiths, 133 Cal.App. 17, 22–23, 23 P.2d 532.

The representations alleged to have been made to plaintiff by Hibernia prior to the quiet title suit as to its legal position, identical with its claims in the suit, do not constitute extrinsic fraud. Jorgensen v. Jorgensen, 32 Cal.2d 13, 22–23, 193 P.2d 728. Such alleged representations were merely that Hibernia had a superior title. They were exactly the same representations made to the court in the suit to quiet title. To be extrinsic the fraud must be collateral to the matter which was tried and determined by the court. Hanley v. Hanley, 114 Cal. 690, 693, 46 P. 736; Carr v. Bank of America, etc., Ass'n, 11 Cal.2d 366, 374, 79 P.2d 1096, 116 A.L.R. 1282; Abels v. Frey, 126 Cal.App. 48, 54, 14 P.2d 594. Two recent cases on all fours are conclusive.

American Borax Co. v. Carmichael, 123 Cal.App.2d 204, 266 P.2d 531, was a suit brought by American Borax Company and the Schorrs to set aside a judgment quieting title in Carmichael. It was claimed the judgment was obtained by extrinsic fraud in that Borax Company and the Schorrs had let judgment go by default on Carmichael's false representation that the Borax Company had no title at the time it had conveyed a lot to the Schorrs. Demurrer was sustained without leave to amend. Affirming, the court said, 123 Cal.App.2d at page 206, 266 P.2d at page 532:

> "The appellants contend that extrinsic fraud was alleged 'as to at least part of the plaintiffs'; that the complaint alleges that the attorneys for Carmichael represented to the Schorrs that the Borax Company had no title to Lot 207 (which the corporation had agreed to sell to them), and because of such misrepresentation the Schorrs made no defense to the former action * * *.

> "The complaint was clearly insufficient, as was the offer to amend which appellants say was made. Moreover, no claim is made in the brief that any specified facts exist, and could be alleged, which would disclose extrinsic fraud in that connection. Whether or not these appellants had any rightful interest in the property was the specific question involved in the action in which the judgment was rendered. The fact that this respondent was claiming title, in spite of certain outstanding instruments, presented a factual question but would not constitute extrinsic fraud.
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> "[123 Cal.App.2d at page 208, 266 P.2d at page 534.] With respect to the appellants Schorr it is argued that the complaint alleges that they were misled by a representation made to them by the attorney for the respondent to the effect that the Borax Company had no title to the lot which it had agreed to sell to them. It is stated in the respondent's brief that such a statement was made by respondent's attorney in a letter written to the Schorrs asking for a quit-claim deed from them, and that when they refused to give such a deed they were thereafter served with summons and complaint in the quiet title action. This is not denied in appellants' reply brief. Whether the Borax Company had any interest or title in the property was the issue involved in the former action, the Schorrs knew that this respondent was making a contrary contention, they had the right to defend when later served with summons, and no extrinsic fraud appears in this connection."

In Thiriot v. Santa Clara, etc., School Dist., 128 Cal.App.2d 548, 275 P.2d 833, the plaintiff sought to set aside a judgment in eminent domain whereby the defendant had acquired title from her. She alleged that in the condemnation suit the school district claimed the land was necessary for school purposes; the district and its officers falsely represented to her the land was needed for school purposes only, and induced her to compromise the suit and thereby avoid the trial of that issue; she believed the representations and consented to a decree of condemnation against her without trial of the issues presented by her answer; and if these issues had been tried she would have prevailed. The court held that obviously the alleged fraud pertained to one of the main issues in the condemnation suit and therefore was intrinsic. Also see Levinson v. Bank of America, 126 Cal.App.2d 122, 271 P.2d 632; Flint v. Hecker, 143 Cal.App.2d 762, 300 P.2d 57.

A party who has been given proper notice of an action and who has not been prevented from full participation, has had an opportunity to present his case to the court and protect himself from any fraud attempted by his adversary. Fraud perpetrated under such circumstances is intrinsic. Having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for an appeal or other direct attack. Howard v. Howard, 27 Cal.2d 319, 321, 163 P.2d 439; Smith v. Smith, 125 Cal.App.2d 154, 163, 270 P.2d 613.

We conclude that the alleged fraud was intrinsic; that the judgment in the suit to quiet title is res judicata as to any claim plaintiff may have had to Cuyama and to prospect for oil or gas thereon, and that it is a bar to the present action. It is not necessary, therefore, to examine the validity of the foreclosure sale or whether the facts alleged constitute fraud.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

Hearing denied; CARTER, J., dissenting.

146 Cal.App.2d 635

In the Matter of the Guardianship of the Person and Estate of Pamela Marie WISDOM, Minor.

In the Matter of the Application of Loyd Earl WISDOM for a Writ of Habeas Corpus.

Loyd Earl Wisdom, Petitioner and Appellant,

Gilbert N. Moore, Petitioner and Respondent.

Civ. 5273.

District Court of Appeal,
Fourth District, California.
Dec. 5, 1956.

Child guardianship case involving dispute between father and maternal grandparent to whom custody had been committed by mother, who had held custody under divorce, at mother's death. The Superior Court of Riverside County, Russel S. Waite, J., entered judgment appointing grandfather as guardian and discharging father's writ of habeas corpus. The father appealed. The District Court of Appeal, Barnard, P. J., held that evidence warranted finding that father was unfit to have custody, and, in any event, that best interests of child would better be served by appointment of grandfather as guardian.

Judgment affirmed.

1. Parent and Child 🔑2(4)

Custody of a child may not be given to a third person in the absence of a finding that the parent seeking such custody is unfit.

2. Appeal and Error 🔑931(1), 1010(2)

An appellate court is required to consider only the evidence most strongly in favor of the respondent, and may not reverse a judgment unless there is no substantial evidence which, with inferences reasonably to be drawn therefrom, will support judgment.

3. Appeal and Error 🔑1010(1)

A decision as to whether evidence supports finding must necessarily rest upon the evidence in the particular case.

4. Parent and Child 🔑2(4)

Rule that decision as to whether evidence supports finding must necessarily rest upon evidence in particular case is especially true with respect to finding of fitness or unfitness of parent to have custody of child.

5. Parent and Child 🔑2(4)

Many things including such matters as parent's character, his disposition, his emotional stability, his neglect or indifference toward child, his trustworthiness, and his acts and conduct may have bearing on parent's fitness, and may be considered by trial judge in deciding question of child's custody.

6. Parent and Child 🔑2(4)

In making finding upon issue whether parent is fit or unfit to have custody of child, trial court must be allowed and must exercise rather wide discretion in weighing evidence and drawing reasonable inferences therefrom, and in determining what part of testimony is to be believed.

7. Parent and Child 🔑2(4)

Rule that trial judge, in finding that parent is fit to have custody of child, should be allowed considerable leeway in drawing inferences from evidence when contrary inference could well have been drawn, also applies with respect to finding of unfitness, especially where best interests of child would be better served by findings made.

8. Guardian and Ward 🔑13(4)

While father's poor financial condition and unsatisfactory home conditions would not be controlling and could not be sole grounds for denying father custody of child, these matters would be properly considered with rest of evidence in determining whether best interests of child would be served by appointing grandfather as her guardian.

9. Guardian and Ward 🔑13(4)

In child guardianship case involving dispute between father and maternal grandparent to whom custody had been committed by mother, who had held custody under divorce, at mother's death, evidence warranted finding that father was unfit to have custody of child, and, in any event, that best interests of child would best be served by appointment of grandfather as guardian. West's Ann.Prob.Code, § 1406.

Roland C. Rutledge, Ontario, for appellant.

Clayson, Stark & Rothrock, Corona, for respondent.

BARNARD, Presiding Justice.

This is an appeal by the father of a six-year old girl from a judgment appointing the maternal grandfather as guardian of the person and estate of the minor, and denying the appellant's application for a writ of habeas corpus.

The appellant and the mother of the child were married on September 6, 1947, and separated on March 21, 1949. The mother was granted an interlocutory decree of divorce in May, 1949, which awarded her custody of the child and ordered the appellant to pay $35 a month for the child's support. The child was nine months old at the time of the divorce, and for about a year and a half thereafter the mother and child lived with the mother's parents at Corona. For several years thereafter, the mother lived, with the child, in her own home at Corona and the appellant lived at the nearby town of Pomona. In May, 1954, the mother returned to the home of her parents, later became ill, and died on February 4, 1955. Prior to her death she requested her parents to care for the child, and they agreed to do so.

The appellant married another woman on June 28, 1950, and separated from her on March 10, 1951. He obtained an interlocutory decree of divorce from that wife on October 25, 1951. Fifteen days later that wife filed an action for an annulment of the marriage, alleging that the appellant had falsely represented to her that he loved children and wanted a family; that after the marriage he informed her that he did not want a family, and did not want to be burdened with family responsibilities; that he refused to permit her to become pregnant; and that she would not have entered into that marriage if she had not believed his representations. The appellant signed a consent that the matter might be heard without notice and as a default, and a decree annulling that marriage was entered on December 6, 1951.

The appellant married another woman on May 29, 1953. They separated in November, 1954, and three weeks later became reconciled. The father moved from Pomona to Waterloo, Iowa, on January 17, 1955, where he was living with his wife, her two children and her mother. He started to work at Waterloo on January 31, 1955, worked a week, and then came to Corona.

On February 10, appellant came to the home in Corona where the child was sick in bed with a temperature of 104°. When the grandmother let him see the child he threw back the covers but was told that the child was very sick and must be kept covered. He told the child that he was going to take her with him when she got well. The grandmother told him he could not take the child, and that he had never acted like a father. He replied that he had seen a lawyer and was going to take the child, and then left. He returned in about twenty minutes and, when the grandmother tried to prevent him from entering the house, he shoved her aside, went into the bedroom, and took the child out of bed. He got as far as the driveway, with no blanket on the child, when the grandmother and her sister succeeded in getting the child away from him. They returned the child to bed and called the police.

On February 9, the maternal grandfather had filed a petition for appointment as guardian of the person and estate of the child, alleging the necessity therefor and that the child had an estate consisting of $1,200 worth of U.S. Savings Bonds and other property of the value of $800. On February 10, the appellant filed a petition for a writ of habeas corpus for the purpose of securing possession of the child, and a writ was issued returnable on February 14. In addition to the answer and return of the grandparents an affidavit of the attending doctor, dated February 14, was filed in which the doctor stated that the physical condition of the child would not permit her appearance in court on February 14, and that "any attempt to move her would greatly endanger her health." On February 15, the appellant filed a counter-petition seeking to be appointed as such guardian, alleging that the child has no legally appointed guardian but has an estate which needs the attention of some fit and proper person.

The two petitions for appointment of guardian and the habeas corpus matter were, by agreement, heard together. There was ample evidence at the hearing that the grandparents are responsible citizens of Corona, that they are aged 50 and 48, respectively, and that they have no minor children. The appellant testified that the grandparents were nice people who could provide for the child, and that the only objection he had is that "I feel she should be in my home." He also testified that his salary "at the moment is approximately $300 a month"; that he owned no property; and that "I do have a bank account in Waterloo." He evaded several questions as to the amount of his bank balance but finally said it was about $50. Later on he admitted that he had closed that bank account and had none at the present time. There was evidence that he had not visited the child during the year and a half after his divorce from the child's mother, and had visited the child only once between May, 1954, and February 10, 1955. He testified that he had visited the child about once a week during the intervening period, while the mother was living in her own home, but from the other evidence received the court would have been justified in disbelieving that testimony. The appellant did not allege or attempt to prove that he had ever complied with the court's order that he pay $35 a month for the support of the child, and the evidence indicates that he was in default in that respect. The only evidence in relation to this matter is the testimony of the grandmother who stated, in response to a question, that they were willing that any payments that might be hanging over the head of the appellant for support might be dropped. The grandmother also testified that the appellant had never shown a fatherly interest in the child, so far as she knew. The extent of her opportunity for obtaining such knowledge was fully apparent to the court from the evidence received.

The court found, among other things, that the divorce decree awarding custody of the child to the mother had never been modified; that prior to her death the mother placed the child in the custody of the grandparents; that the child has an estate and the appointment of a guardian of her person and estate is necessary; that the grandfather is a fit and proper person to serve as such guardian; that it is for the best interests of the child "in respect to her temporal, mental and moral welfare" that the grandfather be appointed such guardian; that it would not be for the best interests of said minor in these respects if the appellant was appointed such guardian; and that the appellant "is not now a fit or proper person to have the custody of said child." The appellant has appealed from the judgment entered in accordance with these findings. The question presented is as to the sufficiency of the evidence to support the finding that the appellant is not a fit or proper person to have the custody of this child.

[1–6] It is now settled that the custody of a child may not be given to a third person in the absence of a finding that the parent seeking such custody is unfit. Stewart v. Stewart, 41 Cal.2d 447, 260 P.2d 44; In re Guardianship of Smith, 42 Cal.2d 91, 265 P.2d 888, 37 A.L.R.2d 867. It is equally well settled that an appellate court is required to consider only the evidence most strongly favoring the respondent and may not reverse a judgment unless there is no substantial evidence which, with the inferences reasonably to be drawn therefrom, will support the judgment. A decision as to whether the evidence supports a finding must necessarily rest upon the evidence in the particular case, and this is especially true with respect to a finding of fitness or unfitness in such a case as this. The meaning of the words "fit" or "unfit" has never been clearly defined in this state, either by statute or decision. It appears from many decisions, however, that many things including such matters as the parent's character, his disposition, his emotional stability, his neglect or indifference toward the child, his trustworthiness, and his acts and conduct, may have a bearing on his present fitness for such purpose, and may be considered by the trial judge in deciding the question of the child's custody. Of necessity, in making such a finding the trial court must be allowed and must exercise a rather wide discretion in weighing the evidence and drawing reasonable inferences therefrom, and in determining what part of the testimony is to be believed. The appearance and manner of the parties and witnesses while testifying may well have an important bearing on a just result, and it is peculiarly true in this type of case that the trial judge is in a much better position to weigh the effect of the evidence than is an appellate court.

It could not be questioned that the evidence here amply supports the findings that the best interests of this child would best be served by appointing the grandfather as her guardian, and that it would not be best served by the appointment of the appellant as such guardian. In view of the evidence as disclosed by the record it is hard to believe that any judge would hold otherwise. While that matter is not controlling, it is a statutory guide in the appointment of such a guardian, Probate Code, Sec. 1406; it should not be entirely overlooked; and the finding of the trial court with respect to the parent's fitness may well be viewed in the light of the findings in that regard.

Disregarding a part of the appellant's testimony which the court was not required to believe, the evidence strongly indicates that the appellant showed very little interest in this child for some six years and until after the death of its mother. It may also be inferred from the evidence that his sudden interest at that time was based on his feelings against the grandparents, and quite possibly on his desire to control the child's estate, rather than on his affection for the child or upon the natural feeling of a father toward his child. Among other things, this is somewhat corroborated by the fact that he voluntarily consented to the annulment of his second marriage on the ground that he had falsely represented to that wife that he loved children, whereas his real feeling was that he did not want a family and did not want to be burdened with family responsibilities.

The instability of the appellant, both emotionally and otherwise, appears in the evidence of his several marriages. He was married three times in less than six years. The first marriage lasted about eighteen months and was dissolved because of his cruelty. The second lasted about eight months and was dissolved because of his fraud. In this connection the court pointed out that the appellant should be considered guilty of a fraud on the court by consenting to an annulment after he already sought and received an interlocutory decree of divorce, in order to end the marriage more quickly. The third marriage had lasted a year and eight months at the time of the hearing, but there was another separation after a year and a half. While there had been a reconciliation, this had only been in effect for some two months, and in view of all of the evidence the judge may well have entertained serious doubts as to the permanence of that marriage. As the court said in Re Guardianship of Casad, 106 Cal.App.2d 134, 234 P.2d 647, 655; "After the parent has broken the home of the child once, the court should not be compelled by an ancient law to break its home again against its will, and to its probable detriment."

[7] The evidence concerning the appellant's forcing his way into the home and attempting to take the child from its sickbed, a few days after the death of its mother, tends to indicate a disregard of the child's welfare and a willingness to gratify his own desires even at the expense of the child's health, and may well be taken as indicating that he was lacking in the feelings, motives and character which are to be considered in determining his fitness to have custody of the child. As was pointed out in a concurring opinion in Re Guardianship of Smith, 42 Cal.2d 91, 265 P.2d 888, 892, 37 A.L.R.2d 867, under some circumstances "the parent's insistence on his right to custody despite the harm that would clearly result to his child will itself be evidence of his unfitness. In re Bensfield, 102 Cal.App. 445, 449, 283 P. 112; In re Guardianship of Casad, 106 Cal.App.2d 134, 152, 234 P.2d 647." In Re Guardianship of McCoy, 46 Cal.App.2d 494, 116 P.2d 103; In re Guardianship of Case, 57 Cal.App.2d 844, 135 P.2d 681, and many other cases where a finding that a parent is fit has been affirmed, the trial court has been allowed considerable leeway in drawing inferences from the evidence when a contrary inference could well have been drawn. The same rule should be applied with respect to a finding of unfitness, especially when it so clearly appears from the evidence as a whole that the best interest of the child would be better served by the findings made.

[8] While the evidence of the appellant's financial condition and as to the conditions existing in his new home in Waterloo is not controlling and could not be taken as the sole ground for denying custody, these were matters to be considered with the rest of the evidence and at least it must be said that they tend to support the findings made, rather than to indicate that contrary findings should have been made.

[9] Assuming that the evidence would have supported a contrary finding with respect to the fitness of the appellant, it cannot be said that there is no substantial evidence supporting the finding made.

The judgment is affirmed.

GRIFFIN and MUSSELL, JJ., concur.

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146 Cal.App.2d 677

Victor GLASBAND, Plaintiff and Appellant,

v.

John HUSSONG, Defendant and Respondent.

Civ. 21399.

District Court of Appeal, Second District, Division 3, California.

Dec. 7, 1956.

Rehearing Denied Dec. 27, 1956.

Hearing Denied Jan. 30, 1957.

Action for breach of oral contract for purchase by plaintiff from defendant of an interest in certain fishing boats. The Superior Court, Los Angeles County, Clarence M. Hanson, J., in a nonjury trial, entered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that refusal to permit plaintiff to amend his complaint to allege unjust enrichment of defendant by reason of certain payments made by plaintiff constituted an abuse of discretion in view of facts that complaint had alleged that such payments had been made and asked for damages including amounts of such payments and that there was no evidence upon which to base a forfeiture of such amount.

Judgment reversed.

1. Evidence 🔑37

In action for breach of oral contract, defense that the contract was illegal under Mexican law because plaintiff did not have a "Visitor For Business Permit" could not be sustained in absence of evidence concerning the Mexican law.

2. Evidence 🔑37

The court could not take judicial notice of foreign law.

3. Appeal and Error 🔑1075

Evidence 🔑37

In action for breach of oral contract, alleged defense to effect that, under a Mexican statute of frauds, the contract was invalid, would not be sustained in absence of proof of the Mexican law and in view of fact that defendant stated in his brief that no reliance was made upon the statute of frauds to sustain the judgment. West's Ann.Civ.Code, § 1624a.

4. Evidence 🔑81

In absence of proof of Mexican law as to statute of frauds in action for breach of oral contract, it would be presumed that Mexican law on the subject was the same as the California law. West's Ann.Civ. Code, § 1624a.

5. Evidence 🔑591

In action for breach of an oral contract, alleged defense that amounts stated by plaintiff were forfeited because plaintiff had failed to secure insurance required by the contract would not be sustained in view of fact that defendant, who had been called as a witness by plaintiff, under the Code of Civil Procedure, conceded that there was no evidence in support of such defense. West's Ann.Code Civ.Proc., § 2055.

6. Contracts 🔑350(2)

In action for breach of oral contract pertaining to purchase of and interest in certain fishing boats, evidence was not sufficient to sustain trial court's findings that the only agreement made by defendant in regard to the boats was to sell them to third party and that sums received by defendant from plaintiff were paid on behalf of such third party.

7. Pleading 🔑236(6)

In action for breach of alleged oral contract for purchase of interest in certain fishing boats, refusal to permit plaintiff to amend his complaint to allege unjust enrichment of defendant by reason of certain payments made by plaintiff constituted an abuse of discretion in view of facts that complaint had alleged that such payments had been made and asked for damages, including amounts of such payments, and that there was no evidence upon which to base a forfeiture of such amount.

Samuel Maidman, Los Angeles, for appellant.

Chandler, Wright, Tyler & Ward and W. A. Caldecott, Los Angeles, for respondent.

PARKER WOOD, Justice.

Plaintiff sought damages for breach of an oral contract. In a nonjury trial, judgment was for defendant. Plaintiff appeals.

Plaintiff is a citizen of the United States, residing in Los Angeles. Defendant is a citizen of Mexico, residing in Ensenada.

The complaint, as amended at the beginning of the trial, alleged that: On February 16, 1954, plaintiff entered into an express contract with defendant in Los Angeles for the purchase of a 49 per cent interest in 3 fishing boats which were registered at the Port of Ensenada, Mexico, in the name of defendant as owner. The names of the boats were Beatriz, LaPaz, and D-D. Plaintiff agreed to pay $8,330 for said interest therein. About February 27, 1954, plaintiff paid $500 to defendant on account of said agreement, and agreed to pay the balance at such time as defendant would designate. About April 2, 1954, they modified the agreement to include in the transaction an additional boat named Frieda III, and plaintiff agreed to purchase a 49 per cent interest in the 4 boats for $10,780. The modification was made in Los Angeles. About March 12, 1954, plaintiff paid to defendant an additional $2,000 on account. About February 27, 1954, they agreed that plaintiff would defray the cost of repairing the boats, and that such payment would be credited upon the purchase price of plaintiff's said interest, and after the boats had been repaired and plaintiff had been credited with the sums expended by him, plaintiff would then pay to defendant the balance remaining on the purchase price of said 49 per cent interest. Plaintiff (erroneously written "defendant") expended $2,799 for repairing the boats, and after the boats had been repaired plaintiff offered to pay $5,481 to defendant to complete the payment of said $10,780 for said 49 per cent interest in the 4 boats. Defendant refused to accept the offer, and about March 23, 1954, notified plaintiff that he would not transfer said interest to plaintiff. At the time plaintiff entered into said agreement to purchase said interest, defendant represented to plaintiff that for some years he had used the boats in a pleasure fishing business at Ensenada and said business had made a net profit of $15,000 a year, and that after repairing the boats it was expected the profits in said business would be at least $15,000 a year. Defendant further represented that the boats were of the reasonable value of $30,000, and he was offering a 49 per cent interest for $10,780 because defendant needed the money from the sale to repair the boats and to finance other business ventures. Defendant agreed to secure the approval of the Mexican government for the transfer of said interest to plaintiff. Plaintiff has performed all conditions in said agreement on his part to be performed. Plaintiff, in expectation that defendant would perform the agreement, expended not less than $2,000 for trips from Los Angeles to Ensenada, for telephone calls to defendant, and for general services rendered by plaintiff to defendant. The prayer of the complaint was for damages, as follows: $2,500 paid to defendant; $2,799 paid for repairing the boats; $3,920 the difference between the sale price and the actual value of the boats; $7,350 loss of 49 per cent of profits for one year; and $2,000 paid for general expenses.

The answer of defendant was to the effect that he admitted that he was the owner of the boats and the boats were registered at the Port of Ensenada; and he denied generally and specifically the other allegations of the complaint. Seven separate defenses were:

(2) Legal incapacity of plaintiff because the law of Mexico provided that persons not citizens of Mexico were required to have a "Visitor For Business Permit" from the government of Mexico in order to invest funds in Mexico, and that plaintiff did not have such a permit.

(3) Purported contract is invalid and unlawful because it purports to allow plaintiff, an American citizen, to invest funds in Mexico without securing a business permit from Mexico.

(4) Contract is invalid because it is not acknowledged before a notary public and recorded in Mexico, as provided by Mexican law.

(5) The only contract which defendant entered into with plaintiff, regarding the boats, was that on said February 27, in Ensenada, defendant orally agreed with plaintiff and Tomas Moreno, a Mexican citizen, that plaintiff would sell the 3 boats for "a sum agreed upon by them" of which $7,500 was "to be paid down in cash" and the balance in installments then "agreed upon" with 6 per cent interest, and the purchaser to carry insurance on the boats in the name of defendant; Moreno entered into an agreement whereby plaintiff agreed to furnish funds to enable Moreno to enter into the contract; thereafter the contract was modified by the parties to include another boat for $5,000 to be paid in installments agreed upon by them; the contract was invalid and unenforceable in Mexico because it was not in writing and the doctrine of part performance is not the law of Mexico, and the oral contract was not acknowledged before a notary public or recorded by the notary.

(6) Any funds received by defendant from plaintiff were paid on behalf of Moreno, who is a necessary party to the action.

(7) The down payment was not made, except $2,500 which was paid to defendant as a deposit and to protect him against loss by failure of the purchasers to complete

the contract; neither plaintiff nor Moreno secured insurance as provided in the agreement, and Moreno is in default under the agreement.

(8) Any sums received by defendant in regard to the contract have been forfeited by reason of said default.

Defendant also alleged a counterclaim, based upon the alleged failure of plaintiff to perform the agreement alleged by plaintiff. (Defendant stated, in alleging the counterclaim, that he did not admit he entered into such a contract as alleged by plaintiff but "if such a contract be found to have been made between them" then defendant is entitled to damages on his counterclaim.)

Plaintiff testified as follows: He resided in Los Angeles and was in the window cleaning and sponge business. He first met defendant in the first part of February, 1954, at Ensenada and he told defendant that Moreno (an employee of defendant) had said that defendant was interested in selling the boat business. Defendant said the price was $16,500. Plaintiff said that as an American citizen he could buy only 49 per cent of a business in Mexico. Plaintiff also said that Moreno had told him that Moreno was dickering to buy the business but could not buy all of it. Plaintiff said he was there "more or less to buy the other part." Defendant said he would like to sell all of it to one person and be through with it, but it was difficult to do so and he realized it, and he was going to sell 49 per cent to plaintiff and the balance to Moreno. Defendant asked him if he was interested in buying it. Plaintiff said that he would buy 49 per cent in it but he (plaintiff) would have to see his brother in Los Angeles, and if defendant would come up in a week or two plaintiff would give him a definite answer. The boats involved in that conversation were the Beatriz, LaPaz and D-D. Moreno was a citizen of Mexico and an employee of defendant, who sold tickets for fishing trips on the boats. In the middle of February, 1954, defendant was in plaintiff's office in Los Angeles, and on that occasion the other persons present were: plaintiff, plaintiff's brother Eugene, plaintiff's wife, his secretary Miss Matsuda, and his employee Blake. At that meeting defendant asked if they had come to a decision. Plaintiff said that he and his brother had talked it over and would accept $16,500 and take it. Defendant said it was $17,000—that he had to spend about $500 to repair the D-D. Plaintiff and his brother discussed the additional charge of $500. Plaintiff accepted the price of $17,000. They discussed how much 49 per cent of $17,000 would be. Plaintiff's secretary figured the amount to be eight thousand and some odd dollars. Defendant said that they had made a deal. They shook hands on it. Defendant asked for money. Plaintiff said that it was necessary to have proper legal papers issued by the Mexican government in order for the sale to be made and he would pay when defendant had them. Defendant said that that was a formality. Plaintiff said until that happens he (plaintiff) would have to wait. Defendant said, "O.K. I will get them." Plaintiff saw defendant again on February 27 in Ensenada, and plaintiff asked him if he had the papers. Defendant said he would take care of that; and that he had to have money to pay bills—he was desperate and was being pressed for money. Plaintiff said that he could not pay the money without having the papers. Defendant told plaintiff not to worry, that he (defendant) would get them. Plaintiff then gave defendant a check for $500. Defendant said the money would be applied as part payment of the percentage plaintiff was buying. Defendant also said that the boats should be repaired, painted and put in the water, and that he did not have any money and that plaintiff would have to assume the expense of the repairs which would be credited against the value of the boats. Shortly thereafter defendant introduced plaintiff to Bonifaz, defendant's lawyer, and then defendant and the lawyer had a conversation in Spanish. Then defendant said the permit to sell Mexican property to plaintiff would be obtained, and that the lawyer would draft it. Plaintiff and the defendant had a conversation with Moreno wherein plaintiff told Moreno that defendant suggested that they get things started by fixing the boats. Moreno said he was in favor of it, and he would let plaintiff know what materials were needed. Plaintiff said he would return to Los Angeles and wait until the permit was issued. Prior to March 12 defendant telephoned plaintiff and said he needed money desperately, and he asked plaintiff to come to Ensenada. Plaintiff saw defendant on March 12 in Ensenada and paid him $2,000. Defendant said that everything was going fine. Then they went to the place where the boats were being repaired, and defendant pointed out what was being done to repair them. Plaintiff opened an account in an Ensenada bank, and he and Moreno used it in paying the expenses for the repairs. About a week later plaintiff saw defendant in Ensenada, and defendant said that Moreno wanted to be paid for the work he was doing on the boats. Defendant told plaintiff to pay him. Plaintiff paid $100 to Moreno. Defendant said that he was dissatisfied with the arrangement with Moreno and he was going to replace him. Plaintiff was making weekly trips to Ensenada and each time defendant requested money, and plaintiff made a counter request for the papers. On March 23 plaintiff received (in Los Angeles) a telegram from defendant. (The telegram stated: "Have made satisfactory arrangements finance I needed thru bank here stop original deal off will consider part of business only as you have not fulfilled your part.") Plaintiff went to Ensenada and asked defendant what the telegram meant. Defendant said he was not going to sell to Moreno and that he would form a corporation and that plaintiff's 49 per cent would be given to him in stock. Plaintiff said it was a good idea. Defendant said he would replace Moreno with Gonzales, the brother-in-law of defendant, and would give Gonzales 15 per cent of the stock. Defendant asked Bonifaz, his lawyer, to prepare the papers for permission from the Mexican government. Defendant asked plaintiff if he wanted to put another boat, the Frieda III, in the deal for $5,000 and make it a $22,000 deal. Plaintiff said he would have to see his brother about it. During the first week in April, defendant was in plaintiff's office in Los Angeles, and on that occasion the persons present were: plaintiff, plaintiff's brother, plaintiff's wife, and his secretary. Defendant asked if he had decided about taking the Frieda boat. Plaintiff replied that he would accept it. They figured that 49 per cent of the $22,000 would be about $10,700. Defendant said they would make $15,000 that year from the boats. About April 18 plaintiff saw defendant in Ensenada and defendant told him that he (defendant) was going to run the boat business until things were settled. Plaintiff replied that it was costing him money to go to Ensenada every week "making payroll" and that defendant was welcome to take the business over and run it. Defendant ran the business after April 18. On May 23 defendant told plaintiff that the business was worth $30,000 at that time. Plaintiff said that they had agreed on $22,000. Defendant said that he knew that but it is now $30,000 and it would go up to $35,000. Plaintiff said that it looked as if defendant did not want to make the deal. Defendant said it is no deal and he would give plaintiff's money back to him. Plaintiff said he had paid "fifty some odd hundred dollars." Defendant said he wanted to know exactly because he did not want anyone to feel that he had cheated him.

The $500 check (Exhibit 1) was drawn on the Bank of America in Los Angeles, California, was payable to and endorsed by defendant, and was paid by the bank. A notation on the front of the check was: "Deposit on Three Boats (D-D, LaPaz and Beatriz in Ensenada, B. C. Mexico.)"

Defendant wrote and signed a receipt for the $500, which receipt was as follows: "March 1st 1954. Received from Mr. Victor Glasband the amount of Five Hundred Dollars ($500.00) on account of three sale of three boats (D. D. LaPaz and Beatriz. John Hussong."

The receipt for $2,000 (Exhibit 2) was as follows: "March 12th 1953 Received on a/c $2,000.00 for D D, LaPaz & Beatriz from Victor Glasband. John Hussong."

Plaintiff's testimony as to the conversation with defendant in plaintiff's office in Los Angeles in the middle of February (to the effect the contract for the 3 boats was made there) was corroborated by his brother, his wife, his secretary, and his employee Blake. Also, plaintiff's testimony as to the conversation with defendant in plaintiff's office in Los Angeles in the first week of April (to the effect the contract for the 4 boats was made there) was corroborated by his brother, his wife, and his secretary.

Defendant, called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, testified as follows: On February 12, 1954, Gonzales and Moreno introduced plaintiff to defendant in Ensenada, and nothing was said on that occasion about buying boats. On February 21 plaintiff and Moreno went to defendant's house and plaintiff told defendant that he heard that defendant wanted to sell the boats; and plaintiff said he had enough money to pay $17,000 for them, which amount Moreno said was the price. He (defendant) had told Moreno that he would pay him $500 commission on the sale of the boats. Plaintiff said he could pay only $7,500 down and $500 a month for the boats. Plaintiff made an offer of $7,500 down and $500 a month with 6 per cent interest on the boats. Bonifaz, the lawyer, came over and told plaintiff that he could not buy boats in Mexico. Plaintiff said he knew that, and he was going to furnish the money and that he and Moreno were going "to partnerships." Plaintiff said he was going to lend the money to Moreno. Plaintiff said he was going to put in all the money. Moreno was going to divide the profits with plaintiff and have a salary of $150 a month. Neither Moreno nor plaintiff said that they had already made a deal between themselves. Defendant had no details of a private contract between Moreno and plaintiff—he only knew the principle of it that they were partners. On February 27 plaintiff told defendant that he wanted to give defendant some money, and he gave defendant the $500 check. Plaintiff came to Ensenada about every week and each time he brought supplies, paint and things. On March 12 plaintiff paid $2,000 to defendant on account. Defendant was in plaintiff's office in Los Angeles on March 4 and they talked about insurance, and nothing was said about buying the boats. He was not in plaintiff's office in the middle of February.

The manner in which the presentation of plaintiff's case was brought to a close should be noted. While plaintiff's counsel was cross-examining defendant under said section 2055 (in an effort to prove the contract was accepted in Los Angeles), the judge said it was not material whether the acceptance of the contract took place in Los Angeles because the last act that made it an enforceable contract was the payment of $500 which took place in Mexico. Thereafter the judge and counsel for plaintiff engaged in a discussion, with reference to the law of contracts, which covered 13 pages of the transcript. At the end of the discussion the judge said that at the next session of court he would have the case sharpened down to essential points, and that his final decision would follow the nonsuit theory unless he was shown cases to the contrary. At the next session of court the judge said, among other things: whether we look at the statute of frauds as creating an invalid contract or a voidable contract it is not material; if we consider the acceptance as a complete acceptance we will have the situation where there was no writing and therefore no enforceable contract; the part payment was made in Mexico, and the only thing that could give vitality to it would be the law of Mexico; the $500 check, the receipts, and the telegram did not amount to a sufficient memorandum because those documents did not, in the language of section "214 of the Restatement," go far enough to state the terms of the contract; it followed from what he said that he could not hold that plaintiff had a contract and therefore the plaintiff could not recover on the theory that he had an enforceable contract; where that leaves the plaintiff could not then be determined because the court did not have the testimony of defendant as to what the terms of the contract were as he indicates it. The judge stated further that the views which he expressed would be followed and if counsel on either side wanted to make an offer of proof regarding further matters the offer could be dictated into the record; and that the court, on its own motion, would exclude evidence that runs counter to the views he expressed.

Counsel for plaintiff offered to prove that plaintiff paid directly to defendant $2,500 at the special instance and request of defendant, and that plaintiff expended for the benefit of defendant $2,799 to repair boats owned by defendant; that the money was paid pursuant to an oral contract made in Los Angeles, California. (A further part of the offer pertained to the provisions of the contract and the breach thereof as alleged in the complaint.) Also, a part of the offer of proof was that by defendant's breach of the contract, defendant had been unjustly enriched in the amount of $5,299, the money actually paid to and for the benefit of defendant. Without an objection being made to the offer, the judge said the objection would be sustained.

Plaintiff further offered to prove, by reference to bank checks, that he paid $2,799 for repairing defendant's boats. The judge said that the objection would be sustained upon the theory that if there is no contract, under the law, there cannot be a recovery for a breach of it. The judge also said plaintiff had alleged an express contract, a breach of the express contract, and resulting damages; and, under the position of the pleadings, the evidence as to payments to defendant was not admissible.

Counsel for plaintiff asked if the judge would consider an amendment to the complaint setting forth a cause of action for unjust enrichment in connection with the payments to and on behalf of defendant. The judge said: "You can't do that now, we have run for several days trying this case on your theory and on the defendant's theory and it will have to go the one way or the other." The judge said he would preclude plaintiff from making any offer to amend the pleadings to conform to proof. Then counsel for plaintiff said there was no further cross-examination of defendant and that plaintiff was compelled to rest.

Thereupon, defendant was called as a witness on his own behalf. He testified that he never offered to sell 49 per cent interest in any of his boats to plaintiff.

The findings were: Plaintiff did not enter into an agreement with defendant for the purchase of an interest in the boats. Plaintiff did not pay defendant $500 or $2,000 or any sum on account of such alleged agreement. It is not true that the parties agreed that plaintiff would assume payment of such moneys as would be necessary to repair the boats, and that such payment would be credited to the purchase price. Plaintiff did not tender to defendant $5,481 or any sum in payment of his obligation for said alleged interest in the boats. Defendant did not agree to make application for approval of the Mexican government for the transfer of an interest in the boats to plaintiff. Plaintiff had not performed all conditions set forth in his alleged agreement. Defendant has not failed or refused to perform an agreement made by him with plaintiff. Plaintiff has not been damaged by any breach of agreement by defendant. The only agreement made by defendant with respect to the boats was to sell the same to Tomas Moreno upon terms agreed upon by them. Any sums received by defendant from plaintiff were paid on behalf of Tomas Moreno. Moreno is a necessary party to any action to recover sums so paid. No findings are made as to the counterclaim of defendant because no evidence was heard thereon.

[1, 2] The alleged defense to the effect that the contract was illegal, under the Mexican law, because plaintiff did not have a "Visitor For Business Permit" is not sustained. There was no evidence regarding the Mexican law. The court could not take judicial notice of the foreign law. See In re Estate of Kennedy, 106 Cal.App. 2d 621, 626, 235 P.2d 837.

[3, 4] Likewise, the alleged defense to the effect that under a Mexican statute of frauds the contract was invalid is not sustained. In the absence of proof of the law of Mexico as to a statute of frauds, it will be presumed that the law of Mexico on that subject is the same as the law of California. See In re Estate of Pusey, 177 Cal. 367, 372–374, 170 P. 846; Hickman v. Alpaugh, 21 Cal. 225, 226. Section 1624a of the Civil Code of California (statute of frauds) provides that a contract to sell goods of the value of $500 or upward shall not be enforceable by action unless the buyer shall give something in part payment or unless some note or memorandum in writing of the contract be signed by the party to be charged. Defendant states in his brief that no reliance is made upon the statute of frauds to sustain the judgment.

[5] The alleged defense to the effect that the amounts paid were forfeited because plaintiff failed to secure insurance is not sustained. Defendant concedes that there was no evidence in support of that defense.

[6] The findings (1) that the only agreement made by defendant with respect to the boats was to sell the same to Moreno, and (2) that any sums received by defendant from plaintiff were paid on behalf of Moreno, are not supported by the evidence. Defendant did testify that he never offered to sell 49 per cent interest in any of his boats to plaintiff. It is admitted by defendant that plaintiff paid $2,500 to him. The receipt for the $500, which is in defendant's handwriting and is signed by him, states that the money was received from plaintiff on account of "sale of three boats (D.D. LaPaz and Beatriz." The receipt for $2,000, which is in the handwriting of defendant and is signed by him, states that the money was received from plaintiff on "a/c" for D D, LaPaz and Beatriz. The $500 check which was drawn by plaintiff and endorsed by defendant, contained a notation thereon that it was a deposit on the 3 boats. Moreno did not testify. No one testified that those amounts were paid on behalf of Moreno. Defendant did testify that plaintiff said that he and Moreno were going "to partnerships." He also testified that he had no details of a contract between them—he knew they were partners. The evidence was not sufficient to prove the partnership. Defendant did not testify that he made a contract with Moreno. As above stated, he testified that he did not offer to sell 49 per cent to plaintiff.

[7] It was an abuse of discretion not to permit plaintiff to amend his complaint to allege unjust enrichment of defendant by reason of the payment of $2,500, and the payment of $2,799 for repairing defendant's boats. In Desny v. Wilder, 46 Cal.2d 715, at page 751, 299 P.2d 257, at page 278, it was said: "Great liberality is indulged in matters of amendment to the end that lawsuits may be determined upon their merits." It was also said therein, 46 Cal.2d at pages 751–752, 299 P.2d at page 278: "[T]he test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant." In the present case the amendment would not give rise to a wholly distinct and different legal obligation of defendant. The complaint herein alleged that the $2,500 had been paid to defendant, and that the $2,799 had been expended for repairing the boats. The prayer of the complaint asked for damages which included those specific amounts. It is clear that defendant received the $2,500 from plaintiff. It appears from plaintiff's offer of proof that he probably could prove that he expended $2,799 in repairing defendant's boats. There was no evidence upon which to base a forfeiture of those amounts.

The judgment is reversed.

SHINN, P. J., and VALLÉE, J., concur.

146 Cal.App.2d 642

In the Matter of the ESTATE of Fred E. BURLEW, Deceased.

Everts P. BURLEW et al., Appellants,

v.

Cora J. BEAR, Nancy Ann Borio, and Doris Kent, Respondents.

Civ. 5518.

District Court of Appeal,
Fourth District, California.

Dec. 5, 1956.

Hearing Denied Jan. 30, 1957.

Will contest. The Supreme Court of Orange County, Franklin G. West, J., entered judgment of nonsuit, and the contestants appealed. The District Court of Appeal, Mussell, J., held that evidence was insufficient to take case to jury on issue of undue influence.

Judgment affirmed.

Wills ⚷324(3)

In will contest, evidence was insufficient to take case to jury on issue of undue influence.

Richmond & Bradley and Robert S. Barnes, Santa Ana, for appellants.

Beardsley, Hufstedler & Kemble, Los Angeles, for respondents Cora J. Bear and Nancy Ann Borio.

John W. Shores, Glendale, for respondent Doris Kent.

MUSSELL, Justice.

Fred E. Burlew died on January 29, 1954, and his holographic will, dated January 12 of that year, was admitted to probate in Orange county on February 19, 1954. The testator, in his will, gave Cora J. Bear $13,000 and an automobile. He gave $5,000 to Mrs. Doris Kent and directed that the balance of his estate be divided into five equal parts, two of which he gave to Cora J. Bear and the remaining three parts to Nancy Ann Borio. On July 20, 1954, a contest of this will was filed by relatives of the testator and his deceased wife, who had been named as devisees in a will executed by Burlew on January 27, 1943.

The contestants claimed (1) That the decedent was not of sound and disposing mind and by reason of mental and physical sickness was not capable of making a will; (2) That said will was signed by the testator under duress on the part of Cora J. Bear; and (3) That the will was procured by the undue influence of Cora J. Bear.

At the trial, the contestants abandoned the issue of unsoundness of mind of the testator and after they had presented their evidence to the court and to a jury, a motion for nonsuit was made by respondents. The trial court granted this motion and entered a judgment of nonsuit, following which the contestants filed this appeal.

Appellants do not argue that the will was signed under duress. The sole issue for our determination is whether the evidence was sufficient on the issue of undue influence to authorize the court to grant the nonsuit.

Fred E. Burlew, who, for many years, had been a practicing attorney, was approximately 90 years of age at the time of his death. His wife, Myrta Preston Burlew, died in 1947, and there were no children the issue of the marriage. In 1950 Burlew was diabetic and was taken to a hospital. After leaving it, he employed Cora J. Bear to act as housekeeper and practical nurse for him and she acted as such from that time until Burlew's death on January 29, 1954.

Mrs. Bear, who was called as a witness by the contestants under section 2055 of the Code of Civil Procedure, testified that she had previously worked for Dr. Jesse Burlew, a brother of the decedent, and was paid $175 per month for her services. However, when she was employed by the decedent, he told her he would not pay her more than $125 per month and she agreed to take care of him until "he got up and around"; that in the fall of 1951 she told Burlew that she could not work for $125 a month, that nurses were getting $1 an hour; that Burlew then agreed to pay her $150 per month and she stayed on; that in the summer of 1951, Burlew made a will leaving her the sum of $3,000; that she saw a previous will on the dining room table in their home and read the provisions therein relating to a division of the decedent's property; that in the summer of 1952, Burlew told her that he had made a will leaving her $10,000; that she told Burlew that that would take care of her services as long as he had her stay with him. In the spring of 1953 Mrs. Bear was offered a job by a Mrs. Wheeler and when she discussed the matter with Burlew, he showed her his then current will in which she was to get a life estate in a house at Corona del Mar in which they were then residing. She stated that she cried and expressed her disappointment because she thought she would be unable to pay the taxes and keep up the property; that Burlew stated that if she was not happy about the house, he would take it out of his will, but that she should let him know if she changed her mind and he would "put her back in"; that she had no further conversations with Burlew concerning his will until after he had executed the will here involved; that in January, 1954, a few days prior to the 12th, she and Burlew took a trip to Los Angeles; that when Burlew was about to enter a bank at Fifth and Spring Streets, he suffered a heart attack; that she gave him nitroglycerin and made him rest while she got the car and that she took him immediately to Corona del Mar; that she did not notify a niece of Burlew's predeceased wife, who worked in a bank a block away, and did not call a doctor; that the following day she went to Santa Ana to make preparation for a trip to Palm Springs and when she got back in the afternoon Burlew showed her the will in question; that she was present when he died at about 6:00 p. m. on January 29th; that he "went to the bathroom and as he came through the room I saw there was something wrong and he sat down and he was just gone in about a half a minute."

Nancy Ann Borio was 15 years of age at the time of the trial. She testified that Burlew did not talk to her at any time about leaving her something in his will; that Mrs. Bear told her at about the time of Burlew's death that the little house would be left to her after her death and that Mrs. Bear was always nice and invited her down to Corona del Mar. There is no evidence in the record that Miss Borio knew that she was a beneficiary under the will in question prior to its execution or that Mrs. Bear ever talked to the decedent on her behalf.

Doris Kent, a next door neighbor of Burlew in Glendale, testified that shortly before Burlew hired Mrs. Bear that she (Mrs. Kent) found him in a diabetic coma and summoned aid; that Burlew and Mrs. Kent and her family were friendly and that they visited back and forth. Mrs. Bear and Burlew visited Mrs. Kent in Glendale a few days before Burlew's last will was executed, but there is no evidence that Mrs. Kent ever discussed the subject of Burlew's will with him or that she knew she was to be a beneficiary, and there is no evidence that Mrs. Bear and Burlew ever discussed the terms of the will involved.

Dr. Charles Young, an orthopedic surgeon, testified that for a time he lived near Burlew in Glendale and often visited with him; that he observed Burlew in May, 1953, and that he then showed symptoms of senility; that he had a conversation with Mrs. Bear after Burlew's death in which Mrs. Bear asked if he, Dr. Young, thought that Burlew was of unsound mind and that he told her Burlew was not insane at the time he saw him; that Mrs. Bear said, "Do you know that he was a stubborn devil? He wanted me to take the house down there, but I told him I wanted cash for my pay. You know he left his estate to Nancy Borio and myself and a much larger estate than I had any idea he had. You know Mr. Burlew settled with his relatives at the time of Mrs. Burlew's death."

Mrs. Lulu Cross testified that she was a fellow employee of Mrs. Bear in the home of Dr. Jesse Burlew; that she had a conversation with Mrs. Bear shortly after Fred Burlew was brought home from the hospital; that Mrs. Bear said to her, "Well, I talked to Mr. Burlew. I asked him if he couldn't give me more and if he couldn't give me more now, maybe he could fix it and compensate me for it after he was through with what he had and he told me 'Oh, no, I can't do that because I have everything fixed'"; that after Burlew's death Mrs. Bear came over to her home and asked her if she would perjure herself for money and stated that she had been informed that she, Mrs. Cross, would do something for money; that Mrs. Bear said she had asked the question because the Burlews were contesting the will and she wondered if they had gotten in touch with her (Lulu Cross).

Peggy Grant Rapson, one of the contestants, testified that she visited Burlew many times; that Burlew was practicing law at the time; that she never got to see Burlew alone, that Mrs. Bear would not leave the room, and that she and her husband had very little opportunity to talk to Burlew alone; that in 1952, when Burlew was living in Glendale, she tried many times to 'phone him but could get no answer; that in March of 1954, Mrs. Bear made the statement "It was just wonderful that Mr. Burlew remembered her"; that Mrs. Bear further stated that she had told Burlew "He couldn't die and not do the right thing."

Mrs. Cora Burlew testified that when Burlew was living in Glendale, Mrs. Bear told her that she had seen his will on the dining room table and had read it and that she was mad because she "figured that what he left me in the will was just bare wages."

Mrs. Wooley, a neighbor of Burlew at Corona del Mar, testified that in January, 1954, she had a conversation with Mrs. Bear in which Mrs. Bear said that Burlew told her that he was going to make it all right with her; that after the death of Burlew, Mrs. Bear told her that Burlew had left her shares and that it was well worth waiting for; that she had another conversation with Mrs. Bear in which Mrs. Bear said that she (Mrs. Wooley) would not have to say anything in court and that all she had to do was to tell the court that she did not remember.

Appellants contend that the foregoing evidence would amply support the finding of undue influence. We are not in accord with this contention.

In Re Estate of Welch, 43 Cal.2d 173, 175, 272 P.2d 512, 514, the court stated the rules to be applied in determining whether a will was a product of undue influence, as follows:

> "In Re Estate of Arnold, 16 Cal.2d 573, at page 577, 107 P.2d 25, at page 27, the rules governing the determination of whether a testamentary instrument is the product of undue influence are stated as follows: 'In an action to set aside a will of a deceased person on the ground of undue influence, it is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. In re Estate of Motz, 136 Cal. 558, 583, 69 P. 294. Evidence must be produced that pressure was brought to bear directly upon the testamentary act. In re McDevitt's Estate, 95 Cal. 17, 33, 30 P. 101. Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to coercion destroying free agency on the part of the testator. In re Estate of Keegan, 139 Cal. 123, 127, 72 P. 828. * * * mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. In re Estate of Easton, 140 Cal.App. 367, 371, 35 P.2d 614.
>
> "' "The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof

> of 'a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made.'"'" (Citations.) See also In re Estate of Keeney, 140 Cal.App.2d 688, 295 P.2d 479.

In Re Estate of Pellegrini, 138 Cal.App. 2d 143, 145, 291 P.2d 558, 559, the exception to the general rule is stated as follows:

> "'However, there is a well-established exception to this settled general rule, upon which respondents rely, to the effect that where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, and has actually participated in procuring the execution of the will, the burden is on him to show that the testamentary document was not induced by coercion or fraud. When proof of the existence of a confidential relationship between the testator and such a beneficiary [one who unduly profits by the will], coupled with activity on the part of the latter in the preparation of the will, is offered, a presumption of undue influence arises therefrom.' (Citations.) 'The rule is firmly established in California that when the contestant has shown that the proponent of a will sustains a confidential relationship toward the testator, and actively participates in procuring the execution of the will, and unduly profits thereby, the burden then shifts to the proponent to prove that the will was not induced by his undue influence.'" (Citations.)

In Re Estate of Bould, 135 Cal.App.2d 260, 274, 287 P.2d 8, 16, 289 P.2d 15, it is held:

> "The mere existence of a confidential relationship coupled with opportunity to impose the beneficiary's will upon the testatrix is not enough to shift the burden of proof. 'As suggested in Re Estate of Higgins, 156 Cal. [257] 261, 104 P. [6] 8, a "presumption of undue influence" arises from proof of the existence of a confidential relation between the testator and such a beneficiary, *"coupled with activity on the part of the latter in the preparation of the will."* The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will.'"

In the instant case there is no substantial evidence from which it can be inferred that Cora J. Bear was active in the preparation of the will involved. The only evidence as to the execution of the will was furnished by the testimony of Mrs. Bear in which she stated that a few days following a trip to Los Angeles with Burlew, she took the car from Corona del Mar to Santa Ana to have it serviced and upon her return, Burlew showed her the holographic will in question. There is no evidence that she discussed the terms of this will with Burlew or that she suggested any of its provisions. The evidence is that she did not know when it was prepared and was unaware of its existence until Burlew showed it to her after it had been fully executed. While her testimony could have been disbelieved, there was no other evidence to believe, and as is said in Hutchinson v. Contractors' State License Bd., 143 Cal.App.2d 628, 300 P.2d 216, 220:

> "But the rejection of testimony does not create evidence contrary to that which is deemed untrustworthy. 'Disbelief does not create affirmative evidence to the contrary of that which is discarded. "The fact that a jury may disbelieve the testimony of a witness who testifies to the negative of an issue does not of itself furnish any evidence in support of the affirmative of that issue, and does not warrant a finding in the affirmative thereof unless there is other evidence in the case to support such affirmative." Marovich v. Central Calif. Traction Co., 191 Cal. 295, 304, 216 P. 595, 600. To this same effect are Edwards v. Freeman, 34 Cal.2d 589, 593, 212 P.2d 883; Moore v. Chesapeake & Ohio Ry. Co., 340 U.S. 573, 576, 71 S.Ct. 428,

> 95 L.Ed. 547; Bunt v. Sierra Butte Gold Min. Co., 138 U.S. 483, 485, 11 S.Ct. 464, 34 L.Ed. 1031. * * * The fact that one testifies falsely may, and usually does, afford an inference that he or she is concealing the truth but it does not reveal the truth itself or warrant an inference that the truth is the direct converse of the rejected testimony.' In re Estate of Bould, 135 Cal.App.2d 260, 264–265, 287 P.2d 8, 10, 289 P.2d 15."

There was evidence that Burlew had confidence in Mrs. Bear as to her performance of her duties as housekeeper and nurse but it does not appear that he entrusted her with his business affairs. In one instance she received $500 from him for services in connection with the sale of real estate but it does not appear that she conducted the negotiations or the sale. If we assume that there was a confidential relationship, such relationship was not accompanied by active participation in the preparation of decedent's will. In re Estate of Bould, supra, 135 Cal.App.2d 260, 275, 287 P.2d 8, 289 P.2d 15.

The statements made by Mrs. Bear to Dr. Young, Mrs. Rapson and Mrs. Wooley do not show active participation in procuring the execution of the will involved within the rules stated in Re Estate of Bould, supra, and as is said in Re Estate of Welch, supra, 43 Cal.2d 173, 178, 272 P.2d 512, 515:

> "It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence; but before the will can be overthrown the circumstances must be inconsistent with voluntary action on the part of the testator."

It further appears from the record that Doris Kent and Nancy Ann Borio, devisees in the will involved, had nothing to do with its preparation or execution and there is no evidence that Mrs. Bear used undue influence on their behalf.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; SHENK and CARTER, JJ., dissenting.

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146 Cal.App.2d 840

Corinne GERARD, Plaintiff and Appellant,

v.

Sherman E. SALTER, Defendant and Respondent (Superior Court No. 62436).

Corinne GERARD, Plaintiff and Appellant,

v.

Sherman E. SALTER, Defendant and Respondent (Superior Court No. 62557).

Matter of the Arbitration Between Sherman E. Salter and Corinne Gerard.

Civ. 5284.

District Court of Appeal,
Fourth District, California.
Dec. 14, 1956.

Action concerning the validity of awards of board of arbitrators under a building contract respecting extras and other matters. From judgment of Superior Court of Orange County confirming the awards, Kenneth E. Morrison, J., plaintiffs appeal. The District Court of Appeal, Griffin, J., held that the arbitrators had jurisdiction to determine the issues presented by the agreement; that the award was not invalid for claimed misconduct of the arbitrators or prejudice or misconception of law; that interest should have been allowed from the time of the entry of judgment and not prior thereto; and that an allowance for attorney's fees in the amount of $750 was unauthorized.

Judgment in respect to interest and attorney's fees reversed and further hearing ordered on such issues alone and the remaining portion of judgment affirmed.

1. Arbitration and Award 🔑73

Where disagreements arose as to charge for extras under a building contract and parties pursuant to arbitration provision appointed arbitrators and the arbitrators found in favor of contractor, evidence did not establish that the arbitrators had no jurisdiction to determine the issues presented by the agreement and subsequent stipulation and order of court representing the damage action for breach of contract. West's Ann.Code Civ.Proc., § 1280 et seq.

2. Arbitration and Award ⚷16(1)

Once a controversy is submitted to arbitration, it remains before the arbitrators until they have completed their determination of the matter unless the parties mutually agree to withdraw it. West's Ann. Code Civ.Proc., § 1280 et seq.

3. Arbitration and Award ⚷35

Where arbitrators were appointed pursuant to provision in building contract to settle a dispute as to charges for extras and other matters, fact that award was not made by all three arbitrators did not invalidate it since the finding of two out of three was sufficient where there was no evidence of fraud. West's Ann.Code Civ. Proc., § 1053.

4. Arbitration and Award ⚷35

The statute providing that when there are three arbitrators all must meet but two of them may do any act which might be done by all, in absence of any contractual agreement or stipulation of submission between the parties, would be applicable. West's Ann.Code Civ.Proc., § 1053.

5. Appeal and Error ⚷1011(1)

Where claim that arbitrators under disputed building contract were guilty of misconduct and prejudice was repudiated by affidavits of other persons, a mere conflict in evidence was presented and finding of the trial court thereon for the respondent could not be considered on appeal.

6. Arbitration and Award ⚷63

Arbitration of dispute respecting extras and other matters under a building contract was not invalid on ground that one arbitrator based his decision upon a misconception of the law where there was no showing that the arbitrator's decision was in fact based upon the claimed misconception.

7. Arbitration and Award ⚷35

The fact that one arbitrator disagreed with the award concerning a dispute under a building contract respecting extras and other matters and indicated a desire to make a different report but failed to do so would not necessarily show that no consideration was given to the subject matter by the entire board so as to invalidate the award even though a previous decision may have contemplated some other action. West's Ann.Code Civ.Proc., § 1286.

8. Arbitration and Award ⚷73

Evidence supported finding of trial court that arbitrators appointed to arbitrate a dispute under building contract considered matters in accordance with stipulation and order of court and that their findings were duly signed and acknowledged by a majority of the arbitrators. West's Ann. Code Civ.Proc., § 1286.

9. Arbitration and Award ⚷73

On a general or unqualified submission to arbitration, the trial court is not authorized to review the entire evidence to see if it supports the award except in case of fraud, or similar misconduct, or unless the error appears on the face of the award.

10. Arbitration and Award ⚷73

Generally, the merits of a controversy between the parties are not subject to judicial review of an award under arbitration.

11. Interest ⚷19(1), 44

Generally, where there is not contract to pay interest, the law awards interest upon money from time it becomes due and payable, if such time is certain or can be made certain by calculation, and in the absence of agreement or statute to the contrary, interest is not recoverable on an unliquidated demand but is allowable only after it had been merged in a judgment.

12. Interest ⚷39(3)

A judgment bears interest from the date of its entry.

13. Interest ⚷39(3)

Where first award under arbitration of dispute under building contract was set aside and resubmitted and amount of final award was uncertain until the date of the second award on December 16, 1954, order of allowance of interest from December 10, 1953, was unauthorized and should be stricken and court directed to allow interest from time of the entry of the judgment especially where the delay appeared to be mutual.

14. Arbitration and Award ⚿73

Where attorney's fees under building contract were allowable only if either party brought suit to enforce terms of any judgment awarded, in which event reasonable attorneys fees were allowable to the successful party and the arbitrators made no allowance for such fees for either party, the trial court in the absence of any other agreement or statute so providing could not increase the amount of award to cover the cost of attorneys' services rendered to the parties in the arbitration proceeding under the contract.

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Monroe & Chula and George H. Chula, Santa Ana, for appellant.

Tobias & Whitlock and George H. Tobias, Santa Ana, for respondent.

GRIFFIN, Justice.

This appeal concerns the validity of awards of a Board of Arbitrators and the court's order confirming the awards, in consolidated actions numbers 62436, In the Matter of the Arbitration between Sherman E. Salter and Corinne Gerard, and action No. 62557, Corinne Gerard v. Sherman E. Salter. The arbitration concerned numerous matters arising out of the contractual work of the builder, respondent Salter, in the construction of a building for the appellant Gerard. The contract was signed on May 2, 1953, for the construction of a commercial building in Laguna Beach. Disagreements arose as to the charge for extras, the quality of workmanship and related matters. Under a provision in the original contract each party appointed one arbitrator who in turn appointed a third. They consisted of one Clarke, Hodgdon and Anderson. The builder claimed approximately $2,000 for extras. On December 10, 1953, they determined that Salter was entitled to a total of $1,760.09, less certain credits, leaving the amount of $1,262.29 due the contractor. They made their award in writing and delivered it to the parties. On March 30, 1954, Salter filed an application in the Superior Court for an order confirming the award of the arbitrators. Appellant Gerard made certain objections thereto and the matter came on for hearing before the trial court. It was stipulated that the entire matter be referred back to the same arbitrators for reconsideration and consolidation with case No. 62557 which was an action for damages for $8,000 for breach of contract, claiming that the building had not been built in a proper manner and the contractor had failed to complete it within the time prescribed. The stipulation was not too specific but the court's minutes show that it was stipulated and ordered that the two cases be consolidated and treated as one matter and that the parties proceed under the arbitration sections of the Code (Sec. 1280 et seq., Code Civ.Proc.). The reporter's transcript shows that respective counsel agreed that the same arbitrators be used and that all matters having heretofore been gone into and all new matters raised in the separate action be submitted to them and they were then to make their findings and report back to the court on the entire matter. Thereafter the three arbitrators met at various places, including the building itself, took evidence for several days, and many witnesses were sworn and examined. It was agreed by them that the former award of $1,262.29 in case No. 62346 for extras, would stand and made written findings to this effect. The findings then recite that the arbitrators have not reached a unanimous decision with regard to the question of Mrs. Gerard's claim arising under case No. 62557, and in this regard two members of the Board of Arbitration, Hodgdon and Anderson, found that the owner, Mrs. Gerard, was not entitled to any of those claims since it was their opinion that Mr. Salter performed all the work in a manner required of him to be done according to his contract and according to the plans and specifications which are a part of the contract;

that the other member of the board, Clarke, reserved the right to hand in a minority decision or report on this question. "Therefore, a majority of the Board hereby agrees that the owner, Mrs. Gerard, is not entitled to any damages from the contractor." All did agree on the amount of fees each arbitrator should have but made no mention of attorneys' fees, interest or other costs. This finding was *signed* by all three arbitrators, although it was not *acknowledged* by Clarke. No minority report was filed by Clarke. On motion to confirm the awards and to fix attorneys' fees, objections were filed by appellant claiming that the question of damages in action No. 62557 was outside the scope of the power of the arbitration board, outside of the provisions of the original contract regarding arbitration, and that appellant believed the arbitration agreement required that the award of damages in this case, if any, must be agreed upon by all three arbitrators; that this award was secured through fraud; that arbitrators Anderson and Hodgdon were guilty of misconduct and were biased and prejudiced and that they all met, as arbitrators, and in effect agreed that they would take no action on the damage element of the case but would refer that matter back to the court, and without the consent or knowledge of one arbitrator, the other two entered a new and different decision denying damages. Further objection was made that the allowance of $750 as attorneys' fees was excessive and unauthorized. Evidence was taken by the trial court on the objections made and the award was affirmed as reported by the arbitrators. Interest was allowed by the court from December 10, 1953, the date of the first award by the arbitrators in case No. 62436, including an allowance of $750 as attorneys' fees. Appellant claims on this appeal that the court erred in so doing.

[1, 2] We see no merit to the first claim that the arbitrators had no power or jurisdiction to determine the issues presented by the agreement and the subsequent stipulation and order of the court respecting the damage action. The issues were fairly submitted by stipulation to arbitrators for determination under section 1280 et seq. of the Code of Civil Procedure. No action was ever taken in the court by appellant to be relieved of the stipulation. No sufficient revocation is indicated as suggested by section 1280 of the Code of Civil Procedure. A hearing was had, findings were made, and the court, after a full consideration of the entire matter, adopted those findings and rendered judgment in accordance with them. Once a controversy is submitted to arbitration, it remains before the arbitrators until they have completed their determination of the matter, unless the parties mutually agree to withdraw it. Thus, when the parties agree upon an umpire to abide by his decision, neither of them, without the consent of the other, may, in the absence of fraud, withdraw the question of performance from the common arbiter for the purpose of referring it to a court or jury. 5 Cal.Jur.2d 100, sec. 26; Church v. Shanklin, 95 Cal. 626, 30 P. 789, 17 L.R.A. 207.

[3, 4] Complaint is next made that the award was not made by all three arbitrators. If appellant's stipulation could be interpreted, as may well be, that the arbitrators were proceeding under the original written agreement pertaining to the appointment and service of the arbitrators in respect to both actions, by its very terms, the finding of two out of three of their number was sufficient. If appellant relies upon the statute indicated in the stipulation, Sec. 1053 of the Code of Civil Procedure is also applicable. It provides that when there are three arbitrators all must meet, but two of them may do any act which might be done by all. In the absence of any contractual agreement or stipulation of submission between the parties on the subject, the statutory provisions would be applicable. Pacific Fire Rating Bureau v. Bookbinders', etc., Union, 115 Cal.App.2d 111, 114, 251 P.2d 694; Bierlein v. Johnson, 73 Cal.App.2d 728, 733, 166 P.2d 644; 5 Cal.Jur.2d 102, sec. 30; Sec. 15, Code Civ.Proc.; Griffith Company v. San

Diego College for Women, 45 Cal.2d 501, 289 P.2d 476, 47 A.L.R.2d 1349. Besides this, there was competent evidence produced at the hearing to show that appellant was apprised of this fact by her then attorney when she inquired of the arbitrators as to the necessary number required to make a finding as to the damage sustained, and no further objection was made. There is no evidence of fraud.

[5] The claim that two of the arbitrators were guilty of misconduct and were biased and prejudiced is predicated upon the testimony of a contractor who was a witness at the hearing before the arbitrators. He said arbitrator Anderson approached him after he gave testimony and "in effect, said he did not know how a builder could testify against another builder" and that the witness said he had merely presented the facts. This testimony, as well as any showing of prejudice or misconduct, was repudiated by affidavits of other persons. A mere conflict in the evidence was presented. The trial court held in favor of respondent in this respect. It therefore cannot be considered on this appeal. In re Estate of Bristol, 23 Cal.2d 221, 223, 143 P.2d 689; Griffith Co. v. San Diego College for Women, supra.

[6] There is some confusion in the record as to a claim by appellant that one arbitrator based his decision upon a misconception of the law and that all agreed upon a decision not to pass upon the damage question but to refer it back to the court. It is the testimony of Arbitrator Clarke, appointed by appellant, that arbitrator Hodgdon based his decision upon a misconception of the law because he said, during the deliberation, that he was informed that according to law if there is no penalty in the contract there could be no damages. The record shows that if he did make such statement he was evidently corrected in his belief by his coarbitrator Clarke, an attorney at law, and that he subsequently made the award indicated. There is no showing that his decision was, in fact, based upon such claimed misconception.

[7, 8] Apparently there was considerable discussion about the damage question and it may have been indicated, at one time during the proceedings, that this question was too involved and the better course would be to refer it back to the court and a proposed award was so prepared. However, the record shows, in the signed award served on the parties and returned to the court, that the question was considered and at least two of them later determined that appellant suffered no damage. It is appellant's claim that all arbitrators were not present when a different decision was arrived at; that his arbitrator did not participate therein, and accordingly under section 1286 of the Code of Civil Procedure there was not a unanimous participation in consulting and deliberating upon the award rendered, since there was a previous decision as to what disposition would be made of the reference. According to the record before us the findings and award seem to be *signed* by all three of the arbitrators with the exception noted in it as to the denial of damages. The trial court took evidence on this subject and found specifically that the arbitrators "considered all matters in both of the above-entitled cases in accordance with the stipulation and order of court and their findings were duly signed and acknowledged by a majority of them", and affirmed the award. It may well appear from the facts related, notwithstanding the testimony of Clarke, that a majority of the arbitrators did in fact meet and consider the question involved and two did agree upon an award as indicated. The fact that one disagreed with the award and indicated a desire to make a different report, but failed to do so, would not necessarily show that no consideration was given to the subject matter by the entire board, even though a previous decision may have contemplated some other action. The finding of the trial court is supported by the evidence. Cecil v. Bank of America, 141 Cal.App.2d 905, 297 P.2d 810.

[9, 10] Some complaint is made because the trial court refused to receive in evidence, at the hearing on the motion to confirm, many exhibits received in evidence before the arbitrators. Their relevancy is not apparent except to show on their face, as appellant contends, that there was in fact some cracking in the concrete slab; that the workmanship was poor, and other similar claims. This evidence was all considered and passed upon by the arbitrators. The other evidence produced before them was not before the court. The admission of the exhibits offered might well call for a re-examination of the entire evidence. On a general or unqualified submission to arbitration the trial court is not authorized to review the entire evidence to see if it supports the award except in case of fraud, or similar misconduct, or unless the error appears on the face of the award. It is the general rule that the merits of a controversy between the parties are not subject to a judicial review. In re Frick, 130 Cal.App. 290, 292, 19 P.2d 836; Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 165, 260 P.2d 156; Griffith Company v. San Diego College for Women, supra; Loving & Evans v. Blick, 33 Cal.2d 603, 609, 204 P.2d 23.

The court allowed interest from December 10, 1953, the date of the first award of the arbitrators finding that $1,262.29 was due. It is appellant's argument that this award did not specify that respondent was entitled to interest and the court's finding in this respect cannot be sustained since it would be different from the award, citing 6 C.J.S., Arbitration and Award, § 112, p. 263. This award, arising out of the arbitration agreement, was resubmitted to the arbitrators by stipulation and order of the court, and a further award was made in respect to both cases on December 16, 1954. It was approved by the court and judgment was entered thereon on July 1, 1955. The arbitration agreement makes no provision for payment of interest but provides that the arbitrators, if they deem that the case demands it, are authorized to award to the party whose contention is upheld, such sums as they shall deem proper for the time, expense and trouble incident to the appeal, and shall fix their own compensation and assess costs and charges of the arbitration upon either or both parties. It then provides that should either party bring suit in court to "enforce the terms thereof any judgment awarded shall include court costs and reasonable attorneys' fees to the successful party". The question then presented is when did the right to interest arise from the facts stated.

[11–13] It is the general rule that where there is no contract to pay interest, the law awards interest upon money from the time it becomes due and payable, if such time is certain or can be made certain by calculation, and that in the absence of agreement or statute to the contrary, interest is not recoverable on an unliquidated demand but is allowable only after it had been merged in a judgment. A judgment bears interest from the date of its entry. 14 Cal. Jur. p. 678, sec. 5; 47 C.J.S., Interest, § 19, p. 28. Here the amount claimed due was in dispute and uncertain. The first award was, in effect, set aside and resubmitted to the arbitrators, and any sum due respondent under that award may well have been offset against appellant's claim in her damage action. Therefore, the amount of the final award was undetermined and uncertain until the date of the second award on December 16, 1954, which award, by the action of the parties, remained subject to the approval of the court. We conclude that the order of allowance of interest from December 10, 1953, was unauthorized and should be stricken and the court directed to allow interest from the time of the entry of judgment. 47 C.J.S., Interest, § 59, p. 68; Southard v. Smyth, 19 Me. 458. There is some authority to the effect that where the entry of judgment on the award is delayed by proceedings taken by the opposing party, the judgment may include interest on the award from the time of entry of judgment, but the delay here appears to be mutual. See also 47 C.J.S., Interest, § 20, p. 32.

[14] Respondent's counsel petitioned the court to confirm the award and to allow $750 attorneys' fees. It was alleged in the petition that the attorneys' services consisted of preparation work and attendance before the Board of Arbitrators from October, 1953, to the present date. The attorney testified before the court that he spent 65 hours on the entire matter, which included time spent in making demands under the contract, assisting his client in preparing his testimony and conducting the hearing before the Board of Arbitrators, filing the first request for confirmation and filing the answer in case No. 62557. Of the hours claimed it appears that about 19 hours were spent on matters in the court hearing, and the balance were spent in preparation and attendance before the arbitrators. Under the contract the arbitrators are authorized, as above stated, to award such sums as they deem proper for expense and trouble incident to the appeal. No such allowance was made in the award. Attorneys' fees under the contract were only allowable if either party brought suit "in court to enforce the terms hereof any judgment awarded shall include court costs and reasonable attorneys' fees to the successful party."

Since the arbitrators made no allowance for attorneys' fees for either party the trial court, in the absence of any other agreement or statute so providing, could not increase the amount of the award to cover the cost of attorneys' services rendered to the parties in the arbitration proceeding. It is apparent that this provision of the contract related to reasonable attorneys' fees in the court proceeding.

It may be questioned whether the provision of the original contract in reference to arbitration would be applicable in respect to the determination of the damage action. If not, no attorneys' fees would be allowable in the separate damage action. If applicable the parties are bound by these provisions in respect to the entire award.

We conclude that the trial court erroneously allowed attorneys' fees in the amount indicated, predicated upon services rendered other than in the court proceedings involving the confirmation of the award.

The judgment in respect to the allowance of interest and attorneys' fees in the sum of $750 is reversed and a further hearing ordered on these issues alone. The remaining portion of the judgment is affirmed.

Each party to pay own costs on appeal.

BARNARD, P. J., and MUSSELL, J., concur.

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146 Cal.App.2d 726

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Bernard G. KEEFER, Defendant and Appellant.

Cr. 5743.

District Court of Appeal, Second District, Division 2, California.
Dec. 12, 1956.

Defendant was convicted under three counts of information charging violations of section of the Labor Code providing that any employer, who misappropriates any property put up as a bond by any employee or applicant, is guilty of theft and shall be punished in accordance with provisions of the Penal Code relating to theft. The Superior Court of Los Angeles County, John G. Barnes, J., entered judgment of conviction and an order denying motion of defendant for a new trial, and defendant appealed. The District Court of Appeal, Ashburn, J., held that evidence sustained conviction.

Judgment and order affirmed.

1. Criminal Law 🔑1159(2)

To warrant reversal of conviction, on ground that evidence is insufficient to sustain conviction, it must be made clearly to appear that on no hypothesis whatever is there sufficient substantial evidence to support conclusion reached in the trial court.

2. Criminal Law 🔑1144(13)

On appeal from judgment of conviction, on ground that evidence is insufficient to sustain the conviction, reviewing court must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts were sufficient to support the verdict.

3. Labor Relations 🔑1060

Evidence sustained convictions under section of the Labor Code providing that any employer, who misappropriates any property put up as a bond by any employee or applicant, is guilty of theft and shall be punished in accordance with provisions of the Penal Code relating to theft. West's Ann.Labor Code, §§ 405, 406.

4. Labor Relations 🔑1061

In prosecution under section of the Labor Code providing that any employer, who misappropriates any property put up as a bond by any employee or applicant, is guilty of theft and shall be punished in accordance with provisions of the Penal Code relating to theft, question whether one of the prosecuting witnesses was an applicant for employment and she and defendant actually agreed on an employment was a question of fact, unless evidence was not susceptible of opposing inferences. West's Ann.Labor Code, §§ 405, 406.

5. Master and Servant 🔑6

In prosecution under section of the Labor Code providing that any employer, who misappropriates any property put up as a bond by any employee or applicant, is guilty of theft and shall be punished in accordance with provisions of the Penal Code relating to theft, evidence sustained finding of employment of one of the prosecuting witnesses by defendant. West's Ann. Labor Code, §§ 405, 406.

6. Criminal Law 🔑1177

Where sentences of defendant, who was convicted on three counts of information, were made to run concurrently, and a single judgment was entered, alleged insufficiency of evidence to establish guilt on first and third counts could not work a reversal, since acquittal on those charges could not reduce the term of imprisonment and therefore no prejudice could be suffered by defendant.

Max Solomon, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., William E. James, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Convicted on three counts of violation of § 405 Labor Code, after a nonjury trial, defendant was sentenced on each count to prison for the term prescribed by law, the sentences to run concurrently. He appeals from the judgment and order denying his motion for new trial. The only claim to reversal is alleged insufficiency of the evidence.

Sections 405 and 406, Labor Code, read: "§ 405. *Property bond: Use of property: Contract not to abrogate provisions: Misappropriation: Punishment.* Any property put up by any employee or applicant as a bond shall not be used for any purpose other than liquidating accounts between the employer and employee or for return to the employee or applicant and shall be held in trust for this purpose and not mingled with the property of the employer. No contract between the employer and employee or applicant shall abrogate the provisions of this section. Any employer or prospective employer, or agent or officer thereof, who misappropriates any such property, mingles it with his own, or uses it for any other purpose than that herein set forth is guilty of theft and shall be punished in accordance with the provisions of the Penal Code relating to theft." "§ 406. *Same: Property deemed put up as bond.* Any property put up by an employee, or applicant as a part of the contract of employment, directly or indirectly, shall be deemed to be put up as a bond and is subject to the provisions of this article whether the property is put up on a note or as a loan or an investment and regardless of the wording of the agreement under which it is put up."

Both sections relate to an employee or an applicant for employment, persons who are afforded this special protection because of their inferior status in the matter of bargaining for employment or fixing the terms of same. People v. McEntyre, 32 Cal.App. 2d Supp. 752, 755, 84 P.2d 560. Counsel agree that the test of applicability of the statute to the facts at bar depends upon the existence or an application for a relationship of employer and employee within the common law concept and measured by its standards. Such is the basis of discussion of the merits of People v. McEntyre, supra, and People v. Pond, 44 Cal.2d 665, 675, 284 P.2d 793.

The law provides that any property put up by the employee or applicant "as a part of the contract of employment, directly or indirectly," constitutes a "bond," "regardless of the wording of the agreement under which it is put up." § 406. Also, that "no contract between the employer and employee or applicant shall abrograte the provisions" of § 405 requiring that any such property shall be held in trust for the purpose of liquidating accounts between employer and employee, or for return to the employee or applicant. Misappropriation, mingling, or use for any other purpose is punishable as a theft. All of this applies to the applicant for a job as well as one whose status has been established.

[1, 2] The information charges employment and prospective employment in each instance and the judgment of guilty rests upon this basic finding. Unless the evidence establishes as a matter of law that there was no employment or application for employment the judgment must be affirmed. To warrant reversal " 'it must be made clearly to appear that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below,' " and " 'we must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.' " People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780.

[3] It appears without conflict that the money received from each of defendant's victims was not held in trust, that it was deposited in defendant's own bank account which was joint with one or more of his relatives, and that it was used for purposes other than those specified in § 405. Applying the rules of the Newland case, supra, rejecting all evidence opposed to the finding and adopting all inferences favorable to it, we find the judgment well supported.

Defendant's claim is that there was no employment and no application for employment; that each person named in the information leased from him certain vending machines for sanitary napkins, paying him a sum of money for the concession for a specified period. Obviously, this version of the facts was rejected by the trial judge.

One of defendant's victims was Miss Blanche M. Chadsey (count II). She read an advertisement which defendant had inserted in the Los Angeles Examiner of February 13, 1956, as follows: "Lady, 40 to 65 Route Manager for lite, pleasant outside supervisory position. Up to 30 hrs. weekly. Earn $5 hr. to start. Must have reliable car. Send application to National Sanitary Napkin Service, Box M8609 Exam." Standing alone, the phrases "Route Manager," "supervisory position," "earn $5 hr. to start," connote employment and nothing else, especially as the advertisement appeared in the column, "Help wanted, female." Miss Chadsey contacted defendant and he called upon her, showed her some pictures of the napkins, told her she would have to put up a bond as she would handle money and stock,—$500 if she worked two days a week, or $1,000 if she worked 25 hours a week; that she would service machines already installed in department stores and she would receive information later as to the location and would be shown what to do; that her time would be her own except that she would have to get to the stores before they closed; her compensation was to be 70¢ on each dollar taken out of the machines; she was to turn over the money to defendant once a month; he would guarantee her $100 a week regardless of what the machines took in; he also said that any of them which did not produce $1 a day would be re-located by him; there was no talk about her buying machines or leasing any machine or route until after defendant got her money. He drove her to the bank on that day, February 14, 1956, refusing to take a check. She withdrew $1,000 in cash and handed it to him in the automobile where he was waiting for her; thereupon he gave her a receipt reading: "Feb. 15 1956 Received of Blanche Chadsey One thousand and oo/100 Dollars for 3 year lease on locations and eqpt. Free Stock to Start—Expires March 1959. $1,000. National Sanitary Service B Keefer." Miss Chadsey did not read it until after she was at home; then she understood the language and concluded something was wrong. On that same day she went to the Better Business Bureau where she was told that defendant was a fake; thence to the Bunko Squad of the Police Department, and finally to the district attorney. On the same evening, the 14th, defendant telephoned her that twenty machines were being sent her from Chicago. She said she had no idea of buying any machines and he replied that that was true, and "I hold a receipt that you have leased the machines." On cross-examination she testified: "Q. And just from reading this receipt, you knew that you were leasing this machines and routes for three years; isn't that right? A. Well, I didn't know what this—because it was never discussed at that time that I remember. On Tuesday morning there was nothing mentioned about any lease and I didn't know what it was. I had no idea I was buying any machines and that I was going to service my own machines. Because he had—I was given to understand that I was servicing these machines that were downtown in Los Angeles and that they were in filling stations all over Los Angeles." The victim never saw defendant after she delivered the money, and had no further conversations with him. Of course she never received the return of her $1,000, or any part of it.

A lease not having been mentioned before Miss Chadsey paid her money to defendant, she being then an applicant for employment, the receipt could not affect the fact that her money, when put up, was a bond within the meaning of the statute. The giving and acceptance of the receipt thereafter could not change its status, which remained a bond "regardless of the wording of the agreement under which it is [was] put up."

[4] The facts above recited leave little room for any finding except that Miss Chadsey was an applicant for employment and that she and defendant actually agreed upon an employment. That is a question of fact, of course, unless the evidence is not susceptible of opposing inferences. Sudduth v. California Emp. Stab. Comm., 130 Cal.App.2d 304, 311, 278 P.2d 946; Isenberg v. California Emp. Stab. Comm., 30 Cal.2d 34, 39, 180 P.2d 11.

In Empire Star Mines Co. v. California Emp. Comm., 28 Cal.2d 33, 43, 168 P.2d 686, 692 (as in many other cases), it is said that in determining the question of employee or independent contractor "the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists." Again, "[o]ther factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job;

(g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. Rest., Agency, § 220; Cal.Ann. § 220." To the same effect, see Tomlin v. California Emp. Comm., 30 Cal.2d 118, 180 P.2d 342; Bemis v. People, 109 Cal.App.2d 253, 263, 240 P.2d 638; Sudduth v. California Emp. Stab. Comm., supra, 130 Cal. App.2d 304, 311, 278 P.2d 946; Bevan v. California Emp. Stab. Comm., 139 Cal.App. 2d 668, 681, 294 P.2d 524.

[5] When the court rejected, as it was authorized to do, the testimony of a lease agreement, there was practically nothing left to point to any inference other than employment. Miss Chadsey was not engaged in a district occupation or business of her own, but in that of defendant; he furnished the instrumentalities and places of work; they were not even known to Miss Chadsey until after her money was paid over; he was free to change locations of machines at any time; hers was not the work of a specialist in any sense, not one requiring any skill; no length of time of service was required; the applicant plainly believed she was to become an employee protecting the employer with a cash bond; she was to be paid a commission (which in itself is not determinative in either direction). Defendant had not only the control of the manner and means of accomplishing the desired result, but also the details, most of which were withheld from Miss Chadsey. Finally, the money being a guarantee of faithful performance and not the purchase price of a lease of territory or machines, there was no impediment to his discharging her at any time and disposing of the $1,000 in the manner required by the statute. The finding of the employment of Miss Chadsey and a violation of § 405, Labor Code, is well supported by the evidence.

The same considerations uphold the finding of guilt in the instances of Mrs. Bessie Ann Stratton (count I), and Mrs. Helen F. Landsberg (count III). The facts are of a pattern with the Chadsey transaction.

[6] As the sentences were made to run concurrently and a single judgment was entered, insufficiency of the evidence to establish guilt on Counts I and III (if such there had been) could not work a reversal,—acquittal of those charges could not reduce the term of imprisonment and therefore no prejudice could be suffered by defendant. See People v. O'Keefe, 54 Cal.App. 649, 651, 202 P. 476; People v. Giambone, 119 Cal. App.2d 338, 341, 259 P.2d 10; People v. Dallas, 42 Cal.App.2d 596, 604, 109 P.2d 409; People v. Pearson, 41 Cal.App.2d 614, 618, 107 P.2d 463; People v. McWilliams, 87 Cal.App.2d 550, 552, 197 P.2d 216; People v. Bean, 88 Cal.App.2d 34, 41, 198 P.2d 379; People v. Anderson, 75 Cal.App. 365, 371, 242 P. 906. However, we have carefully examined the evidence pertaining to each of those counts and find the same sufficient to support the conviction on each.

Judgment and order denying new trial affirmed.

MOORE, P. J., and FOX, J., concur.

146 Cal.App.2d 584

In the Matter of the ESTATE of Berta ZUBER, also known as Katherine Auguste Berta Zuber, Deceased.

Herbert BROWNELL, Jr., Attorney General of the United States, Contestant and Appellant,

v.

H. A. GEBHARDT, Esquire, Petitioner and Respondent,

Emilie Exner and other German Beneficiaries, Respondents.

Civ. 21741.

District Court of Appeal, Second District, Division 2, California.

Dec. 4, 1956.

Rehearing Denied Dec. 31, 1956.

Hearing Denied Jan. 30, 1957.

Estate proceeding concerning order of distribution which was made by the Superior Court of Los Angeles County, John Gee Clark, J., from which an appeal was taken by the United States Attorney General acting as successor to Alien Property Custodian on ground that order denied him any participation in estate by virtue of Custodian's vesting order. The District Court of Appeal, Ashburn, J., held that under testatrix' will German nationals' interests at testatrix' death were contingent future interests subject to seizure under Trading With the Enemy Act.

Reversed with instructions.

1. Trusts ⚷280

A trust for maintenance becomes effective immediately.

2. Wills ⚷602(1), 630(11)

Where will bequeathed residue to trustee for benefit of two German nationals, subject to executor's right to sell residue during administration in which event testatrix gave all proceeds to German nationals "share and share alike if they both survived distribution" quality of interest of beneficiaries was to be determined at time of testatrix' death and a vested equitable estate passed which was a defeasible fee subject to a conditional limitation or a species of executory devise. West's Ann.Prob.Code, § 28; West's Ann.Civ.Code, §§ 688, 690, 701, 778.

3. Deeds ⚷7

Mortgages ⚷12

No matter whether a future estate is vested or contingent, it is transferable, and may be encumbered. West's Ann.Civ.Code, §§ 688, 690, 693, 695, 697, 701, 767, 773, 778.

4. Remainders ⚷1

A contingent remainder is an estate and not a mere expectancy. West's Ann. Civ.Code, § 700.

5. Wills ⚷7

Executory devises are transmittable future estates. West's Ann.Civ.Code, § 699.

6. Estates ⚷1

Property ⚷11

An estate so worded as to convey no interest until the executory devisee survives happening of contingency is, when created by an inter vivos instrument, known as an "executory interest," which is an alienable estate. West's Ann.Civ.Code, § 699.

See publication Words and Phrases, for other judicial constructions and definitions of "Executory Interest".

7. War and National Defense ⚷12

Where will bequeathed residue to trustee for benefit of two German nationals, subject to executor's right to sell residue during administration in which event testatrix gave all proceeds to such German nationals "share and share alike if they both survived distribution" at testatrix' death nationals had a contingent future interest which was subject to seizure under Trading With the Enemy Act. West's Ann.Prob. Code, § 28; West's Ann.Civ.Code, §§ 688, 690, 693, 695, 697, 699, 701, 741, 767, 773, 778; Trading With the Enemy Act, §§ 2(a), 5(b), 7(c) as amended 50 U.S.C.A. Appendix, §§ 2(a), 5(b), 7(c); Executive Order No. 9095, § 2(c, f), No. 9788, 50 U.S.C.A.Appendix, § 6 note.

8. War and National Defense ⚷12

Change of status of alien, occurring after vesting order, cannot affect order's validity or give rise to any new rights with respect to the property unless it be sanctioned by some statutory or perhaps some regulatory authority. Trading With the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c); Executive Order No. 9095, § 2(c, f), 50 U.S.C.A. Appendix, § 6 note.

9. War and National Defense ⚷12

In estate proceeding involving validity of vesting order with respect to beneficiary who was German national at time of testatrix' death, but subsequently became a United States citizen, evidence that such beneficiary had previously filed naturalization papers in United States and then returned to Germany where she remained to take care of relative, was insufficient to show that she was not a "resident within the territory" of an enemy whose property was subject to seizure. Trading With the

Enemy Act, § 2(a) as amended 50 U.S.C.A. Appendix, § 2(a).

10. War and National Defense 🔑12

Where accomplishment of purpose of trust became impossible because Attorney General of United States had vested right and interest of enemy beneficiaries of trust, trust was terminated and was required to be transferred in accordance with terms of vesting order. Trading With the Enemy Act, § 2(a) as amended 50 U.S.C.A.Appendix, § 2(a).

11. War and National Defense 🔑12

Where testatrix made certain specific legacies to German nationals and provided that each bequest should be effective only in event beneficiary shall survive distribution of article bequeathed, legacies were executory devises subject to seizure under Trading With the Enemy Act. Trading With the Enemy Act, §§ 5(b), 7(c) as amended 50 U.S.C.A.Appendix, §§ 5(b), 7(c).

◆

Dallas S. Townsend, Asst. Atty. Gen. of the United States, Laughlin E. Waters, U. S. Atty., Airline Martin, Asst. U. S. Atty., Los Angeles, Mary Eschweiler, Office of Alien Property, San Francisco, James D. Hill, George B. Searls and Irwin A. Seibel, Dept. of Justice, Washington, D. C., for appellant.

Don L. Gilman and Alvin B. Baranov, Beverly Hills, for respondent Emilie Exner.

ASHBURN, Justice.

The Attorney General of the United States, acting in his capacity of successor to the Alien Property Custodian,[1] appeals from decree of distribution in the estate of Berta Zuber, deceased, because it denies him any participation therein by virtue of the custodian's vesting order of November 1, 1945. The challenged ruling was made upon the theory that respondents had a mere expectancy and did not take under decedent's will any interest which the custodian could seize.

Decedent, a citizen of this country and a resident of Los Angeles county, died on February 7, 1944, leaving a last will which was executed on October 31, 1940. The principal asset of her estate was a parcel of realty.

Paragraph Third of the will made certain specific legacies, three of which named German nationals and residents as recipients. They embraced a watch, silver teapot and porcelain lamp. The will provided that "each such bequest * * * be effective only in the event the beneficiary shall survive distribution of the article bequeathed." Also that, as Germany was then at war, the executor was authorized to defer transmittal to legatees residing in Germany until after termination of the war or such earlier time as he might be satisfied that same could be delivered in good order in Germany. In the event that Germany should be at war when the estate became otherwise ready for distribution, said articles were given to H. A. Gebhardt as trustee for the said named beneficiaries, to be held in trust until in the judgment of the trustee they could be delivered in good order.

Paragraph Fourth disposes of the residue in the following manner. The executor, Mr. Gebhardt, is given discretionary power to sell the same during the ordinary course of the probate proceeding, and in that event testatrix gives all the proceeds to a nephew, Heinrich Schlette, and a niece, Emilie Exner, both of whom were German nationals and residents, "share and share alike, if they both survive distribution;" but in the event of either of them failing to survive that event his or her share to go to the surviving children of that decedent by right of representation. It is also provided that, in the event the executor does not sell the property during pendency of the probate proceeding, said residual estate is given to Mr. Gebhardt as trustee for the benefit of the said Heinrich Schlette and Emilie Exner, and to the surviving children of either of them who might decease, by right of representation; testatrix further directs that the property then constituting the trust estate be sold within three years after its receipt by the trustee and the proceeds of the sale distributed, share and share alike, to said nephew and niece and the children of either of them who may have died prior to such distribution. The concluding paragraph of Fourth confers upon the trustee, notwithstanding "anything which is apparently to the contrary in the foregoing paragraphs," uncontrolled discretion "during the life of said trust" to make remittances from time to time to or for the benefit of either of the German beneficiaries "for their maintenance or education in such amounts and at such times as he in his sole discretion may consider for their best interests."

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[1] By Executive Order No. 9788 of October 14, 1946, 3 C.F.R., 1946 Supp. 169, 50 U.S.C.A.Appendix, following Section 6, the authority and property vested in the Alien Property Custodian were transferred to the Attorney General.

During the progress of the administration the executor, under court order and for the purpose of avoiding condemnation, sold the realty to the City of Los Angeles, and the court in confirming the sale ordered "[t]hat the proceeds of said sale shall at all times be deemed to be real property and retain the original character of real property." This was but the application of a familiar equity principle (18 Cal.Jur.2d § 14, p. 127), and the parties present this appeal upon that basis, doubtless being persuaded thereto by Clark v. Allen, 331 U.S. 503, 517, 67 S.Ct. 1431, 91 L.Ed. 1633, which holds that the California reciprocal inheritance statute, Prob.Code § 259, yields to the Treaty of Friendship, Commerce and Consular Rights with Germany, signed December 8, 1923, 44 Stat. 2132, and therefore operates only upon personal property. However, no problem of reciprocal rights of inheritance is present in the instant case.

The trial court ruled that the specific legacies to German beneficiaries and the residue of the estate should be distributed to Mr. Gebhardt as trustee; "[t]hat the trust is valid and free from any claim of the United States arising by virtue of Vesting Order No. 5329 for the reason that at the time of the Vesting Order, to wit on November 1, 1945 and at the time of the death of the testatrix, to-wit: on February 7, 1944, there was no right, title and interest of the residuary legatees, their interests arising only upon distribution and contingent upon the survival of Heinrich Schlette and Emilie Exner, residuary beneficiaries, and the fact that distribution can be made personally to the beneficiaries, this being a condition precedent, the interests of the foreign heirs arising only upon the distribution of the estate." Distribution was made accordingly. It is that order from which the appeal is taken.

Essentially the ruling is that the German legatees had no estate or interest which the custodian could seize because their rights were subject to a condition precedent which prevented their having any cognizable interest until the contingency ripened into a vested estate and that could happen only upon distribution by the court. Counsel for respondent take substantially the same position in their brief.[2] The appellant argues that respondents took under the will a contingent future estate which is an interest subject to seizure under the Trading with the Enemy Act.[3]

Section 5(b) thereof authorizes the vesting of "any property or interest" and § 7 (c) permits seizure of "any money or other property including (but not thereby limiting the generality of the above) * * * choses in action, and rights and claims of every character and description" belonging to or held for the benefit of any enemy alien, 50 U.S.C.A.Appendix, §§ 5(b) and 7(c). Executive Order No. 9095, § 2(c) authorized the vesting of "any other property or interest within the United States of any nature whatsoever owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, a designated enemy country or national thereof * * *", and subdivision (f), "any property of any nature whatsoever which is in the process of administration by any person acting under judicial supervision or which is in partition, libel, condemnation or other similar proceedings and which is payable or deliverable to, or claimed by, a designated enemy country or national thereof." 50 U.S.C.A.Appendix, following § 6.

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[2] Respondent Heinrich Schlette has not appeared in this court and counsel disclaim any representation of him.

[3] 50 U.S.C.A.Appendix, §§ 5, 7.

The language of the vesting order is: "All right, title, interest and claim of any kind or character whatsoever of Heinrich Schlette, children, names unknown, of Heinrich Schlette, Emilie Exner, children, names unknown, of Emilie Exner, Richard Exner, and Kaethe Semmerau, and each of them, in and to the Estate of Berta Zuber, also known as Katherine Auguste Berta Zuber, deceased."

Discussion of the problem thus raised will be directed to the status of the residue, except as otherwise indicated.

[1, 2] Reference to the will discloses that, fairly construed with a view to immediate vesting, Prob.Code § 28; In re Estate of Prior, 111 Cal.App.2d 464, 469, 244 P.2d 697, the legal estate was bequeathed to Mr. Gebhardt, as trustee,[4] subject to a right of sale by him as executor in his discretion, and in the event of that occurrence the proceeds to be held in trust. Immediate vesting of the legal title in the trustee is evidenced, among others, by the provision of the last paragraph of Fourth which gives him discretionary control of the income during administration with a view to maintenance of the beneficiaries. It is settled law that a trust for maintenance becomes effective immediately. In re Estate of Dare, 196 Cal. 29, 37–38, 235 P. 725; In re Estate of Marré, 18 Cal.2d 184, 188, 114 P.2d 586. The right of the legatees to receive the proceeds of an executor's sale is subject to the condition that they "survive distribution" by the court. If no sale is made "while the probate proceeding is still pending" the trustee is to hold the residue for the benefit of the two German nationals (or their surviving children) until a sale is made by him in that capacity, and he is directed to do that within three years after distribution to him as trustee, whereupon the proceeds shall be turned over to said Heinrich Schlette and Emilie Exner, or their surviving children, without being subject to any further delay or condition. In the absence of a sale during administration their rights to ultimate distribution are fixed and not subject to divestment. It is only in the event of such sale that their rights (to the proceeds) are conditioned upon "surviving distribution." Thus the condition which respondent's counsel assert to be precedent proves to be a condition subsequent. The quality of the interest of the nephew and niece is to be determined as of the time of decedent's death and is not controlled by subsequent events. Specifically, the *fact* of a sale during administration does not enlarge or detract from the interest or estate which was conferred upon the respondents by the will and the fact of decedent's demise. The equitable estate thus passing to respondent is a defeasible fee subject to a conditional limitation, which is one species of executory devise, an interest later discussed herein. See, 2 Tiffany on Real Property (Third Edition), § 360, p. 111, § 364, pp. 115–118; Taylor v. McCowen, 154 Cal. 798, 803–804, 99 P. 351; Civ.Code, § 778. The possibility of an executor's sale constitutes a conditional limitation upon the fee or a condition subsequent which defeats it. Respondent's main arguments are based upon the assertion that the condition of survival until distribution is a condition precedent rather than a condition subsequent.

It makes little difference, however, whether the condition in this case is precedent or subsequent. Contingent future interests are recognized as estates by statute in California. Civil Code § 701: *"Interests in real property.* In respect to real or immovable property, the interests mentioned in this Chapter are denominated estates, and are specially named and classified in Part 2 of this Division." Section 688 of the same code classifies interests as present or future with respect to time of enjoyment. Section 690 defines a future interest as one entitling the owner to possession of the property only at a future period. Section 693 divides future interests into those which are vested and those which are contingent. Section 695 says: *"Contingent interests.* A future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain." Section 697 provides that a future interest is not void "merely because of the improbability of the contingency on which it is limited to take effect." In part two of the same division, mentioned in § 701, are found §§ 767, 773 and 778, which read as follows: "§ 767. *Future estates, what.* A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time or otherwise, of a precedent estate created at the same time." "§ 773. *Remainders, future and contingent estates, how created.* Subject to the rules of this title, and of Part 1 of this division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this title."[5] "§ 778. *Remainder upon a contingency.* A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation." Section 699, which is captioned *"Qualities of expectant estates"* provides: "Future interests pass by succession, will, and transfer, in the same manner as present interests."

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[4] The intervention of a trust does not affect the nature or transferability of the future estates herein discussed. (69 C.J. § 1674, p. 595; 33 Am.Jur. § 107, p. 564.)

The original Code Commissioners in their note to § 741, Civil Code,[6] say in part: "* * * Much nice learning has been thrown around the subject of contingent remainders, and many nice distinctions and refinements have accumulated, but in many of the States, and by this Code, future interests include all estates in expectancy, vested, and contingent, and all future interests are descendible, devisable, and alienable in the same manner as estates in possession, so that a thorough examination of the common law rules concerning remainders, and the delicate questions springing therefrom, must be esteemed as of more interest in showing the learning and scholarly attainments of the early law writers rather than as of any practical utility."

[3, 4] The decisions have followed this view rather consistently. They establish the general rule stated in 18 Cal.Jur.2d § 4, p. 389, as follows: "A future interest, whether vested or contingent, is transferable, and may be encumbered." See also, Sinclair v. Crabtree, 211 Cal. 524, 528, 530–531, 296 P. 79; Gray v. Union Trust Co., 171 Cal. 637, 642, 154 P. 306; Blackburn v. Webb, 133 Cal. 420, 422, 65 P. 952; Johnston v. City of Los Angeles, 176 Cal. 479, 486, 168 P. 1047; County of Los Angeles v. Winans, 13 Cal.App. 234, 242–244, 109 P. 640; 13 Cal.App. 257, 260, 109 P. 650; Caldwell v. Rosenberg, 47 Cal.App.2d 143, 146, 117 P.2d 366; Anglo California Nat. Bank of San Francisco v. Kidd, 58 Cal. App.2d 651, 654, 137 P.2d 460; In re Es-

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[5] Neither side raises at bar any problem of perpetuities or suspension of the power of alienation.

[6] Code Commissioners' Notes are accepted aids to the determination of the intent and meaning of the code sections so annotated. Rowe v. Chandler, 1 Cal. 168, 178–179; O'Hara v. Wattson, 172 Cal. 525, 534, 157 P. 608; Baranov v. Scudder, 177 Cal. 458, 465, 170 P. 1122.

tate of Schneider, 140 Cal.App.2d 710, 718, 296 P.2d 45. The authorities draw no distinction in this respect between conditions precedent and subsequent. That a contingent remainder is an estate and not a mere expectancy, such as those mentioned in Civil Code § 700,[7] is held in Akley v. Bassett, 68 Cal.App. 270, 283, 228 P. 1057; County of Los Angeles v. Winans, supra, 13 Cal.App. 257, 260, 109 P. 650; Hall v. Wright, 17 Cal.App. 502, 506–507, 120 P. 429; Meyer v. Superior Court, 200 Cal. 776, 789, 791, 254 P. 1108. Additional cases involving conditions subsequent and upholding assignability of interests subject to such contingencies are the Gray, Caldwell, Johnston and Anglo California cases, cited supra. Among those considering conditions precedent are Sinclair, Schneider and Winans, supra.

Respondent presents this case upon the postulate that the German nationals have nothing except as conditioned in the first part of section Fourth of the will, i. e., surviving distribution by the court. That such is not the true concept appears from the preceding discussion, but if it be accepted as the proper basis of decision no different result follows. In that event § 767, Civil Code, becomes operative, and as applied to the present situation in which (supposititiously) respondent Emilie Exner takes nothing unless or until she survives distribution, there is presented a contingent future interest created by will which has no supporting particular estate; that is known as an executory devise. 2 Tiffany on Real Property, Third Edition, § 360, page 109, describes the nature and effect of such an interest: "In view of these considerations, and in analogy to the doctrines which prevailed in regard to the limitation of uses, it was decided that devises of freehold estates might be made to take effect in the future, that is, at a time subsequent to the testator's death, either with or without a preceding limitation to another. Such a limitation by way of devise of an estate to arise in futuro, which could not be regarded as creating a contingent remainder, became known as an 'executory devise,' a term which is also frequently applied to the prospect or possibility of an estate created by such a devise.

"As examples of an executory devise may be mentioned a devise to A of an estate to commence six months after the testator's death, or when he becomes a citizen of the United States, provided he does so within a limited time. In such a case, the limitation of an estate to commence in the future not being preceded by a limitation in favor of another, the testator's fee simple vests in his heir or heirs with a right to the accruing rents and profits, until the estate vests under the executory devise by reason of the satisfaction of the condition precedent, unless there is a residuary devise, in which case the fee simple will pass thereunder subject to the possibility of subsequent displacement." That such estates are recognized in California appears from the Code Commissioners' explanation of § 767 and their reference to the note to § 741 above quoted. They say, under § 767: "See note to Sec. 741, ante. The definition in this section comprehends every species of expectant estates created by the act of the party; remainders strictly so called, future uses and executory devises. The words, with or without the intervention of precedent estate, embrace what are technically known as estates *in futuro*. The words 'lapse of time or otherwise,' provide for contingent limitations operating to abridge or defeat the prior estate.—Nicoll v. New York & Erie R. Co., 12 N.Y. 121, 139. Expectant estates, says Chancellor Walworth, 'include every present right and interest, either vested or contingent, which may by possibility vest at a future day.'—Lawrence v. Bayard, 7 Paige, N.Y., 70, at page 76." See also, 10 Cal.Jur. § 8, p. 605.

[5] As such interests have the status of estates they are assignable under § 699. That executory devises are transmittable

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[7] § 700. "A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind."

future estates is the general law. 21 C.J. § 231, p. 1032; 31 C.J.S., Estates, § 122h, p. 140; 19 Am.Jur. § 132, p. 587. While it is said in the decisions of some sister states that "[e]xecutory limitations which are so worded as to convey no interest unless the executory devisee survives the happening of the contingency have been held to carry no interest either devisable, descendible, or alienable, prior to the contingency happening", 31 C.J.S., Estates, § 122h, p. 141, that rule does not apply in California. The specific language of our statutes, construed in the light of the Code Commissioners' explanations above quoted, leaves little room for doubt on this.

[6] If such an estate is created by an *inter vivos* instrument it is known as an "executory interest," which is also recognized as an alienable estate. See 2 Tiffany on Real Property, Third Edition, § 356, p. 103, § 363, p. 114, § 367, p. 120; 3 Simes Law of Future Interests, § 709, p. 147, § 713, p. 154, § 714, p. 156; 19 Am.Jur. § 95, p. 555, § 132, p. 587; 31 C.J.S., Estates, § 15, p. 28; Restatement of Law of Property, § 162, p. 591. Comment c on this section of the Restatement, at page 592, says: "Except when the form of the transfer provides otherwise, the transferee acquires all the potentialities held by the transferring owner, that the share or proportion ultimately constituting the future interest will be greater than the presumptive share of the transferring owner at the time of such transfer (see Illustration 4 I)."

The cited case of In re Estate of Jameson, 93 Cal.App.2d 35, 208 P.2d 54, cannot be accepted as establishing a rule of nonassignability of contingent future estates dependent upon a condition precedent, although some of its language tends in that direction. Decedent there devised to her husband a life estate in certain real property conditioned upon his surviving distribution of her estate; in event of his failure so to do same was to go to certain nephews; she also left the residue to him upon the same condition and provided that in the event of the husband's failure to survive distribution the residue should go to her stepsons. The trial court ordered distribution of the life estate to the husband and held he was entitled to the income from that parcel from the date of death. The remaindermen, as appellants, argued that the life estate would not vest unless or until the husband had survived distribution and hence the income up to that time was available for expenses of administration. The appellate court held that that income went to the executor and was subject to costs of administration. Concerning the nature of Mr. Jameson's estate the court said, 93 Cal.App.2d at page 40, 208 P.2d at page 57: "Applying the foregoing principles of law to the facts herein, it is clear that the devises to the husband were made upon a condition precedent: that he survive distribution of testatrix' estate. Accordingly, neither his life estate in the realty nor his interest in the residue could vest until such condition was fulfilled. Until that time he had a mere expectancy in the property devised. In the interim, title to the life estate and to the residue vested in the remaindermen, i. e., the nephews and stepsons, respectively, subject to divestiture upon fulfillment of the condition." But the court, while reversing in other respects, affirmed the order "in so far as it decrees distribution of a life estate in the realty to Mr. Jameson", 93 Cal.App. 2d at page 43, 208 P.2d at page 59, notwithstanding that the condition related to survival of distribution of the estate, not distribution of the particular parcel. We are unable to reconcile this ruling with the remarks above quoted from, 93 Cal.App.2d at page 40, 208 P.2d at page 57, and prefer to attribute them to a discussion of vesting in the sense of coming into the right of immediate enjoyment.

[7] Under California statutes and decisions above cited respondent Exner took under the Zuber will an interest which was not less than a contingent future estate, transmissible by way of assignment or bequest. That the custodian had the right to seize such an estate is clear. The Schneider case, supra, 140 Cal.App.2d 710, at page

718, 296 P.2d 45, at page 51, says: "Conceding that the interests thus created were contingent, they were nevertheless property interests capable of transfer or of inheritance. Civ.Code, secs. 669, 688, 693, 699; Sinclair v. Crabtree, 211 Cal. 524, 528, 296 P. 79. Since they were interests capable of transfer, they became property of the German beneficiaries promptly on the death of Mrs. Schneider in 1945.

"The conclusion is, therefore, unavoidable that at the time of the vesting order, in 1946, the estate of each legatee and the beneficial interest of each beneficiary of the trust was subject to seizure under the Trading with the Enemy Act, as amended."

The same ruling has been made in other jurisdictions. See, In re Bendheim's Estate, 124 Misc. 424, 209 N.Y.S. 141, affirmed in 214 App.Div. 716, 209 N.Y.S. 794; In re Carrington's Estate, 195 Misc. 442, 90 N.Y.S.2d 757; In re Kuhirt's Estate, Sur., 132 N.Y.S.2d 97; In re Bendit's Will, 214 App.Div. 446, 212 N.Y.S. 526; Clark v. Continental Nat. Bank of Lincoln, Neb., D.C. Neb., 88 F.Supp. 324. The Bendheim case says, 209 N.Y.S. at page 144: "Alfred Bendheim was vested with an expectant estate. 'An expectant estate is descendible, divisible and alienable in the same manner as an estate in possession.' Real Property Law, § 59. Such an estate, therefore, is an interest in property, and as such was subject to taking over under the federal statute." In re Carrington's Estate, supra, 90 N.Y.S.2d at page 758: "The order of the Alien Property Custodian vested 'all right, title, interest and claim of any kind or character' of the legatee and that order was sufficiently comprehensive to acquire the legatee's interests in the estate that came into being upon decedent's death. The fact that such interest was contingent and that compliance with the condition attached to the legacy was a prerequisite to its payment * * * did not affect the validity of the order. The expectant estate of the legatee was subject to seizure under the government's order."

Certain authorities relied upon by respondent (and those making similar holdings) cannot control the decision herein, for they proceed upon the predicate that, for one reason or another, the enemy alien never acquired any right, title or interest whatever and hence there was nothing to seize. Such cases are Monarski v. Greb, 407 Ill. 281, 95 N.E.2d 433; Chase Nat. Bank of New York City v. Reinicke, Sup., 76 N.Y.S.2d 63; McGrath v. Ward, D.C. Mass., 91 F.Supp. 636; Harvard Trust Co. v. Attorney General, 329 Mass. 79, 106 N.E.2d 269; Brownell v. Edmunds, 4 Cir., 209 F.2d 349.

Respondent relies heavily upon Anglo California Nat. Bank v. Kidd, supra, 58 Cal.App.2d 651, 137 P.2d 460, which holds that a contingent interest in the corpus of a trust estate is not subject to execution. Counsel insist that the analogy to a vesting order is complete, but in that they are mistaken. The federal government in the exercise of its war powers cannot be controlled by state policy as to exemption from execution. Moreover, the cited case does not proceed upon the basis of nonexistence of an interest which could be seized, but upon one of policy. At page 655 of 58 Cal.App.2d, at page 462 of 137 P.2d, it is said: "The rule is sound, based upon the well-known fact that ordinarily on a forced sale of such an interest a nominal price only is obtained, to the injury of the judgment debtor.

"The above rule does not prohibit the outright sale or transfer of the uncertain, prospective interest of a legatee providing the sale or assignment is fair and not against public policy." 2 Freeman on Executions, § 178, page 905, is cited in support of the ruling that a contingent interest is not subject to execution until reduced to possession. Reference to that work (Third Edition) discloses that the basis of the rule is the out-moded common law doctrine that a contingent interest is not assignable.

San Diego Trust & Savings Bank v. Heustis, 121 Cal.App. 675, 694, 10 P.2d 158, does seem to say that a contingent future interest cannot be taken on execution because it is a mere expectancy having no substantial present existence; but there was no application for hearing in the Supreme Court; and the conclusion is opposed to the statutes and decisions above cited.

That immunity to seizure under execution is not a test of substantial existence sufficient to sustain a vesting order is evidenced by the settled rule that the spendthrift feature of that type of trust does not preclude acquisition of the beneficiary's interest by the custodian. (See 1 Scott on Trusts, § 157.4, p. 798; Griswold on Spendthrift Trusts (Second Edition), § 344, p. 406; Rest. of Trust, § 157, comment b, p. 391.)

In an appeal to the court's sense of justice respondent Exner emphasizes the fact that she is a permanent resident and now a citizen of the United States. She further asserts (and it does not seem to be denied) that she came to the United States in 1921, resided with Mrs. Zuber and her husband in New York until 1927, filing naturalization papers in 1926. In 1927 she returned to Germany to marry Karl Exner. She lived with him about 15 months, bearing a son whose exclusive custody was awarded her when she divorced Exner in December, 1930. Thereafter, she resided permanently in Germany; she says she had intended to return to the United States but was compelled to remain where she was in order to take care of two incapacitated aunts, that during that period she received financial aid from Mrs. Zuber. Immediately upon cessation of hostilities she made application for immigration to the United States, obtained a quota number and arrived here in January, 1950, becoming a permanent resident and eligible for citizenship which she obtained in due course. She also avers in her Petition To Enforce Trust Under Will that she has never been a member of the Nazi party or its affiliated organizations. Respondent's brief further says (although this seems to be an enlargement on the petition): "* * * that she was never disloyal to the United States, never a member of any Nazi organization, never aided or assisted Germany in its war effort, always intended and expected to return to and become a citizen of the United States and has always regarded her statement in her first declaration of intention to become an American citizen, filed in 1926, wherein she agreed to renounce any allegiance or fidelity to any foreign country, as a binding obligation upon her. It further states that she always regarded herself as a potential American citizen, at all times friendly to the United States and never as its enemy, even during the period when she was in Germany. After the death of her two aunts in Germany and while Germany was at war, she found it was impossible for her to leave that country and return to the United States."

[8, 9] Counsel's suggestion is that this change of status brings respondent within the rule of Guessefeldt v. McGrath, 342 U.S. 308, 72 S.Ct. 338, 96 L.Ed. 342, wherein it was held that the phrase "resident within the territory" of an enemy (as used in § 2(a) of the Trading With the Enemy Act, 50 U.S.C.A.Appendix § 2(a)) did not include a German citizen who had been living in Hawaii for many years, had gone to Germany with his family for a vacation trip before World War II broke out, was involuntarily detained for 11 years in Germany, being unable to secure passage to the United States before the date of expiration of his re-entry permit, and who during his stay did nothing directly or indirectly to aid the war effort of the enemy. Respondent's facts do not measure up to the rationale of that case because she voluntarily became and remained a resident of Germany many years before the outbreak of war with this country. The element of necessity which ruled the Guessefeldt case was absent in that of Mrs. Exner. Moreover, change of status of the alien, occurring after the vesting order, cannot affect its validity or give rise to any new rights with respect to the property unless that be sanctioned by some statutory or perhaps some regulatory authority. Swiss National Insurance Co. v. Miller, 267 U.S. 42, 44–45, 45 S.Ct. 213, 69

L.Ed. 504; Farmers' Loan & Trust Co. v. Hicks, 2 Cir., 9 F.2d 848, 853, certiorari denied, 269 U.S. 583, 46 S.Ct. 120, 70 L. Ed. 424; In re Littman's Estate, 176 Misc. 679, 28 N.Y.S.2d 458, 459.

In Re Estate of Schneider, supra, 140 Cal.App.2d 710, 720, 296 P.2d 45, we voiced our concern over being the agency which must enforce this type of confiscation—it is nothing less—but we are bound to apply the law as it stands. The remedy for hardships such as are now visited upon respondents herein lies with the Congress, not the courts.

The briefs contain considerable discussion of the right of the Attorney General to vest property at this time,—all of which is beside the point. We have no such subsequent or amended vesting order as was presented in the Schneider case, supra. We therefore have no occasion to discuss the Jay Treaty of Friendship of 1923, or the effect of the Bonn Convention of 1953, which reaffirmed and reinstated the Jay Treaty.

[10] The condition of the Zuber bequest has now been fulfilled. The contingent estate was transferred to the custodian by the vesting order; the estate has ripened into a vested one which belongs to the Attorney General as successor to the Custodian. The time has come for distribution to the Attorney General, notwithstanding the terms of the trust, for those terms can never be fulfilled. See, In re Kuhirt's Estate, supra, 132 N.Y.S.2d 97; Central Hanover Bank & Trust Co. v. Markham, D.C.S.D.N.Y., 68 F.Supp. 829, 830; In re Reiner's Estate, Sur., 44 N.Y. S.2d 282; Clark v. Continental Nat. Bank of Lincoln, Neb., supra, D.C.Neb., 88 F. Supp. 324, 337.

[11] The legacies of the watch, silver teapot and porcelain lamp to German nationals are strictly in the class of executory devises; as such they were subject to the seizure power which was exercised by the custodian. They must be distributed to the Attorney General.

The judgment is reversed with instructions to enter judgment distributing to the Attorney General of the United States the watch, silver teapot and porcelain lamp mentioned in the will, together with the residue of decedent's estate, free of any claims of respondents and other persons mentioned in decedent's will as legatees, devisees or beneficiaries of the trust respecting same.

MOORE, P. J., and FOX, J., concur.

Hearing denied; CARTER, SCHAUER and McCOMB, JJ., dissenting.

COUNTY OF LOS ANGELES, Plaintiff and Respondent,

v.

L. C. FAUS; Alhambra Bond Company, Trustee; Katharine Graves Armstrong, also known as Katherine Graves Armstrong; Emily W. Bell, as Executrix of the Will of George B. Wardman, deceased; Ruth Bradford; Bank of America National Trust and Savings Association; City of Alhambra; City of Pasadena; M. Richard Cohen; Carey H. Conley; Ethel T. Conley; Corporation of America, Trustee; Irene G. Dalton; Rameau W. Dalton; Mary G. Faus; First Federal Savings and Loan Association; Rufus Freitag, Trustee; Dorothy J. Gillette, also known as Dorothy J. Benson Gillette; Geraldine Virginia Gould; Francis P. Graves; Frances R. Harrison; Samuel L. Harrison; Elizabeth Reynolds Herbert, formerly Frances Elizabeth Reynolds, also known as Elizabeth Reynolds; Investors Savings and Loan Association; Herbert C. Iske; Ruth M. Iske; Alice V. Lewis; Los Angeles Trust & Safe Deposit Company, Trustee; Bernieta M. Maetta; Joseph R. Maetta; Henry Macias; Mary Macias; Charles R. Martin; Willa Mason; Celeste Merlo; Jean E. Naylon; Robert L. Naylon; Bess P. Newport; Charles L. Newport; Corinne McCann Noel; John Nuccio; Robert C. Nuccio; Paul Overton; Pacific Electric

Railway Company; Mariquita W. Reeves, as Executrix of the Will of George B. Wardman, deceased; Henry Graham Reynolds; Security-First National Bank of Los Angeles; Shell Oil Company; Everett R. Smith Estate; Maude P. Speer; Mortimer T. Speer; State of California; Alice Graves Stewart; Eva C. Taylor; The Farmers and Merchants National Bank of Los Angeles, Trustee; The Marble Company, formerly The John M. C. Marble Company; The Northwestern Mutual Life Insurance Company; Title Insurance and Trust Company, Trustee; Ann Wagenseller, also known as Ann Dexter Wagenseller, a.k.a. Ann Dexter Wagonseller; Fred Baker Wallace; Walter John Wallace, Jr.; Dorothy M. Morris (sued as Doe One); William R. Morris (sued as Doe Two); Doe Three To Doe One Hundred, Inclusive; All Persons Unknown Claiming Any Title or Interest In or to the Property Sought to be Condemned Herein, Defendants,

L. C. Faus, Francis P. Graves, Paul Overton, Mary G. Faus, Katharine Graves Armstrong and Alice Graves Stewart, Appellants.*

Civ. 21805.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1956.

Rehearing Denied Dec. 14, 1956.

Hearing Granted Jan. 8, 1957.

Condemnation suit involving land lying between divided street. The Superior Court, Los Angeles County, Ellsworth Meyer, J., entered judgment upon jury verdict, and landowners appealed. The District Court of Appeal, Moore, P. J., held, in part, that though experts, who testified for county on market value of property, based valuation on sales where one of parties possessed power to condemn, where property owners, on cross-examination, failed to elicit that latent power of eminent domain actually prevented sale from being true market transaction, no grounds existed in evidence for striking any of estimates of market value.

Affirmed.

1. Eminent Domain 🔑219

Whenever, in condemnation suit, cross examination reveals that estimate of expert as to market value of property is based primarily upon consideration of incompetent factors, his estimate should be stricken upon appropriate motion.

2. Eminent Domain 🔑219

In condemnation suit, California does not allow the sales prices of similar lands to be brought out on direct examination as part of case-in-chief.

3. Evidence 🔑560

Once expert in condemnation suit has offered his opinion of value of land, it is burden of cross examiner to bring out sales upon which expert relies, in order to impeach his estimate; cross examiner may bring out that sales prices were much lower, or higher, than expert's valuation, or that other properties sold were not similar to subject property, or that sales were not true market transactions.

4. Eminent Domain 🔑219

Though experts, who testified in condemnation suit for county on market values of property located between divided street, based valuation on sales where one party to transaction possessed power to condemn, where property owners, on cross examination, failed to elicit that latent power of eminent domain actually prevented sale from being true market transaction, no grounds existed in evidence for striking any of estimates of market value.

5. Evidence 🔑555

Where, in condemnation suit involving property lying between divided street, expert witnesses based opinion of value on prices at which similar property had been sold to party who possessed power to condemn, and only question asked witness on cross examination adduced response that witness considered sales "openly negotiated", that witness would consider all such sales relevant except under threat of condemnation, and that witness had been informed that vendor had instituted negotiations in at least one of these sales, estimates of market value were properly admitted in evidence.

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* Opinion vacated 312 P.2d 680.

6. Eminent Domain 🔑222(4)

Instruction in condemnation suit involving property lying between divided street, that any sale wherein one of parties possessed power to condemn would be irrelevant to market value by reason of fact that such sale was in nature of a compromise, was properly refused.

7. Eminent Domain 🔑222(4)

Instruction in condemnation suit involving property lying between divided street, which failed to alert jury to possibility that sales of similar property to potential condemner might not be relevant to market value because of element of compulsion, was defective, but in absence of request for correct instruction embodying such principle, owners were not entitled to relief on appeal.

8. Eminent Domain 🔑221

The effect of the probability of a change in zoning upon mind of an ordinary purchaser may be taken into consideration by jury in fixing present market value of property in condemnation suit.

9. Evidence 🔑571(7)

In condemnation suit involving property located between divided street, in view of testimony of county's experts that in their opinion subject property had no use other than as park, recreational area or route for transportation because zoning ordinance would allow only such uses of northern 30 feet of each parcel, evidence warranted jury in assuming that there would be no change in zoning of property to business uses, in determining market value of property.

10. Eminent Domain 🔑131

Even if refusal of city to change zoning of subject property in condemnation suit would be unconstitutional, that fact would not affect verdict of jury in condemnation suit, though verdict fixing market value was based partly on assumption that there would be no change in zoning of property to business uses, since jury could find that that fact would affect decision of potential purchaser for business use.

11. Municipal Corporations 🔑601(7), 625

Where property surrounding subject property within boundaries of city was primarily residential, and not so filled with business establishments as to force allowance of business activity on subject property, residential zoning classification was not unconstitutional, arbitrary or unreasonable.

12. Eminent Domain 🔑131

The beneficial result to be derived by the condemner's use of property is not to be taken into consideration in determining market value, because compensation is based on loss imposed upon owner rather than on benefit received by taker.

13. Eminent Domain 🔑131

It would be incompetent to consider advantages to county in its attempt to widen street, namely, amount of extra traffic that could be successfully steered along street, or easing of traffic control problems in area, or peculiarly dire need of condemning agency for acquiring property, in determining market value of condemned property, within rule that value in use to the condemner is incompetent consideration of market value.

14. Eminent Domain 🔑134

If property has a particular adaptability for a certain use, that fact may be considered in determining its market value in condemnation suit.

15. Eminent Domain 🔑202(4)

Disregarding elements affecting value resulting subsequent to or because of actual taking, fact that condemner actually plans to use premises for purpose to which it is specially adapted does not render that special adaptability incompetent as indicium of value in condemnation suit.

16. Eminent Domain 🔑202(4)

Testimony by county's expert witnesses, in condemnation suit involving property line between divided street, that property was peculiarly adapted to street uses, was properly admitted, and not based on incompetent consideration of "value in use to the condemner".

17. Evidence ⚷555

In condemnation suit involving property line between divided street, in view of fact that county's experts considered variety of factors indicating market value and did not, in effect, abdicate their duty to appraise by making simple mathematical computation to exclusion of other considerations, opinion of market value was not incompetent on claim that it was based solely on mathematical averaging of sales prices of other lands.

On Denial of Rehearing

18. Evidence ⚷555

Though every sale relied upon by expert on market value in condemnation suit might be involuntary, he is not required to negate that possibility upon direct examination.

19. Evidence ⚷558(9)

An expert on market value in condemnation suit is to offer his estimation of market value without delving into side issues of other sales upon which he relies; instead, cross-examiner is allowed to bring out that matter in order to impeach expert's valuation.

20. Evidence ⚷558(9)

Upon cross-examination of expert on market value in condemnation suit, cross-examiner may first inquire whether expert relied to considerable extent upon other sales prices, and if so, examiner may next inquire concerning particular sales upon which expert relied in forming and stating opinion of market value.

21. Evidence ⚷558(12)

The opinion of expert on market value in condemnation suit need not be stricken as a matter of law merely because he discloses that he has relied upon some sales where prospective condemnation might be a factor; further questioning is required relative to involuntary nature of transaction, and proponent of expert may then on re-direct attempt to rebut any inference that sales relied upon were incompetent.

22. Eminent Domain ⚷219, 222(4)

If trial judge in condemnation suit is satisfied that expert's opinion rested primarily upon sales which were incompetent, he should strike that estimation of market value if requested to do so; and in absence of such motion, judge upon proper request should instruct jury that sales prices tainted by potential condemnation are incompetent considerations.

23. Evidence ⚷543(3), 560

Once qualified, an expert on market value in condemnation suit may always give his opinion of market value; opponent is always reduced to impeaching him on cross-examination, and even then, only remedy available is retroactive striking or cautionary instructions.

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Holbrook, Tarr, Carter & O'Neill, W. Sumner Holbrook, Jr., Francis H. O'Neill, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and Arthur Loveland, Deputy County Counsel, Los Angeles, for respondent.

MOORE, Presiding Justice.

This appeal is from an award in condemnation.

Appellants are the owners of certain elongated strips of realty situate in the cities of Alhambra and San Marino. They are derelict portions of the abandoned right-of-way in the center of Huntington Drive which formerly provided the street car route from Los Angeles northeasterly through the Santa Anita area.

The description of the property is unusual and important to the issues presented by the litigants. The vacant right-of-way is sixty feet wide and divides the Drive. Parcel 20–2, bounded by Stoneman Avenue, Atlantic Avenue, and the two sides of Huntington Drive, is 113.71 feet in length;

parcel 20-3 runs easterly from Stoneman to Granada Boulevard, a distance of 1435.13 feet. The northerly half of each parcel is located within San Marino; the southerly within Alhambra. Respondent has condemned a 30-foot strip running along the southerly edge of each parcel for the purpose of widening Huntington Drive. The jury returned a verdict resulting in a judgment for a sum which appellants contend is reversibly low because of material errors of law.

Evidence of Sales to Potential Condemners

The majority of the alleged errors urged by appellants revolve about the competency or incompetency of the amounts paid by instrumentalities having the power of eminent domain for stretches of similar abandoned rights-of-way located in other areas. Specifically, appellants complain of (1) the cross examination of their expert relative to his knowledge of those sales prices, (2) the court's refusal to strike the opinions of value of respondent's experts after cross examination disclosed the latters' reliance upon such sales prices in making their estimation, and (3) the refusal of the court to instruct the jurors as to the impropriety of considering the prices.

Two expert witnesses testified on behalf of respondent. (1) Frank C. Wood admitted on cross examination that he had based his estimate of the market value of the premises "primarily" upon twelve previous sales of rights-of-way. Eight of these sales were made to government agencies possessing the power of condemnation. Five were of strips of land having no street access whatsoever. Three were located more than fifteen or twenty miles from the site of the subject property. Upon termination of Mr. Wood's testimony, appellants vainly moved to strike his estimate of the value of the premises. (2) J. B. Irvin testified as to his reasons for placing his valuation upon the property: "Well, it was based on the investigation which I made, the various properties that were sold by open negotiation from the Pacific Electric to the various municipalities, and from the Huntington Land Company to the City of San Marino, and also the value of the land being sold by the Huntington Land Company up in the rear of the residences on the abandoned Oak Knoll line." Despite the similarity of Irvin's testimony to that of Wood, no motion was made to strike his estimate. But had the motion been made upon exactly the same ground as the motion to strike Wood's testimony, it would inevitably have been denied.

[1] Whenever cross examination reveals that the estimate of an expert as to the market value of property is based primarily upon consideration of incompetent factors, his estimate should be stricken upon appropriate motion. People By and Through Dept. of Public Works v. Dunn, 46 Cal.2d 639, 297 P.2d 964; Blumenstein v. City of Long Beach, 143 Cal.App.2d 264, 299 P.2d 347. Therefore, if the sales relied upon by the witnesses were indeed incompetent, the opinions of respondent's experts were incompetent and should have been stricken. It is true that both experts asserted that they had "considered" other factors, such as sales prices of adjacent lands fronting upon Huntington Drive, but had rejected them due to their dissimilarity to the subject property.

The issue of law is clearly presented: *Is an opinion of market value necessarily incompetent because admittedly based "primarily" upon amounts paid for other similar property by a purchaser with the power of eminent domain, regardless of whether that power is actually a factor in the negotiations?*

California authorities do not supply a definitive answer. In City of San Luis Obispo v. Brizzolara, 100 Cal. 434, 34 P. 1083, defendant property owners introduced into evidence the report of certain commissioners appointed by statute to compute the value of lands being condemned. The report included amounts paid by the condemner to other landowners in the area. The Court held that the report was incompetent to prove the market value of the subject property, commenting, "we have not been referred to any case in which it has been held that the value fixed by an agreement between the owner *and a corporation seeking to condemn his land* by virtue of eminent domain can be taken as a criterion of the market value of other land in that vicinity." 100 Cal. at page 436, 34 P. at page 1084, emphasis added. The policy behind the exclusion of evidence of such sales prices is based upon the theory that the prices so paid are neither more nor less than a compromise of litigation, present or prospective, rather than a price paid by a willing buyer to a willing seller where neither acts under any compulsion other than the circumstances of the market place and intensity of desire. In City of Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928 the Brizzolara case was cited for the proposition that "it is not competent for either party in a condemnation proceeding to put in evidence the amount paid by a *condemning* party to the owners of adjacent lands, however similar they may be to that in controversy, because the price paid under such circumstances 'is not a reasonable or fair test of market value.'" 28 Cal.2d at pages 517–518, 170 P.2d at page 933. Emphasis added.

The precise facts of the Cole case are important to an understanding of its holding. The property involved was located in the immediate vicinity of the civic center of Los Angeles. The various governmental agencies involved had resolved that all the subject and surrounding property was to be acquired for an expansion of the center. Plans had been drawn and absolutely no other property would be suitable for the expansion. Thereupon, those agencies sought to condemn defendants' land. At the trial, defendants' expert witnesses admitted that their estimate of market value was largely predicated upon purchase prices paid by these same condemning agencies to other landowners in the area of the civic center as part of the same development program. The trial court properly instructed the jury that they were not to consider those sales in determining the value of subject property. As stated by the county counsel in his brief before the Cole court, "The Bureau of Water and Power [the buyer in the questioned sales] had no choice as to what property it would buy. It was essential to buy a specific site. That site was necessarily within the Civic Center and in that area the amount of land privately owned was steadily diminishing. To suggest that the price which the public entities are required to pay for land *under these circumstances* constitutes market value, is simply to declare that as the public entities proceed to acquire Civic Center property, the more they are required to pay for that which they have acquired, the more they will be required to pay for the remainder of the property." (Emphasis added.) In other words, the vice of the questioned sales was the lack of a "willing" buyer.

Turning to authority from other jurisdictions, it is quite true that a majority of courts have stated at one time or another that evidence of sales prices where one party to the transaction possessed the power to condemn is irrelevant to market value because of the threat of ultimate litigation present during the negotiations. Note, 174 A.L.R. 386, 395–397; note, 118 A.L.R. 869, 893–904. However, a respectable number of jurisdictions have recognized that purchases by public bodies are not inevitably tainted with threats of compulsion; that when such purchases are of similar property as a result of negotiations instituted, for example, by the vendor and therefore free of compulsive elements, they may be perfectly competent as an aid to computing the value of the subject property. Washington Home for Incurables v. Hazen, 63 App.D.C. 185, 70 F.2d 847; Amory v. Commonwealth, 321 Mass. 240, 72 N.E.2d 549, 559–560; State Highway Commission v. Buchanan, 175 Miss. 157, 166 So. 537, 538; Eames v. Southern New Hampshire Hydro-Electric Corp., 85 N.H. 379, 159 A. 128; Curley v. Jersey City, 83 N.J.Law 760, 85 A. 197; Wadsworth v. Manufacturers' Water Co., 256 Pa. 106, 100 A. 577, 579–580. "A sale otherwise competent is

not necessarily inadmissible because the condemner was the purchaser if it does not appear that the sale was in connection with or in anticipation of condemnation proceedings." Eminent Domain, 18 Am. Jur. § 352, p. 996.

The situation in the instant case is a convincing reminder of the inadvisability of constructing a rigid rule of evidence to exclude relevant indicators of "market value." The concept is already as evanescent as most minds can comprehend. Here lies property situated directly in the middle of a divided highway. What would a "willing buyer" pay for it? Appellants insist that the true indicia of value are the sales prices of residential lots adjacent to and fronting upon Huntington Drive. Such lots are of normal depth and width, quite in contrast with the 60-foot strip down the center of a thoroughfare which, at some points, is as much as eight feet higher than the adjacent highway. Proximity of a narrow, irregularly shaped plot in the center of a boulevard to tracts of orderly subdivided city lots, facing improved streets, does not *per se* give it a value comparable with that of such city lots. If the sales by the Pacific Electric of other portions of its rights-of-way were indeed free from threatened condemnation actions, it is quite likely that such sales, when admitted, would be of greater weight in determining the value of the subject strip than sale prices of neighboring lots along the boulevard. After all, the question of whether the sale price of another parcel of property is "competent" here is solely a matter of logical relevancy. Is the property similar? Were the buyer and seller both willing?

[2–5] Many courts which approved the admission of evidence of sales to bodies with power of eminent domain as part of the case-in-chief require that the proponent of such evidence *lay a foundation* for the sale; that is to say, demonstrate to the satisfaction of the trial court that not only was the property similar, but that no element of compulsion entered the sale. Amory v. Commonwealth, supra, 321 Mass. 240, 72 N.E.2d 549, 559–560. "[J]ust as the trial court must find sufficient similarity and likeness of conditions of the property sold to the property in question before the evidence of the sale is relevant, so, where the offer is of a sale to the condemnor, the court must likewise find that the circumstances of the sale, as respects the freedom of contract, are such that the sale has some tendency to evidence market value before it is relevant. Such findings, if not express, may be implied from the admission of the sales, while the contrary findings may likewise be implied from their exclusion. But in neither case can the respective findings be made without supporting evidence." Eames v. Southern New Hampshire Hydro-Electric Corp., supra, 85 N.H. 379, 159 A. 128, 130. However, California does not allow the sales prices of similar lands to be brought out on direct examination as a part of the case-in-chief. People v. La-Macchia, 41 Cal.2d 738, 748, 264 P.2d 15. Once the expert offers his opinion of value, it is then the burden of the cross examiner to bring out the sales upon which he relies so as to impeach his estimate. The opponent may bring out that the sales prices were much lower, or higher, than the expert's valuation, or that the other properties sold were not similar to the subject property, *or that the sales were not true market transactions*. Therefore, it was incumbent upon the appellants here to extract from the opposing experts not only that they relied upon sales where one party to the transaction possessed the power to condemn, but that the latent power of eminent domain actually prevented the sale from being a true market transaction. The only questions asked relative to the voluntary nature of the transactions adduced the response from Mr. Irvin that he considered the sales "openly negotiated"; "I figured it was an open negotiated sale without threat of compulsion"; that he would consider all such sales relevant "except under threat of condemnation"; that the city manager of San Marino had informed him that the Pacific Electric had instituted negotiations in at least one of the sales. No grounds exist in the evidence for striking any of the estimates of market value.

[6] Appellants complain of the refusal of the trial court to give certain instructions patterned after those expressly approved in the case of City of Los Angeles v. Cole, supra, 28 Cal.2d 509, 516–517, 170 P.2d 928 932. The instructions there directed the jury not to consider prices paid by the condemning agency for other property in the vicinity in computing market value of subject property because " 'such sales are not a fair criterion of value for the reason that they are in the nature of a compromise.' " Appellants' instructions here would instruct the jury that *any* sale wherein one of the parties possessed the power to condemn was irrelevant to market value by reason of the fact that such sale was in the nature of a compromise. As may be gathered from the conclusions hereinabove indicated, such a direction would not correctly state the law.

[7] Among the instructions actually given by the trial judge was the standard admonition to the jury that instances of sales of other properties were brought out on cross examination not as evidence of market value but merely to determine the basis upon which the expert predicated his opinion. "The opinion of a witness is no better than the reasons upon which such opinion is based, and when a witness gives an opinion as to the market value of property, it is permissible to ascertain the extent of his investigation into matters which would be a legitimate subject of inquiry by anyone desiring to purchase the property in question." The instruction satisfactorily indicated that the similarity of the property involved in sales other than of the subject property was a factor to consider, but did not inform the jury of the problems involved when an expert relies upon sales transactions in which one of the bargainers is a government instrumentality. In other words, the jury should have been alerted to the possibility that sales of similar property to a potential condemner might not be relevant to market value because of an element of compulsion. But since appellants requested no correct instruction embodying such principle, they are not entitled to relief now.

Potential Zoning Change

[8] Respondent's experts testified that in their opinion subject property had no use other than as a park, recreational area or route for transportation *because San Marino zoning ordinances* would allow only such uses of the northern 30 feet of each parcel. Appellants attempted to prove that it was a reasonable probability that the zoning would be changed to allow commercial uses in the near future. The effect of the probability of a change in zoning upon the mind of an ordinary purchaser may be taken into consideration by the jury in fixing present market value. Long Beach City High School District of Los Angeles County v. Stewart, 30 Cal.2d 763, 768–769, 185 P.2d 585, 173 A.L.R. 249. The jury apparently chose to believe it was unlikely that San Marino would change the allowable use. The award made does not indicate that the jury considered the probability of normal business activity on the premises.

[9] The jury was entitled to assume that there would be no change in the zoning of the property to business uses. San Marino had recently denied for the third time a request that nearby property be used for commercial purposes. All the surrounding property within the limits of San Marino is zoned residential. The only "exceptions" are (1) a preparatory school located in a large residence which had apparently been constructed about 1913, long before the property was ever zoned, and (2) a medical office building located in a wash undesirable for residences and mandatorily screened by careful landscaping from the view of nearby homes.

[10, 11] However, appellants argue that a refusal to change the zoning of subject property by the city would be unconstitutional and therefore the jury could not consider the property unusable commercially.

This contention cannot affect the verdict. If the city indeed contemplated no change in zoning, the best a purchaser planning to use the site for business could buy would be a lawsuit. The jury was entitled to believe that a potential purchaser for business use would not be interested in so dubious a proposition. In the second place, the situation presented here would not justify a finding that the zoning imposed by San Marino was unconstitutionally arbitrary and unreasonable. The property surrounding subject property within the boundaries of San Marino was primarily residential and certainly not so filled with business establishments as to force allowance of business activity on subject property. See Skalko v. Sity of Sunnyvale, 14 Cal.2d 213, 215–216, 93 P.2d 93, for the extreme situation required before a good faith zoning ordinance violates constitutional safeguards.

Value in Use to Condemner

Respondent's expert witnesses testified that in their opinion the uses for which the property is zoned, to wit, park, recreation and transportation, are actually the highest and best uses. As regards use for transportation, the only feasible mode of use to which the property was immediately adapted was for "street purposes." Appellants assert that the opinion of market value advanced by those witnesses was thus based upon "value in use to the condemner", an incompetent consideration. People v. La Macchia, supra, 41 Cal.2d 738, 754, 264 P.2d 15; City of Redding v. Diestelhorst, 15 Cal.App.2d 184, 193, 59 P.2d 177; City of Stockton v. Vote, 76 Cal.App. 369, 400, 244 P. 609.

[12, 13] Appellants misunderstand the meaning of "value in use to the condemner" as a basis for incompetency. The beneficial result to be derived by the condemner's use of the property is not to be taken into consideration in determining market values, because compensation is based on loss imposed upon the owner rather than on the benefit received by the taker. People v. LaMacchia, supra. Therefore, applying this important rule to the instant matter, it would be incompetent to consider the advantages to the county in its attempt to widen Huntington Drive, namely, the amount of extra traffic that could be successfully steered along the streets, the easing of traffic control problems in the area, etc. See authorities cited immediately above. Nor may a jury consider the peculiarly dire need of the condemning agency for acquiring the property. In other words, the last parcel condemned for use as a roadway between two cities has no greater market value merely because it is the last link in the chain and thereby *must* be acquired by the condemning body.

[14, 15] If property has a particular adaptability for a certain use, that fact may be considered in determining its market value. Disregarding elements affecting value resulting subsequent to or because of the actual taking, the fact that the condemner actually plans to use the premises for the purpose to which it is specially adapted does not render that special adaptability incompetent as an indicium of value. United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 76–77, 33 S.Ct. 667, 57 L.Ed. 1063; Minneapolis-St. Paul Sanitary District v. Fitzpatrick, 201 Minn. 442, 277 N.W. 394, 398–400, 124 A.L.R. 897; Eminent Domain, 18 Am.Jur., § 245, p. 882. In San Diego Land & Town Co. v. Neale, 88 Cal. 50, 25 P. 977, 11 L.R.A. 604, where property was condemned for reservoir use, the "jury had a right to consider the fact in determining the market value, that the land in controversy was in proximity to a dam-site, and to consider its adaptability for reservoir purposes," 88 Cal. at page 66, 25 P. at page 981, but evidence of the benefit to be gained by the condemner because of the construction of a reservoir was incompetent.

[16] From the foregoing considerations, it should be patent that respondent's experts properly testified that in their opinion the narrow strip down the center of Huntington Drive in San Marino is peculiarly adapted to street uses.

Braket of Sales

[17] Appellants argue that an opinion of market value based solely on the mathematical averaging of sales prices of other lands is not competent evidence and should be stricken. However, the record here discloses that respondent's experts considered a variety of factors indicating market value and did not, in effect, abdicate their duty to appraise by making a simple mathematical computation to the exclusion of other considerations.

Affirmed.

ASHBURN and FOX, JJ., concur.

On Denial of Rehearing

PER CURIAM.

Petitioners' primary attack upon the decision in the above entitled case is against the procedural rule there invoked that the burden rests upon the opponent of an expert witness as to market value to extract from that witness not only that he primarily relied upon the sales of comparable property to bodies with power to condemn, but also that the potential power to condemn was actually a factor in the sales. Petitioner suggests that the expert should be required on direct examination to justify his opinion as to value by himself affirmatively volunteering that he relied upon such sales and testifying that they were indeed voluntary transactions.

[18] The policy behind the California procedure in the trial of condemnation actions is professedly to eliminate detailed and time-consuming consideration of collateral issues. "The general rule which permits a witness to state the reasons upon which his opinion is premised may not be used as a vehicle to bring before the jury incompetent evidence. To so open up the inquiry would create a disastrous break in the dike which stands against a flood of interminable investigation. Upon direct examination, a witness never should be allowed to go into the details of particular offers for the property being condemned or specific sales or transactions in connection with other property." People v. LaMacchia, 41 Cal.2d 738, 745–746, 264 P.2d 15, 21 "* * * witnesses * * * cannot, upon the direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for adjoining lands of like quality and location, or for the land in question, or any part thereof, or how much the company have [sic] been compelled to pay in other and like cases—notwithstanding those transactions may constitute the source of their knowledge. If this was allowed, the other side would have a right to controvert each transaction instanced by the witnesses, and investigate its merits, which would lead to as many side issues as transactions, and render the investigation interminable. Upon cross-examination, however, the knowledge of the witnesses, and, therefore, the value of their opinions, may be tested in that mode, if desired by the party in whose interest the examination is conducted." Central Pacific Railroad Company v. Pearson, 35 Cal. 247, 262. "The courts have neither deviated nor retreated from this rule." People v. LaMacchia, supra, 41 Cal. 2d at page 744, 264 P.2d at page 20. The policy announced in these cases could not be served while requiring the expert witness to justify the sales he relies upon as voluntary transactions. Every sale relied upon by any expert might be involuntary, but he is not required to negate that possibility upon direct examination. Should the Supreme Court revamp the entire system so completely set forth in the LaMacchia case and allow sales prices of comparable property to be introduced as direct evidence, then it would be possible to follow those courts which require a "foundation" for such evidence to be laid before its admission. However, as the case law stands at present, it would apparently be a "disastrous break in the dike" to so require.

[19–22] Under present law, an expert is to offer his estimation of market value without delving into side issues of other sales upon which he relies. Instead, the cross examiner is allowed to bring out that matter in order to impeach the expert's valuation. The cross examiner may first inquire of the expert whether he relied to a considerable extent upon other sales prices. If the answer is in the affirmative, the next query relates to the particular sales. Our holding is only that the opinion of the expert need not be stricken as a matter of law merely because he discloses that he has relied upon some sales where prospective condemnation *might* be a factor. Further questioning is required relative to the involuntary nature of the transaction. The proponent of the expert may then on re-direct attempt to rebut any inference that the sales relied upon were incompetent. People v. LaMacchia, supra, 41 Cal.2d at pages 748–749, 264 P.2d at pages 22–23. If the trial judge is satisfied that the expert's opinion rests primarily upon sales which are incompetent, he should strike that estimation of value if requested so to do. In the absence of such a motion, the judge upon proper request should instruct the jury that sales prices tainted by potential condemnation are incompetent considerations. City of Los Angeles v. Cole, 28 Cal.2d 509, 516, 170 P.2d 928.

[23] Petitioner claims that our ruling has some particular vice in that the mere striking of an expert's opinion after its rendition does not truly erase its impression from the minds of the jury and that it is unrealistic to expect counsel to obtain correct and complete testimony as to the character of the various transactions from a hostile witness on cross examination. Petitioner's complaint seems to be with the entire California condemnation procedure which has been promulgated by a higher court than this. Once qualified, an expert may always give his opinion of market value; the opponent is always reduced to impeaching him on cross examination and even then the only remedy available is a retroactive striking or a cautionary instruction.

Rehearing is denied.

ASHBURN, Justice.

I concur in the court's opinion upon denial of rehearing in this case, and I would add some further observations.

Appellants' counsel in their criticism of this court's discussion of City of Los Angeles v. Cole, 28 Cal.2d 509, 170 P.2d 928, go entirely outside the record in a repeated statement that the County of Los Angeles, prior to institution of this suit, "had *publicly* determined its necessity for and intention to acquire *all* abandoned rights of way of the Pacific Electric lying within unincorporated territory, either by private purchase or threat of eminent domain proceedings." Reference to Faus v. Pacific Electric Ry. Co., 134 Cal.App.2d 352, 285 P.2d 1017, adds no efficacy to such gratuitous assertion for it is well settled that a court will not take judicial notice of the facts in another case for the purpose of importing those facts into the record under consideration. 18 Cal.Jur.2d § 53, p. 471.

It is indeed true that appellants' asserted grievance strikes at existing procedure in condemnation cases,—the rule that evidence of sales of similar property cannot be received on direct examination or be considered as proof of value of the parcel under condemnation. Appellants' counsel complain that under our instant ruling they, when confronted with sales to agencies having power of eminent domain, are limited to a futile effort to establish by cross-examination the existence of an element of coercion in such sales, while those courts which have heretofore approved of receiving that type of evidence accept it upon direct examination but only after preliminary proof of absence of express or implied threat of a taking *in invitum*. In this connection it is said at page 22 of the petition: "In short, the proposed adoption of the so-called 'minority' rule, as to the use of sales transactions to public bodies with power of eminent domain as the foundation of an expert's testimony, cannot be engrafted onto the present evidential system of this State."

The fact is that appellants herein suffer from exactly the same embarrassments which any other party faces in the ordinary eminent domain case. The witness for his opponent enumerates certain sales which he considers comparable and upon which he relies. The witness testifies upon the assumption and implied assertion that those sales had been freely negotiated and no one questions this assumption until cross-examination is reached. If the cross-examiner considers any of them to have been induced by need of money or necessity of closing a probate estate or other element of compulsion on either side, he may canvass those things upon cross. If he gets favorable answers all is well, but if unable to do so he is through upon those particular sales; he can do nothing more about them except by indirection and not always does he have that opportunity. If his witnesses have not previously testified he probably will be able to show by them that they have not considered those specific sales because not made voluntarily. But if his witnesses have testified first (if he represents the owner), there is no opportunity for him to do that; he must rest upon cross-examination, and if that is unsuccessful he must content himself with a reflection that such are the inequities of the law as applied to individual cases. It is interesting to note that the cited Massachusetts authorities, which hold that a preliminary showing of lack of compulsion is necessary in case of sales to agencies having power of eminent domain, start that inquiry with a presumption of absence of any element of coercion. Amory v. Commonwealth, 321 Mass. 240, 72 N.E.2d 549, 559–560, 174 A.L.R. 370; Epstein v. Boston Housing Authority, 317 Mass. 297, 58 N.E.2d 135, 138–139.

That appellant alone does not suffer from the restrictions of the California procedure is illustrated by the record at bar. The defendant property owner of course presented his evidence of value first. The initial mention of abandoned rights of way occurred on cross-examination of defendants' witness Frisbie. He denied any knowledge of such sales and so the cross-examiner could not go much further. Manifestly he could not prove by that witness the voluntary nature of the sales. He did assert the fact in his questioning, but of course that did not make proof. He attempted to bring out on cross-examination the prices for which those parcels had sold but was defeated therein by Mr. Frisbie's lack of knowledge. He never did get those prices into evidence. Some of the rights of way in question were sold to persons other than public agencies (Nos. 5, 10, 11 and 12), but counsel for the property owner elected not to ask about those prices and they never were placed before the jury in the form of evidence. Defendants' counsel having passed over that matter, the plaintiff's attorney was powerless to do anything about it.

All this difficulty grows out of the established rule that sales of similar properties are not receivable into evidence upon direct examination; which means not at all unless elicited upon cross-examination; and the fundamental trouble lies in the exclusion of evidence of other sales as *proof* of market value. The rule is designed to avoid collateral issues and resultant delays. It does not seem to be based on any concept of irrelevancy or immateriality, for it could not rest upon any such considerations.

The case of Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 533, 28 P. 681, voices the rule (as do many others) that the jurors should know about and consider all matters which a reasonably prudent buyer would weigh in determining upon a purchase. "The rule is that the owner is entitled to the market value of his land, to be determined in view of all the facts which would naturally affect its value in the minds of purchasers generally, which necessarily makes it proper to consider for what purpose it is most valuable. 'Any existing facts which enter into the value of the land in the public and general estimation, and tending to influence the minds of sellers and buyers, may be considered.' Russell v. [St. Paul M. & M.] R. Co., 33 Minn. [210] 213, 22 N.W. 379." Spring Valley Water-Works v. Drinkhouse, supra, 92 Cal. at page 533, 28 P. at page 683.

Everyone recognizes that the first thing a prospective buyer of any kind of porperty wants to know is what other people have paid for like property in the recent past. If interested in a listed stock or bond he goes to New York or American or Los Angeles Stock Exchange quotations and takes note of prices paid on sales, as well as bid and ask prices. If the stock is not listed he goes to the over-the-counter market quotations. If it is wheat or hogs or cotton or other commodities which interest him he goes through much the same procedure to learn what others have paid recently for like property. If a sale has been made of the same real or personal property which is under examination at a trial, evidence of that sale is admissible upon its value. Bagdasarian v. Gragnon, 31 Cal.2d 744, 755–758, 192 P.2d 935. But when the valuation of realty is the problem, court and jury are suddenly cut off from informative sources and forced to rely (theoretically) upon opinions based principally upon undisclosed prices of other sales. The excuse for the rule is avoidance of collateral issues. How does this work in actual practice?

Long experience with application of the rule in the trial court has disclosed to me that the following pattern develops in the case of a property of substantial value which is tried by attorneys experienced in condemnation. Defendant calls his expert who testifies that he has considered in arriving at his valuation some 10, 20 or 30 comparable sales. He has them spotted on a map which is received in evidence and placed before the jury. The examiner then elicits from the witness the exact location and area of parcel number 1, whether improved or unimproved, when last sold, to whom and by whom, whether for cash or cash and credit, the terms of credit if any, and any other particulars which he can bring to mind. Then he says to the witness, "Do you have the price on that sale?" "Yes." "And you can give it to Mr. Loveland (opposing counsel) if he asks you about it on cross-examination?" "Yes." This is supposed to put the cross-examiner in a position requiring him to ask the price. Here the direct examiner must stop. Opposing counsel blithely ignores the challenge. He has objected to none of this because he has a map with 20 sales on it which he expects to use in the same manner. This process is repeated as to all of lots 2 to 20, inclusive, if 20 be the total number of lots on the map. The cross-examiner asks the witness about the sale price on such lots as he considers helpful to him (let us say all but numbers 1, 5, 10 and 15); but he is studiously silent as to those numbers and the attorney who called the witness is helpless with respect to them. This procedure occurs when each of the owner's witnesses is on the stand and again with the condemner's witnesses, and the case goes to the jury with information as to prices of all lots except those which are most helpful to the parties who called the respective witnesses.[1] Before People v. LaMacchia, 41 Cal.2d 738, 748, 264 P.2d 15, the trial judge had some control over the matter. It had been held repeatedly that the details of other transactions cannot be given on direct, and the judge, if diligent and firm, could without help from either side hold the trial within a reasonably narrow compass. In De Freitas v. Town of Suisun City, 170 Cal. 263, 266, 149 P. 553, 555, it is said: "It should not be difficult to prove value and damage in a legal manner by competent witnesses. By preliminary questions the examiner should elicit the facts relating to the qualifications of the witnesses; for example, that he has seen and examined the land, or that he knows something of its character and condition, or the market values of land in that vicinity, if such values have been established, or the values of land similarly situated, and the like. He may, thereupon, be asked to give his opinion of its respective values * * *. The weight of the testimony of such witnesses will, of course, depend upon the knowledge he shows in his answers to the preliminary questions and on cross-examination. He should not be asked regarding specific facts in the examination in chief. The rules controlling such examinations are well established. See Central Pac. R. Co. [of California] v. Pearson, 35 Cal. [247] 262; Clark v. Willett, 35 Cal. [534] 544." See, also, City of Los Angeles v. Deacon, 119 Cal.App. 491, 493–494, 7 P.2d 378. But the LaMacchia opinion, supra, says, 41 Cal.2d at page 748, 264 P.2d at page 22: "Although, as a general proposition, a witness upon his examination in chief should not be allowed to go into the details of particular sales or transactions, Reclamation Dist. No. 730 v. Inglin, supra, 31 Cal.App. [495] at page 500, 160 P. [1098] at page 1100, the core of inadmissibility is the consideration. City and County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 656, 272 P. 585; In re Estate of Ross, supra, 171 Cal. [64] at page 67, 151 P. [1138] at page 1139. Where no price is mentioned, the rule laid down in Central Pac. R. R. Co. of California v. Pearson, supra, does not apply. City & County of San Francisco v. Tillman Estate Co., supra, 205 Cal. at pages 656–657, 272 P. at pages 586–587." Since that decision the trial judge's hands are practically tied. The possibility of abbreviating the hearing has disappeared, and the jury must decide upon the basis of those sales which are the least helpful to each side and without others which would be helpful to it in ascertaining the truth. The main objective of the rule—avoidance of collateral issues—has proved abortive and the procedural aspect of the trial has changed for the worse.

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[1] If, as some trial judges assert, the cross-examiner obligingly brings out the prices of all sales mentioned in direct, the vice of the exclusion rule is merely ameliorated thereby; the necessity of instructing the jury that such sales prices are not evidence of value remains.

The jury, having the case submitted to it upon the least enlightening evidence, is in for a real surprise when the instructions are given. Ever since adoption of the rule excluding other sales on direct it has been stated repeatedly that such sales, though the prices are given on cross-examination, are not evidence of value, are to be considered only upon the imputation of lack of information or trustworthiness of the witness. The jurors are so instructed. They know that sales are the basis on which mankind universally values properties; they have many of the pertinent sales before them; when they hear the judge instruct that those sales are not any evidence of value the jurors who are still listening begin to wonder what is the matter with the judge; but those who are listening, as well as those who are not, pay no attention to that instruction and proceed to do the job the best way they can despite the barriers placed in their path by the court. This whole picture is unrealistic.

That such an instruction must be given is well settled in the law of this state. Los Angeles City High School Dist. of Los Angeles County v. Schumann, 78 Cal.App. 353, 358–359, 248 P. 737; Palladine v. Imperial Valley Farm Lands Ass'n, 65 Cal.App. 727, 756, 225 P. 291; Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 478, 284 P. 1072; City of Los Angeles v. Cole, supra, 28 Cal.2d 509, 518, 170 P.2d 928; People v. LaMacchia, supra, 41 Cal.2d 738, 745, 264 P.2d 15.

That the rule should be re-examined will be clear to anyone who will read or re-read the dissents of Justices Carter, Traynor and Schauer in City of Los Angeles v. Cole, supra, 28 Cal.2d 509, 519, 170 P.2d 928; and People v. LaMacchia, supra, 41 Cal.2d 738, 754, 264 P.2d 15; also that of Justices Carter and Schauer in Heimann v. City of Los Angeles, 30 Cal.2d 746, 760, 185 P.2d 597. Of course this court is not free to depart from rules established by the Supreme Court. Because we are powerless in the premises, and our decision heretofore rendered is in consonance with the presently established procedure, I join in the denial of the petition for rehearing. It is to be hoped that this rule of procedure (and that is all it is) will some day yield to the actualities and be revoked as one which has failed to achieve its desired objective.

146 Cal.App.2d Supp. 904

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Donald L. CLARKE, Defendant and Appellant.
Cr. A. 3483.

Appellate Department, Superior Court, Los Angeles County, California.
Nov. 29, 1956.

Defendant was convicted of violating statute penalizing a father for failure to provide for his child. The Municipal Court of the Los Angeles Judicial District, Byron J. Walters, J., entered judgment accordingly, and defendant appealed. The Superior Court, Appellate Department, held that the provisions of statute penalizing failure to provide for child by imprisonment in county jail for term not to exceed two years were repealed or modified by Penal Code provision limiting confinement in county jail on conviction for misdemeanor to one year, and fact that statute penalizing failure to so provide was reenacted twice since Penal Code section providing for punishment for misdemeanors did not constitute a restoration of provision authorizing two year sentence.

Judgment reversed with directions.

Swain, J., dissented in part.

1. Criminal Law ⚿1023(11)

An appeal taken from "order made and entered in this action * * * sentencing defendant to two years in the county jail" would be considered an appeal from a judgment of conviction.

2. Parent and Child ⚿17(7½)

The provisions of statute penalizing failure to provide for child by imprisonment in county jail for term not to exceed two years were repealed or modified by statute limiting confinement in county jail on conviction for misdemeanor to one year, and fact that statute penalizing failure so to provide was re-enacted twice since statute providing for punishment for misdemeanors did not constitute a restoration of provision authorizing two-year sentence. Wset's Ann.Pen.Code, §§ 19a, 270; West's Ann.Const. art. 4, § 24.

3. Criminal Law ⚿1173(2)

In prosecution of alleged father for failure to provide for minor child, court's refusal to give instruction that he was under no duty to provide food, clothing, etc., for unborn child if he honestly with reason believed it not to be his and refusal to give a cautionary instruction was not prejudicial, in view of evidence in case. West's Ann.Pen.Code, § 270.

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Irmas, Rutter & Halper, Beverly Hills, for appellant.

Roger Arnebergh, City Atty., Donald M. Redwine, Asst. City Atty., Philip E. Grey and Walter C. Foster, Deputy City Attys., Los Angeles, for respondent.

Before BISHOP, P. J., and PATROSSO and SWAIN, JJ.

BY THE COURT.

About once out of every fifty cases, we wish we had the power to certify the appeal to a higher court. This is one of those cases. However, we have no power to certify, and so discharge our responsibility to decide.

[1] In the first place, the appeal is "from that certain order made and entered by the court in this action on the 10th day of May, 1956, sentencing defendant to two years in the county jail." In spite of the long and growing list of cases dismissing appeals from sentences (see West's Cal.Digest, Criminal Law ⚿1023 (10)) broken only by People v. Lopez, 1941, 43 Cal.App.2d Supp. 854, 867, 110 P.2d 140, 147; and People v. Tokich, 1954, 128 Cal. App.2d 515, 519, 275 P.2d 816, 818; fortified by the latter, we consider that the defendant has appealed from the judgment of conviction.

[2] The judgment (sentence) imposed was two years in the county jail, as expressly authorized by section 270, Penal Code. By virtue of section 19a, added to the Penal Code in 1933, the provision of section 270 was "repealed" or "modified", People v. Phair, 1934, 137 Cal.App. 612, 614–615, 31 P.2d 421, 422–423; "amended", People v. Lewis, 1939, 13 Cal.2d 280, 283, 89 P.2d 388, 389–390; or repealed, In re Chiapetto, 1949, 93 Cal.App.2d 497, 499, 209 P.2d 154, 155–156; so that it no longer controlled. It might well be argued, then, that when section 270 was reenacted in 1939 (and again in 1955) as Art. IV, § 24 of the Constitution requires, if an amendment is to be made, its inclusion of a provision for a two-year sentence was a restoration of that provision, which had been effectively, although not expressly, deleted since 1933, and not a continuation of the provision that had ceased to be. We consider that we are precluded from following where this argument leads, however, by the case last cited, which holds that section 19a controls, even though a statute providing for two years' imprisonment had been amended since 19a was adopted. It follows that the judgment imposed was excessive, and must for that reason be reversed.

[3] We are asked to reverse it generally, and not with directions, on a number of grounds. We find none of them to warrant a reversal. In addition to the grounds advanced by the appellant we have considered the trial court's failure to give two instructions of its own initiative. One, would be to advise the jury that the defendant was under no duty to provide food, clothing, etc., for the unborn child if he honestly, with reason, believed it not to be his. The other would be the cautionary instruction found essential in People v. Putnam, 1942, 20 Cal.2d 885, 888, 892, 129 P.2d 367, 368, 370. Whatever conclusion we would ultimately have reached respecting the propriety of these instructions in this case, the conviction governs that had they been given, the result would have been the same. To be sure the complaining witness testified that the defendant was the father of her unborn child and the defendant denied having committed any act that made her accusation possible. But this was not a simple case of charge and denial. In addition there were cards, admittedly signed by the defendant, registering Mr. and Mrs. D. Clarke at motels where the prosecuting witness testified they spent the night, and visits to three doctors admittedly made by the defendant in company with the complaining witness, and admissions on his part contrary to his present protestations of innocence. We are of the opinion that it is quite improbable that had the jurors been advised to view with caution the charge of the complaining witness, or been told that the defendant had no obligation to take care of a child he honestly believed not to be his, that they would have been persuaded to find the defendant not guilty.

The judgment is reversed with instructions to rearraign the defendant for judgment.

SWAIN, Judge.

I concur and dissent. I concur in that part of the opinion which holds that one year is the maximum jail sentence which may be imposed for violating Penal Code, § 270, but there are other errors for which the judgment should be reversed and a new trial had.

There is no merit to appellant's claim that he cannot be prosecuted criminally for failing to provide for an illegitimate child until it has been established by a civil action that he is its father. The law on that point, adverse to appellant's claim, was established in People v. Stanley, 1917, 33 Cal. App. 624, 166 P. 596, and People v. Hamil, 1925, 73 Cal.App. 649, 238 P. 1075. This claim, however, is closely related to a valid principle of criminal law, the disregard of which by the trial court was error.

The court should have instructed the jury that if the defendant had reasonable grounds for believing and did in good faith believe that he was not the father of the unborn, illegitimate child of the complaining witness, he was not guilty of willfully failing to provide for it. Penal Code, § 20 provides: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." Penal Code, § 26 provides: "All persons are capable of committing crimes except those belonging to the following classes: * * * Four—Persons who committed the act or *made the omission* charged under an ignorance or mistake of fact, which disproves any criminal intent." (Emphasis added.) In People v. Swiggy, 1924, 69 Cal.App. 574, at pages 580–581, 232 P. 174, at page 176, the court said: "The word 'willfully,' as used in section 270, means a deliberate intention or a set purpose to omit to perform the natural duty which the section declares that an omission to perform shall be penalized. The word, when used in criminal statutes, has been said to be a stronger word than the word 'intentionally' in so far as the word may expose the intention or purpose in the mind of the defendant, and that 'it means governed by the will; obstinate; perverse.'"

It is to be noted that Penal Code 26, subd. 4, treats *ignorance* of fact and *mistake* of fact alike. Both were good defenses at common law. See 22 Harvard Law Review 75. Although no cases have directly considered the effect of a *mistake* of fact under section 270, several cases have recognized that *ignorance* of fact is a good defense under this section.

1. Ignorance of the fact that the child is in need is a defense under § 270. People v. Swiggy, 1924, 69 Cal.App. 574, 584, 232 P. 174; People v. Meads, 1915, 28 Cal. App. 140, 151 P. 552.

2. Ignorance of the whereabouts of his family is a defense because it rebuts willfulness. People v. Wallach, 1923, 62 Cal. App. 385, 217 P. 81.

3. Ignorance of the fact that a child has been born is a defense. People v. Frietas, 1939, 34 Cal.App.2d 684, 94 P.2d 397.

Mistake of fact has been recognized as a good defense to prosecutions under other statutes.

1. Under a federal statute making it a misdemeanor to fail to supply certain information willfully, it was held that "* * * Congress did not intend that a person by reason of a bona fide misunderstanding as to his liability for the tax, as to his duty to make a return, or as to the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct. And the requirement that the omission in these instances, must be willful, to be criminal, is persuasive that the same element is essential to the offense of failing to supply information." United States v. Murdock, 1933, 290 U.S. 389, 54 S.Ct. 223, 226, 78 L.Ed. 381.

2. In Matter of Ahart, 1916, 172 Cal. 762, 159 P. 160, defendant was charged with willfully transporting liquor to an unauthorized place in the City of Covina, contrary to the terms of a local ordinance. The court followed the leading English case of Regina v. Tolson and held that a good faith and honest mistake of fact would be a defense under this ordinance.

3. In re Trombley, 1948, 31 Cal.2d 801, 193 P.2d 734, the court held that under Section 216 of the Labor Code making it a misdemeanor willfully to refuse to pay an employee under certain circumstances, a good faith dispute as to whether wages are due is a defense because such dispute tends to rebut willfullness.

In cases of robbery, People v. Sheasbey, 1927, 82 Cal.App. 459, 255 P. 836, and larceny, People v. Hoagland, 1903, 138 Cal. 338, 71 P. 359, it is a defense that the defendant took the property in mistaken but good faith belief that the property was his own.

In the recent case of People v. Vogel, 1956, 46 Cal.2d 798, 299 P.2d 850, 854, which deals with bigamy, Justice Traynor held that "* * * the prosecution makes a prima facie case upon proof that the second marriage was entered into while the first spouse was still living (see People v. Priestly, 17 Cal.App. 171, 173–174, 118 P. 965; People v. Huntley, 93 Cal.App. 504, 506, 269 P. 750), and his bona fide and reasonable belief that facts existed that left the defendant free to remarry is a defense to be proved by the defendant."

It is true that Penal Code section 270e provides: "Proof of the * * * omission to furnish necessary food, clothing, shelter, or of medical attendance for a child or children is prima facie evidence that such * * * nonsupport or omission to furnish necessary food, clothing, shelter or medical attendance is wilful." This does not negative the defense of denial of paternity in good faith, it merely casts upon the defendant the burden of proving that defense by evidence sufficient to raise a reasonable doubt of his guilt.

It is true that the defendant did not request an instruction which embodies the principles just discussed but the point is so basic and of such importance, where the defendant claims that he is not the father, that it is the duty of the court to give, on its own motion, instructions on that defense. In People v. Putnam (1942) 20 Cal.2d 885, at page 890, 129 P.2d 367, at page 369, the court said: "It is incumbent upon a court in a criminal case to instruct the jury of its own motion, charging them fully and fairly upon the law relating to the facts of the case. [Citing cases.] The court is not relieved of the duty to give instructions whose necessity is 'developed through the evidence introduced at the trial.' * * * An instruction is necessary if it is vital to a proper consideration of the evidence by the jury."

This being a case which involved sex relations and the evidence being conflicting, the court also erred in failing to give, on its own motion, the cautionary instruction that the charge that the defendant was the father of the unborn child was easy to make and difficult to disprove. For the law on this point as applied to rape cases, see People v. Rankins, 1944, 66 Cal.App.2d 956, 153 P.2d 399. I would reverse the judgment.

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146 Cal.App.2d Supp. 899

MILLS SALES COMPANY, Ltd., Plaintiff and Respondent,

v.

Oscar R. GONZALES, individually, and doing business as Union Square Service, Defendant and Appellant.

C. A. 179.

Appellate Department, Superior Court,
Alameda County, California.
Nov. 21, 1956.

Action to recover on conditional sales contract and on common count for money due and owing. The Municipal Court for the Oakland-Piedmont Judicial District, Joseph A. Murphy, J., entered an order denying defendant's motion for change of venue, and defendant appealed. The Superior Court, Hoyt, J., held that venue was properly laid in county in which complaint showed without contradiction that contract was to be performed and that inclusion of common count did not entitle defendant to change of venue to county of his residence.

Order affirmed.

1. Venue 🔑72

On motion for change of venue, averments of complaint are to be deemed true, at least, to the extent that they are not controverted.

2. Venue 🔑7

Where complaint disclosed that common count for money due and owing was based upon same facts as cause of action on conditional sales contract, venue of action was properly laid in county in which complaint showed without contradiction that installment payments under contract were to be made, and inclusion of common count in complaint did not entitle defendant to change of venue to county of his residence. West's Ann.Code Civ.Proc., § 395.

3. Action 🔑38(2)

Where common count for money due and owing, following cause of action on conditional sales contract, and prayer of complaint made it clear that common count was based upon same set of facts as preceding cause of action, common count should be considered not as a different cause of action, but as alternative method of pleading plaintiff's right to recover.

4. Judgment ⚷306, 323

Courts have inherent power to correct judgments and orders where there has been a clerical error by clerk or by judge himself, and such correction can be made ex parte and without notice.

5. Judgment ⚷328

Where new order is substantially different from original order or substantially changes the rights of the parties, if court in entering new order is purporting to correct a clerical error, it should say so, or there should be something in the record to show it.

6. Courts ⚷189(15)

Recital in order of municipal court that through clerical error action had been ordered transferred to municipal court for another judicial district and that such order was incorrect and erroneous sufficiently showed that order transferring action was being set aside in order to correct clerical error.

7. Appeal and Error ⚷1010(1), 1011(1)

Where order purporting to correct clerical error in prior order is based on evidence in which there is a substantial conflict as to whether such error was clerical, trial court's determination will not be disturbed on appeal, but if the undisputed facts show that error was not clerical, reviewing court is not bound by trial court's recital of the clerical error.

8. Courts ⚷190(8)

In order of municipal court setting aside prior order that action be transferred to municipal court for another judicial district, declaration that through clerical error, action had been ordered transferred, was a judicial declaration and should be accepted by reviewing court as true, in absence of anything in the record to contradict such declaration.

9. Courts ⚷189(15)

Order of municipal court denying defendant's motion to strike affidavit filed by plaintiff in opposition to motion for change of venue was void, in absence of finding and declaration that prior order granting motion to strike such affidavit was made through clerical error.

10. Appeal and Error ⚷1043(8)

Where complaint showed without contradiction that contract on which action was based was to be performed in county in which venue of action was laid, void order denying defendant's motion to strike affidavit filed by plaintiff in opposition to defendant's motion for change of venue was not prejudicial to defendant. West's Ann.Code Civ.Proc., § 395.

Allan L. Sapiro, San Francisco, Church, Church & Howard, Los Angeles, and Church, Howard & Stevens, for appellant.

Donahue, Richards, Rowell & Gallagher, Oakland, for respondent.

HOYT, Judge.

This is an appeal from an order denying a motion for a change of venue. On October 13, 1955, plaintiff filed a complaint against defendant containing two causes of action: (1) a cause of action on an alleged conditional sales contract, and (2) a common count for moneys due and owing. In due time the defendant filed a motion for change of venue supported by an affidavit which alleged his residence at all times pertinent to this action to be in the County of Los Angeles; that if any contract was entered into between plaintiff and defendant, said contract was made in the County of Los Angeles and that the goods mentioned in the purported contract were to be received by defendant in said County of Los Angeles. At the same time defendant filed an affidavit of merits, a demurrer and a memorandum in support of the motion and demurrer.

On November 23, 1955, defendant's motion for change of venue was argued and taken under submission by the court with the request that counsel submit authorities. On December 2, 1955, plaintiff filed an affidavit in opposition to the motion for change of venue. On December 12, 1955, defendant filed a notice of motion to strike said affidavit. On December 15, 1955, said motion was argued and submitted.

On December 27, 1955, the following minute order was entered: "All authorities having been presented, motions submitted; Motion to strike affidavit granted; Motion for change of venue granted.

"It Is Ordered that this action, together with all papers and files, be transferred to the Municipal Court for the Los Angeles Judicial District, County of Los Angeles, State of California, upon prepayment of fees."

On December 29, 1955, the following minute order was entered: "It Appearing to the Court That, through clerical error, the above-entitled action was ordered transferred to the Municipal Court for the Los Angeles Judicial District, County of Los Angeles, California, on the 27th day of December, 1955, and that this is incorrect, and erroneous; therefore,

"It Is Ordered that the order transferring said cause to Los Angeles Municipal Court, and entered in Minute Book No. 155, at page 2196, is hereby vacated and set aside."

Thereafter, on January 9, 1956, the following minute order was entered: "Motion of defendant for change of venue and to strike affidavit on file herein heretofore heard and submitted; now called for decision.

"It Is Ordered that motion of defendant for change of venue and to strike affidavit on file herein be and the same is hereby Denied. See Armstrong v. Smith, 49 Cal. App. [2d 528] at page 536 [122 P.2d 115, at page 119]."

Defendant has appealed from the order of January 9, 1956.

Appellant attacks the decision of the trial court on its merits and also contends that the order of January 9th is void because no clerical error appears on the face of the record and that the court was correcting judicial error in a manner not authorized by law.

The complaint alleged that defendant agreed to purchase certain merchandise from plaintiff and to pay for the same in installment payments and that "Said contract * * * provided that said installment payments be made at the Oakland Main Office of Bank of America National Trust and Savings Association in the City of Oakland, County of Alameda, State of California; * * *"

[1-3] Defendant's affidavit in support of his motion for change of venue did not controvert the above-mentioned allegation of the complaint. The averments of the complaint are to be deemed true upon a motion for change of venue, at least to the extent that they are not controverted. Ward Manufacturing Company v. Miley, 131 Cal.App.2d 603, 606, 281 P.2d 343. It therefore follows that the County of Alameda was a proper county in which to try this action unless the second cause of action is transitory in nature. Code of Civil Procedure, § 395; Armstrong v. Smith, 49 Cal.App.2d 528, 122 P.2d 115. A reading of the second cause of action and the prayer of the complaint make it clear that the second cause of action is based upon the same set of facts as the first cause of action. Under this circumstance the second cause of action is to be considered not as a different cause of action but as an alternative method of pleading the plaintiff's right to recovery. In such a situation the defendant is not entitled to a change of venue because of the inclusion of the common count in the complaint. Maselli v. E. H. Appleby & Co., Inc., 117 Cal.App.2d 634, 256 P.2d 618.

[4] Concerning Appellant's contention that the order made by the trial court on December 29, 1955, is void, it should be noted that the cases uniformly hold that courts have an inherent power to correct judgments and orders where there has been a clerical error by the clerk or by the judge himself and the correction can be made ex parte and without notice. Morgan

v. State Board of Equalization, 89 Cal.App. 2d 674, 677, 201 P.2d 859, and cases therein cited.

[5] Where the new order is substantially different from the original order or substantially changes the rights of the parties, "* * * if the court is purporting to correct a clerical error, it should say so, *or* there should be something in the record to show it." Morgan v. State Board of Equalization, supra, 89 Cal.App.2d at page 682, 201 P.2d at page 864. (Italics supplied.)

[6] In the instant case the trial court fully met the requirement that if it "is purporting to correct a clerical error, it should say so" by saying, "It Appearing To The Court That, through clerical error, the above entitled action was ordered transferred * * * and that this is incorrect, and erroneous; therefore,

"It Is Ordered that the order transferring said cause * * * is hereby vacated and set aside."

No case has been cited in the briefs of the parties and there appears to be none in this State which holds that under the circumstances of the instant case the trial court needs to go further than it did in this case to show that it is clerical error which is being corrected.

[7] Both sides have referred in their briefs to In re Estate of Burnett, 11 Cal. 2d 259, 79 P.2d 89, 90. In that case the Supreme Court said, "The recital in the order made nunc pro tunc that a clerical error had crept into its first order is not conclusive of either the fact or the nature of the error * * *, although where such an order rests upon evidence in which there is a substantial conflict, it will not be disturbed upon appeal. * * * But where the facts upon which the court acted are undisputed and only one conclusion can be drawn from them, the appellate court is not bound by the order made below." This merely means that if there is a substantial conflict in the evidence as to whether the error was clerical, the trial court's determination will not be disturbed on appeal, but if the undisputed facts show that the error was not clerical the Appellate Court is not bound by the trial court's recital of the clerical error.

In Bastajian v. Brown, 19 Cal.2d 209, 120 P.2d 9, 12, the trial court in its order setting aside findings and judgment declared and found that the findings and judgment "'do not conform to * * * the true judgment rendered by the court, in that the court intended to pronounce judgment * * * in favor of defendants * * *."

The Supreme Court held such a declaration to be a declaration of fact which was concealed in the mind of the judge and said it "has a direct bearing on the existence of such [clerical] error."

[8] The court's declaration here that there was a clerical error is a judicial declaration and should be accepted by the reviewing court as true unless, as was held in In re Estate of Burnett, supra, the facts are undisputed and the only conclusion which can be drawn from them is that the error was judicial and not clerical. There is nothing in the record here to contradict the judge's declaration that he was correcting clerical error.

[9, 10] In its order of December 27, 1955, the trial court granted defendant's motion to strike plaintiff's affidavit filed after the motion for change of venue was argued and submitted. The court did not find or declare that the order granting the motion to strike plaintiff's affidavit was made through clerical error. Consequently, the trial court's order of January 9, 1956, denying defendant's motion to strike the affidavit was to that extent void and of no legal effect. Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869. Since the complaint showed that the contract was to be performed in the City of Oakland, County of Alameda, and this was not denied, it is apparent that defendant suffered no prejudice by reason of this void order.

For the reasons above stated, the order denying the motion for change of venue should be affirmed.

The order is affirmed.

WAGLER, P. J., and LEDWICH, J., concur.

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146 Cal.App.2d Supp. 892

PEOPLE of the State of California, Plaintiff and Respondent,
v.
John E. COTE, etc., Defendant and Appellant.
Cr. A. 3524.

Appellate Department, Superior Court,
Los Angeles County, California.
Nov. 19, 1956.

Defendant was convicted in the Municipal Court of the Compton Judicial District, Donald E. Dunbar, J., of violating county ordinance requiring license for operation of tank vehicles, and he appealed. The Appellate Department of the Superior Court, Patrosso, J., held that regulation of such vehicles was within exclusive power of Public Utilities Commission, and the ordinance was unconstitutional.

Reversed and remanded with directions.

1. Automobiles 🔑73

Los Angeles county ordinance requiring license for operation of tank vehicles was unconstitutional. West's Ann.Const. art. 12, § 23; West's Ann.Public Util. Code, §§ 213, 214, 1062, 1063.

2. Automobiles 🔑62

Regulation of operation of tank vehicles carrying petroleum has been committed to the Public Utilities Commission to the exclusion of all local authorities. West's Ann.Const. art. 12, § 23; West's Ann.Public Util. Code, §§ 213, 214, 1062, 1063.

Arlo D. Poe, Los Angeles, for appellant.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Fred N. Whichello, Deputy Dist. Attys., Los Angeles, for respondent.

PATROSSO, Judge.

[1] Defendant was convicted of violating section 710 of Ordinance 5860 of the County of Los Angeles, in that he operated a "tank vehicle" within the County without having procured a license therefor as provided in said section. The sole question presented is whether the ordinance is constitutional as applied to the defendant and the business conducted by him. We have concluded that the question must be answered in the negative and accordingly are reversing the judgment.

The facts are undisputed. At the times charged in the complaint and for several years prior thereto, defendant was and had been engaged in the business of operating tank trucks and other tank vehicles as a highway common carrier and as a petroleum irregular route carrier under certificates of public convenience and necessity issued by the Public Utilities Commission of the State of California, and it was for operating a vehicle in the pursuit of such business that he was convicted because he had not procured the license required by section 710 of the ordinance previously mentioned.

Section 710 reads as follows: "710. *Gasoline and oil tank trucks.* Every person engaged in the business of running a tank vehicle and every person who, in connection with or as part of, any business in which he is engaged, runs such a vehicle shall procure a license and pay a license fee of fourteen dollars per year per vehicle."

Section 708 of the same ordinance defines a "tank vehicle" as follows: "708. *Definition.* As used in this article 'tank vehicle' means any vehicle which, in the unincorporated territory of the County, either collects and transports, or transports and delivers flammable liquids or liquefied petroleum gases, or both, both as now or hereafter defined in the County Fire Code. A tank truck and tank trailer attached thereto shall be considered as only one vehicle."

By section 7 it is provided that every person who engages in any business for which a license is required without having procured a license so to do is guilty of a misdemeanor.

Ordinance 5860 is the general licensing ordinance of the County of Los Angeles, and section 83 thereof provides that no license required by the terms thereof shall be issued for "any business, occupation or activity, if such business, occupation or activity has been, will be, or is apt to become any one or more of the following: (a) Prohibited by any local ordinance or by any state law, statute, rule or regulation. (b) A Public nuisance. (c) In any way detrimental to the public interest. (d) Prohibited by Ordinance No. 1494." In addition, section 84 provides that a license may be denied if the applicant "is a person unfit to be trusted with the privileges granted by such license" or has knowingly made a false statement in a material matter in his application. Section 92 provides for the revocation of a license upon any of the grounds specified as authorizing a denial of such license and other additional grounds therein specified which are not necessary to be set forth in detail except to note that included therein are false advertising and "willful failure to comply with the terms of any contract made as a part of the exercise of the occupation or activity licensed."

It is conceded by both parties that the fee required to be paid by persons engaged in any of the occupations or businesses mentioned in the ordinance is for the purpose of regulation, not revenue, and each likewise concedes that, except as to certain occupations not here material, a county may not license for the purpose of revenue. B. & P. Code, secs. 16100, 16101; In re Bock, 1932, 125 Cal.App. 375, 379, 13 P.2d 836.

By the provisions of section 23 of Article XII of the California Constitution all public utilities therein enumerated, and every class of corporations, individuals or associations "declared by the Legislature to be public utilities" are declared to be "subject to such control and regulation by the Railroad Commission [now Public Utilities Commission] as may be provided by the Legislature." It is further provided therein that "From and after the passage by the Legislature of laws conferring powers upon the railroad commission respecting public utilities, all powers respecting such public utilities vested in boards of supervisors, or municipal councils, or other governing bodies of the several counties, cities and counties, cities and towns, in this State, or in any commission created by law and existing at the time of the passage of such laws, shall cease so far as such powers shall conflict with the powers so conferred upon the Railroad Commission * * *."

Pursuant to the power thus conferred upon it by this constitutional provision, the legislature adopted the Public Utilities Code, among the provisions of which we find the following pertinent provisions: Section 213 defines "'highway common carrier'" as any person or corporation owning or operating any auto truck used in the business of transportation of property as a common carrier for compensation over any public highway in this State between fixed termini or over a regular route and not operating exclusively within the limits of an incorporated city with certain exceptions not here mentioned.

Section 214 defines a "'petroleum irregular route carrier'" as every person or corporation engaged as a common carrier, other than as a highway common carrier, for compensation in the ownership, control, operation or management of any motor vehicle transporting petroleum or petroleum products in a tank truck or tank trailer over any public highway in the State.

Both highway common carriers and petroleum irregular route carriers are required to secure from the Public Utilities Commission, certificates of public convenience and necessity prior to operating on the public highways of the State, sec. 1063.

Section 1062 reads as follows:

"*Regulatory authority of commission.* The commission may:

"(a) Supervise and regulate every highway common carrier and petroleum irregular route carrier in this State.

"(b) Fix the rates, fares, charges, classifications, and rules of each such carrier.

"(c) Regulate the accounts, service, and safety of operations of each such carrier, and require the filing of annual and other reports and of other data by such carriers.

"(d) Supervise and regulate such carriers in all other matters affecting the relationship between them and the shipping public.

"The commission, by general order or otherwise, may prescribe rules applicable to any and all highway common carriers and petroleum irregular route carriers. The commission, in the exercise of the jurisdiction conferred upon it by the Constitution of this State and by this part, may make orders and prescribe rules affecting highway common carriers and petroleum irregular route carriers, notwithstanding the provisions of any ordinance or permit of any city, city and county, or county, and in case of conflict between any such order or rule and any such ordinance or permit, the order or rule of the commission shall prevail."

[2] From the foregoing it appears too clear to admit of argument that the regulation of the business in which defendant is engaged has been committed to the Public Utilities Commission to the exclusion of all local authorities. The language of the Court in People v. Sackett, 1935, 6 Cal.App.2d Supp. 763, 767, 43 P.2d 1115, 1117, effectively answers and disposes of all arguments of the People to the contrary: "Thus, it appears that the Legislature has acted pursuant to the right given it by said section 23 of article 12, Const. and has conferred upon the Railroad Commission full jurisdiction over common carriers of passengers and property. The city of Los Angeles therefore had no right to pass, and has no power to enforce, the ordinance in question, unless the 'regulation' thereof be 'local' and the power thereunto be 'vested'. As heretofore suggested, we think that the subject of the legislature in this case was not local and that the city never possessed the power of statewide regulation of a transportation business whose use of the streets of the city of Los Angeles, like those of every municipality through which its vehicles passed, was merely incidental to the carrying on of a business which by definition of the ordinance itself is exclusively nonlocal." See to the same effect: People v. Willert, 1939, 37 Cal.App.2d Supp. 729, 739–741, 93 P.2d 872.

It need only be added that if defendant could, as the ordinance provides, be denied a license to operate as a common carrier in the County of Los Angeles merely because the Board of Supervisors determined that such business was "detrimental to the public interest", or because in its judgment defendant was "unfit to be trusted with the privilege" of engaging therein, the exclusive jurisdiction over public utilities vested in the Public Utilities Commission by the Constitution and the statutes above referred to would be effectively nullified.

The judgment is reversed and the cause remanded to the trial court with directions to dismiss the same.

SWAIN, Acting P. J., and KAUFFMAN, J., concur.

146 Cal.App.2d Supp. 885

Nettie SACKS, Plaintiff, Cross-Defendant and Respondent,

v.

Freida HAYES, Defendant, Cross-Complainant and Appellant.

C. A. 9088.

Appellate Department, Superior Court,
Los Angeles County, California.

Nov. 19, 1956.

Action to recover rent. From a judgment of the Municipal Court for the Inglewood Judicial District, Lester O. Luce, J., and from order overruling exceptions to findings of fact and conclusions of law, defendant appealed. The Appellate Department, Patrosso, J., held that tenant's exercise of option to purchase terminated tenant's liability for rent.

Judgment reversed and purported appeal from order dismissed.

Landlord and Tenant 🔑197

Tenant's exercise of option to purchase terminated tenant's liability for rent.

Gervais & Gould, Los Angeles, for appellant.

H. L. Sacks, Los Angeles, and E. Stephens, Difani, Gardena, for respondent.

PATROSSO, Judge.

Plaintiff instituted this action by filing a complaint wherein it is alleged that on the 1st day of October, 1955, the defendant became indebted to plaintiff in the sum of $125 as rent for the premises therein described. Defendant answered denying the allegations of the complaint and filed a cross-complaint in the form of a common count for money had and received in the sum of $625. Judgment was rendered in favor of plaintiff on her complaint and against the defendant upon her cross-complaint.

The undisputed evidence discloses that on August 27, 1955, the parties entered into an agreement evidenced by a writing executed by plaintiff reading as follows:

> "Netti Sacks
> Interior Decorator
> Complete Home Furnishings
> PL. 66684
> 12315 So. Budlong
> L.A. 44
> Aug. 27, 1955.
>
> Rec'd. 375.00 for rent on above adds. with privilege of buying. 125.00 from Sept. 1, '55 to Oct. 1. 55. 250.00 to be applied as rent Sept. to Oct. 56.
> 1st payment of 500.00 to be paid Dec. 30th
> 2nd " " 500.00 " " " Mar. 30
> 3rd " " 500.00 " " " June 30
> 4th " " 500.00 " " " Sept. 30
> Full price of 13,500.00
>
> Nettie Sacks"

Concurrently with the execution of the agreement, defendant paid to plaintiff the sum of $375 as recited therein and on September 1 entered into the possession of the premises. Subsequent to the execution of the writing hereinbefore set forth, plaintiff advised defendant that if she (defendant) would pay the first $500 under the option, which by its terms was not payable until December 30th, plaintiff would build a fence at no charge, and defendant on August 31 paid said sum.

Under date of October 4, 1955, plaintiff executed another writing as follows:

> "For and in consideration of $500.00 received of which is hereby acknowledged and 3 *promissory* notes dated —— I hereby agree that when the last note is paid, I will execute and give a deed to Frieda Hayes.
>
> "Frieda Hayes promises to execute and deliver a first & 2nd Trust Deed in the sum of $11,500 to the party or parties that I will obtain the loan from.
>
> "Property above mentioned is located at 12315 South Budlong described as the North 40 ft of Lots 14 and 13 and the south 10 ft. of lots 11 and 12 Block M. Howard Townsite.
>
> Nettie Sacks"

Whether the notes therein mentioned were executed by defendant does not appear but the fact is of no moment here.

In plaintiff's brief she undertakes to set forth additional facts with respect to which she asserts testimony was adduced upon the trial, but as no such evidence appears in the settled statement, we may not consider the same.

The trial court found that the parties entered into an agreement to lease the premises in question for one year commencing September 1, 1955; that pursuant thereto defendant paid to plaintiff the sum of $375 "covering the rental for the month of September, 1955 and July and August, 1956"; that under the terms of said agreement the sum of $125 became due on October 1, 1955, which defendant refused to pay, and that the $500 paid by defendant to plaintiff "was as a part of a down payment to purchase the above described property pursuant to an option previously given to the defendant." The court's finding as to the term of the lease and the period for which the advance rental was paid appears contrary to the recitals in the writing previously set forth wherein it is expressly stated that the $375 was rental for the month of September, 1955 and the months of September "to" October, 1956, which would also indicate that the lease was for a period of 14 months rather than one year. This error, however, does not affect the disposition which we find necessary to make of the cause upon this appeal but mention is made of it here in order that consideration may be given thereto in the event of a new trial.

Upon the basis of the undisputed evidence as set forth in the statement on appeal, and the findings of the trial court which we have hereinabove summarized, it was error to render judgment for the plaintiff, for when defendant exercised the option granted her to purchase the property by making the first payment of $500 thereunder, the lease and option agreement no longer existed and a binding contract of purchase and sale came into existence between the parties, see Peebler v. Seawell, 1954, 122 Cal.App.2d 503, 505–506, 265 P.2d 109, where the earlier cases are collected, and as a consequence defendant's obligation to pay rent under the lease terminated. As said in Cities Service Oil Co. v. Viering, 1949, 404 Ill. 538, 89 N.E.2d 392, 402, 13 A.L.R.2d 1448, 1460: "Where the relation of landlord and tenant exists under the terms of a written lease, containing an option to purchase which the lessee exercises, he is no longer in possession as a tenant, but his possession is that of a vendee. Bakaitis v. Fink, 340 Ill. 440, 172 N.E. 923; 51 C.J.S., Landlord and Tenant, § 82a. The lessor is not entitled to rent after the option to purchase is exercised unless there is in the lease an express stipulation therefore. 51 C.J.S., Landlord and Tenant, § 82a. The exercise of the option extinguishes the lease and terminates the relation of landlord and tenant. The lease and all its incidents, express and implied, are blotted out of existence, and the relation of vendor and vendee created. 32 Am. Jur., Landlord and Tenant, sec. 300."

At the date of the filing of the complaint herein the second payment of $500 was not due, but if defendant has since defaulted under the terms of her agreement to purchase, resulting from the exercise of the option, plaintiff's action is upon that contract, not the lease.

The trial court, however, did not err in granting judgment against the defendant upon her cross-complaint. The fact that at a date subsequent to the exercise of the option defendant stated to plaintiff that she had "decided against buying the house" and requested that the $500 paid upon the exercise of the option be applied as rent or refunded to her, does not entitle her to a return of the amount so paid or the advance rental in the absence of evidence, of which there is none, that plaintiff agreed thereto.

The judgment is reversed. The purported appeal from the order overruling defendant's exceptions to the findings of fact and conclusions of law is dismissed.

BISHOP, P. J., and SWAIN, J., concur.

146 Cal.App.2d Supp. 896

FIDELITY INVESTORS, Inc., etc., Plaintiff and Respondent,

v.

BETTER BATHROOMS, Inc., etc., et al., Defendants,

David Waters, Bernard Bechthold and C. E. Vandervort, Defendants and Appellants.

C. A. 9099.

Appellate Department, Superior Court,
Los Angeles County, California.
Nov. 20, 1956.

Action for balance claimed to have been due plaintiff's assignor from defendants on a book account because of shower doors and bathroom equipment delivered and installed as ordered by defendants. The Municipal Court of the Los Angeles Judicial District, Ray P. Brockmann, J., entered summary judgment against certain defendants, and such defendants appealed. The Superior Court, Appellate Department, Bishop, P. J., held that affidavit, which was made in support of plaintiff's motion for summary judgment, but which failed to mention a book account against anyone, and which did not state the facts with particularity nor show affirmatively that affiant, if sworn as a witness, could testify competently, was inadequate, and such defect was fatal to the summary judgment granted plaintiff.

Judgment reversed with directions.

1. Judgment 🔑185.3(3)

In action for balance claimed to be due plaintiff's assignee from defendants on a book account because of shower doors and bathroom equipment delivered and installed as ordered by defendants, affidavit, which was made in support of plaintiff's motion for summary judgment, but which failed to mention a book account against anyone, and which did not state the facts with particularity nor show affirmatively that affiant, if sworn as a witness, could testify competently, was inadequate, and such defect was fatal to the summary judgment granted plaintiff. West's Ann.Code Civ.Proc. § 437c.

2. Assignments 🔑134

In action for balance claimed to have been due plaintiff's assignor from defendants on book account because of shower doors and bathroom equipment delivered and installed as ordered by defendants, proof of the assignment was essential to plaintiff's case.

◆

Tanner, Odell & Taft, Los Angeles, for appellant Waters.

Behymer & Hoffman, Los Angeles, for appellants Bechthold and Vandervort.

Rose & Rose, Los Angeles, for respondent.

BISHOP, Presiding Judge.

A summary judgment was entered against the three individual defendants in this action and they have appealed. The plaintiff, as the assignee of the Delta Shower Door, Inc. (alleged to be a California corporation), seeks to recover the balance claimed to be due that corporation from the defendants because of shower doors and bathroom equipment delivered and installed as ordered by the defendants. We are reversing the judgment because the affidavit, upon which plaintiff's motion for a summary judgment depends, fails to measure up to the requirements of the summary judgment section, section 437c, Code of Civil Procedure, at several vital points.

In the cases dealing with summary judgments, we repeatedly run across a statement like this one in Kimber v. Jones, 1954, 122 Cal.App.2d 914, 919, 265 P.2d 922, 925: "It must be borne in mind that in a summary judgment proceeding, which is a drastic procedure to be used sparingly and with circumspection in order to fully preserve the rights of litigants, the affidavits of the moving party must be strictly construed. United States Fidelity & Guaranty Co. v. Sullivan, 93 Cal.App.2d 559, 561, 209 P.2d 429; Travelers Indemnity Co. v. McIntosh, 112 Cal.App.2d 177, 182, 245 P.2d 1065." The first of the two cases cited in the passage just quoted, refers to still other cases and makes this quotation from Eagle Oil & Ref. Co. v. Prentice, 1942, 19 Cal.2d 553, 556, 122 P.2d 264, 265: "'The procedure is drastic and should be used with caution * * *.'" [93 Cal.App.2d 559, 209 P.2d 431.] This conclusion is not only supported by authority, but follows from the strict requirements of section 437c itself. We note there: "The facts stated in each affidavit shall be within the personal knowledge of the affiant, shall be set forth with particularity, and each affidavit shall show affirmatively that the affiant, if sworn as a witness, can testify competently thereto."

The complaint, in this case, alleges that the defendants became indebted to the Delta Shower Door Co., Inc., upon a book account, which has been assigned to the plaintiff. These allegations are denied in the answers filed by the individual defendants. Looking at the affidavit presented in support of plaintiff's motion, we find no mention whatever made of a book account against anybody. We do find the affiant stating that the Delta Shower Door, Inc., "delivered and installed shower doors and bathroom equipment and tub enclosures for the defendant Better Bathrooms, Inc. on the following orders:" [then appear nine references of which the first is typical:] "John Farrow, at 612, Beverly Drive, Beverly Hills, Calif., purchase order no. 4640, Inventory no. 684 in the amount of $144.20 on May 3, 1954." With respect to the assignment the affidavit declares: "That on November 10, 1955, the Delta Shower Door, Inc. corporation assigned its claim for the money due as above stated to [the plaintiff]."

[1, 2] Directing our attention, first, to the matter of the assignment, it is apparent that the affidavit is inadequate. In the first place, the facts are not stated "with particularity"; that which we have is, in reality, no more than we already had in the complaint. By what action was the assignment made? Did a bookkeeper call up plaintiff's counsel and tell him to seek recovery in plaintiff's name? Did a mere stockholder sign a document believed to constitute an assignment? What are the probative facts? The affidavit does not give them.

Nor does the affidavit "show affirmatively that the affiant, if sworn as a witness, can testify competently thereto." True, he states, sometime after these various things are alleged to have happened, that he *is* (our emphasis) the president of plaintiff's alleged assignor, "and as such has knowledge of the business dealing of the said corporation", and he adds that all the facts are within his personal knowledge and that he could competently testify thereto. We find in these statements a *claim* that the affiant would be a competent witness, but no *showing* that he would. Did he see the assignment signed? Or was it made orally, in his hearing? The drastic requirements of section 437c have not been satisfied. Proof of the assignment was, of course, essential to plaintiff's case, Kimber v. Jones, supra, 122 Cal.App.2d 914, 919, 265 P.2d 922, 925. It was alleged and realleged but the plaintiff did not demonstrate that he could prove it.

The defect that we have pointed out respecting the assignment is fatal to the judgment, and nothing would be gained by applying the same yardstick to the averments of the affidavit, as to the nine orders allegedly received.

The judgment is reversed with directions to enter an order denying plaintiff's motion.

PATROSSO and SWAIN, JJ., concur.

47 Cal.2d 479

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ed FARMER, Defendant and Appellant.

Cr. 5879.

Supreme Court of California.
In Bank.

Dec. 11, 1956.

Defendant was convicted of selling mortgaged cows without giving mortgagee prior notice of such sale in writing. The Superior Court, Merced County, R. R. Sischo, J., entered judgment and defendant appealed therefrom and from order denying motion for new trial. The Supreme Court, Gibson, C. J., held that if mortgagee previously consented to the sale, such sale without prior written notice to mortgagee was not a crime under the statute.

Judgment and order reversed.

Opinion, 294 P.2d 47, vacated.

1. Chattel Mortgages 🔑230

Under statute making it a crime to sell mortgaged property without giving mortgagee prior notice in writing, intent to defraud is an essential element of the crime. West's Ann.Pen.Code, § 538.

2. Larceny 🔑3(1)

In order to establish the crime of larceny, a felonious intent to steal must be proved.

3. Chattel Mortgages 🔑230

Where mortgagor sold mortgaged cows without giving mortgagee prior notice in writing as required by statute, nevertheless if mortgagee had previously consented to such sale the sale was not a crime under the statute. West's Ann.Pen.Code, § 538.

◆

Robert Elledge, Muir Woolley, Modesto, for appellant.

Edmund G. Brown, Atty. Gen., and G. A. Strader, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Defendant was convicted of having violated section 538 of the Penal Code by selling mortgaged cows without giving the mortgagee a prior notice in writing.[1] He appeals from the judgment entered upon the jury's verdict and from an order denying a motion for a new trial.

Defendant was in the dairy business, and the number of cows in his herd varied from time to time as he bought and sold in an attempt to dispose of dry cows and obtain productive ones. In 1953 defendant executed a promissory note for $3,300 payable to the Acme Investment Company and, as security for the note, signed a chattel mortgage covering 30 branded cows and all "replacements" for such cows. Without giving prior *written* notice to Acme, defendant, on April 30, 1954, sold 27 of the 30 mortgaged cows. In June or July he informed the manager of Acme that he had sold the cows for $3,531 but that the check which he had received as payment had proved to be worthless. In August defendant was granted a further loan of $300 "on the strength" of the existing mortgage. He continued to make payments on the note until October when he discontinued his dairy operations.

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[1] Section 538 of the Penal Code provides: "Every person, who, after mortgaging any of the property, permitted to be mortgaged by the provisions of section two thousand nine hundred fifty-five of the Civil Code, excepting locomotives, engines, rolling stock of a railroad, steamboat machinery in actual use, and vessels, during the existence of such mortgage, with intent to defraud the mortgagee, his representative or assigns, takes, drives, carries away, or otherwise removes or permits the taking, driving, or carrying away, or other removal of the mortgaged property, or any part thereof, from the county where it was situate when mortgaged, without the written consent of the mortgagee, or who sells, transfers, slaughters, destroys or in any manner further encumbers the said mortgaged property, or any part thereof, or causes the same to be sold, transferred, slaughtered, destroyed, or further encumbered, is guilty of larceny, and is punishable accordingly; unless in case of a sale, transfer or further encumbrance at or before the time of making such sale, transfer or encumbrance, such mortgagor informs the person to whom such sale, transfer, or encumbrance is made, of the existence of the prior mortgage, and also informs the prior mortgagee of the intended sale, transfer, or encumbrance, in writing, by giving the name and place of residence of the party to whom the sale, transfer or encumbrance is to be made."

The trial court refused defendant's offer to prove that prior to the April sale a field agent of Acme had consented to the sale and that the agent had advised the manager of Acme that he had done so. The trial court also refused an offer of proof by defendant that prior to the April sale he had arranged to purchase other cows as replacements in order to increase the milk production of his herd. It appears, however, from evidence which was received without objection, that the field agent told defendant before the sale it was all right for him to sell the cows.

The jury was instructed: "If you find that it has been established beyond a reasonable doubt as a fact that the defendant sold or transferred cows mortgaged to the Acme Investment Company without having informed the Acme Investment Company of the intended sale or transfer by a notice in writing, giving the Acme Investment Company the name and place of residence of the party or parties to whom the sale or transfer was being made, then the defendants are guilty of the crime with which they are charged."

The trial court refused to give an instruction requested by defendant to the effect that oral consent to the sale of the cattle constituted a defense to the charge.

In support of its position that the quoted instruction correctly states the applicable law and that the intent with which the act was done is not an essential element of the offense, the prosecution relies on People v. Phillips, 27 Cal.App. 409, 150 P. 75, and People v. Phillips, 30 Cal.App. 31, 157 P. 1003, 1005. The opinion in the first of the Phillips cases contains the following statement: "That part of section 538 under which defendant is charged with the commission of the offense does not make the *intent* with which the act is done an element of the offense." 27 Cal.App. at page 412, 150 P. at page 76. The judgment was reversed by the District Court of Appeal for reasons not material here; on retrial defendant was again convicted, and he again appealed. In the second Phillips case the District Court of Appeal approved an instruction which stated that "'when the intent is not made an affirmative element of a crime the law [imputes] that the act knowingly done was [with] criminal intent and it need not be alleged or proven,'" and it was held that "the giving of mere permission to sell does not work a waiver of the right to have notice of the sale furnished * * *." 30 Cal.App. at page 34, 157 P. at page 1004. In denying a petition for hearing this court said, "* * * we do not wish to be understood as holding that if permission to sell was given by the mortgagee it would not operate as a complete waiver of the requirement of the statute that notice of the sale shall be given to the mortgagee. We express no opinion upon that question. The complaint that error was committed in the giving of an instruction bearing on this question was sufficiently answered by what is said in the opinion of the District Court of Appeal that: 'The information contained a twofold charge, to wit, not only that there was a failure to give notice to the mortgagee, but also a failure to give notice to the purchaser of the animals sold.'" 30 Cal.App. at page 35, 157 P. at page 1005.

[1, 2] The statements of the District Court of Appeal in the two Phillips cases are disapproved. Although the requirement in section 538 that there be an "intent to defraud the mortgagee" applies to the *removal* of mortgaged property and does not appear to be made specifically applicable to a *sale* of mortgaged property,

we are of the view that an intent to defraud is an essential element of the crime charged here. Section 538 designates the offense as "larceny," and it has long been the rule in this state that, in order to establish the crime of larceny, a felonious intent to steal must be proved. See People v. Raschke, 73 Cal. 378, 15 P. 13; 15 Cal.Jur. 906.

In Reno v. A. L. Boyden Co., 115 Cal. App. 697, 701–702, 2 P.2d 214, it was stated that the purpose of section 538 of the Penal Code is to protect not only the purchaser of mortgaged property by giving him notice of the existence of the mortgage but also the mortgagee by giving him the name and address of the intended purchaser so that he can trace his property. The court held, however, that where the property is sold with the consent of the mortgagee there is no reason for such a requirement since the mortgagee waives his lien and the buyer is protected by the sale. In Kuehn v. Don Carlos, 5 Cal.App.2d 25, 27–28, 41 P.2d 585, 586, it was said: "A chattel mortgagee may waive his mortgage lien or be estopped to enforce it by conduct inconsistent with its existence. 11 C.J., p. 674; 5 Cal.Jur., p. 88. Thus, consent to sell under certain circumstances may constitute a waiver. 5 R.C.L., p. 458. A sale authorized by the mortgagee upon condition that the proceeds be deposited to his account operates to extinguish the mortgage lien. Maier v. Freeman, 112 Cal. 8, 44 P. 357, 53 Am.St. Rep. 151."

[3] We are satisfied that the intent with which the act is done is an essential element of the offense charged and that where the mortgagee consents to the sale it would be unreasonable to construe the statute as making it a crime for the mortgagor to fail to give prior written notice of the intent to sell.

The judgment and order denying a new trial are reversed.

SHENK, CARTER, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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147 Cal.App.2d 1

Alberta WILLIAMS, Mary Boyd, Dakota Foster, Luberta Lang, Virginia Falrey, Plaintiffs and Appellants,

v.

PACIFIC ELECTRIC RAILWAY CO., a Corporation, Doe I Co., a Corporation, Doe II, an unincorporated association, et al., Defendants,

Pacific Electric Railway Co., a Corporation, Respondent.

Civ. 22005.

District Court of Appeal, Second District, Division 1, California.

Dec. 17, 1956.

Rehearing Denied Jan. 6, 1957.

Hearing Denied Feb. 13, 1957.

Action by union members against employer for breach of provision of collective bargaining agreement relating to payment of displacement allowance. The Superior Court, Los Angeles County, Aubrey N. Irwin, J., sustained employer's demurrer and entered judgment in favor of employer upon its motion for judgment of dismissal, and union members appealed. The District Court of Appeal, Fourt, J., held that under the circumstances the union members were required to submit to arbitration as provided for in the agreement before resorting to the courts.

Judgment affirmed.

1. Labor Relations ⚿416, 433

Where collective bargaining agreement provides that a dispute "may" be referred to arbitration, either party has an option to arbitrate if he so desires, but, should he desire to litigate, he must first submit to arbitration and exhaust that remedy.

2. Labor Relations ⚿416

Where collective bargaining agreement provided that dispute "may" be referred to arbitration, employees were required to submit to arbitration before suing employer for breach of a provision relating to payment of displacement allowance.

H. L. Richardson, Los Angeles, for appellants.

E. D. Yeomans, Walt A. Steiger, Los Angeles, for respondent.

FOURT, Justice.

This is an action for breach of contract. The demurrer of defendant Pacific Electric Railway Co. to the plaintiffs' third amended complaint having been sustained, and plaintiffs having failed to amend, judgment was entered in favor of said defendant upon its motion for judgment of dismissal under section 581, subd. 3, of the Code of Civil Procedure. Plaintiffs have appealed.

The contract in question was entered into by the union representatives of the appellants with the respondent, who was ceasing the operation of certain of its trains upon which the plaintiffs had been performing services in the capacity of car cleaners. Respondent had entered into an agreement with the Metropolitan Coach Lines for the transfer of its passenger services to the latter company.

It was provided in the agreement between respondent and the union of which plaintiffs were members, that "[i]f, as a result of the sale, any employe of the Pacific Electric Railway Company, hereinafter referred to as the 'company', is displaced, that is, placed in a worse position with respect to his compensation and rules governing his working conditions, and is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position in his craft or class with the Company or with the Metropolitan Coach Lines producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and monthly compensation received by him in the position from which he was displaced."

The agreement further provided as follows:

"Int the event that any dispute or controversy arises with respect to the protection afforded byt the foregoing conditions which cannot be settled by the Company and the authorized representatives, of the employe or employes involved, within thirty (30) days after the controversy arises, *it may be referred,* by either party, to an arbitration committee selected in the following manner: One (1) to be selected by the representative of the employes and one (1) to be selected by the Company. These two shall endeavor by agreement within ten (10) days after their appointment to select the third arbitrator. In case they are unable to reach agreement within ten (10) days, the National Mediation Board will be requested to appoint such third arbitrator who shall be the Chairman of the Board. The decision of a majority of the Board shall be required and shall be final and binding on both parties. The salary and expenses of the third or neutral arbitrator shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the member of the board of arbitration selected by such party." (Emphasis added.)

The present controversy arose because respondent refused to pay to the plaintiffs the displacement allowance which they contended was owing to them under the terms of the agreement. Plaintiffs did not allege in their third amended complaint that they had duly performed all of the conditions of the contract on their part to be performed, and failed to allege that the dispute had first been submitted to arbitration in accordance with the agreement.

The sole question for determination is whether plaintiffs were required to submit to arbitration as provided for in the agreement before resorting to the courts.

Appellants contend that the word "may" as used in the arbitration provisions of the agreement is permissive only, and not mandatory, and that therefore they were not required to exhaust that remedy before instituting suit.

[1] It has been held in cases involving collective bargaining agreements that when it is provided that a dispute *may* be referred to arbitration, either party has an option to arbitrate if he so desires but, should he desire to litigate, he must first submit to arbitration and exhaust that remedy.

In Thompson v. St. Louis-San Francisco Ry. Co., D.C., 113 F.Supp. 900, the court had under consideration a claim based on the so-called Washington Job Agreement wherein the railroad undertook to guarantee to its employees that they would not be displaced in a worse position with respect to their compensation and rules governing their working conditions as a result of the sale or consolidation, and if any were placed in a worse position or wholly deprived of employment, certain payments would be made to them by the railroad. The agreement provided, in part, as follows: "In the event that any dispute or controversy arises * * * in connection with * * * application or enforcement of any of the provisions of this agreement * * * which is not composed by the parties thereto within thirty days after same arises, *it may* be referred by either party for consideration and determination to a Committee * * *." (Emphasis added.) The court said, at page 903, in deciding the case, "* * * where contracting parties agree that either 'may' resort to a designated tribunal for an adjustment of grievances, they must exhaust such remedy before resorting to the courts for redress."

In Transcontinental & Western Air, Inc., v. Koppal, 345 U.S. 653, 73 S.Ct. 906, 909, 97 L.Ed. 1325, the defendant discharged the plaintiff by compelling him to resign for the abuse of the sick leave provisions of his employment contract. The contract contained provisions for the determination of grievances, including provisions for a fair hearing before a designated representative of the company, a written decision by such representative, and if that decision was not satisfactory, "'appeal *may* be made in accordance with the procedure prescribed in Step 3.'" (Emphasis added.) Step 3 provided for an appeal to the chief operating officer of the company and if the decision in Step 3 was not satisfactory to the union the "matter *may* then be referred by the system general chairman, acting for the union, to the system board of adjustment or, by mutual agreement, to arbitration." (Emphasis added.) Without availing himself of the contract provisions for successive appeals to the employer's chief operating officer and to the system board of adjustment, the plaintiff brought action in the federal court to recover damages for his wrongful discharge. The Supreme Court held that, under the applicable state law (Missouri), the plaintiff was required to show exhaustion of administrative remedies under his employment contract in order to sustain his cause of action.

Barker v. Southern Pacific Co., 9 Cir., 214 F.2d 918, was an action for damages for an alleged wrongful discharge of appellant, who was employed by appellee under a collective bargaining agreement. The contract provided that if an employee who was disciplined or dismissed were dissatisfied, he should be given a hearing provided a written request therefor was filed within 10 days from the date of notice of discipline or dismissal. Appellant failed to file the written request required within the 10 day period. The court stated at pages 919–920: "It is argued by appellant that notwithstanding the contractual provisions, an employee need not exhaust his administrative remedies unless required so to do under the applicable state law. It is questionable whether this doctrine is applicable where, by contract the request for a hearing has been made a condition precedent to the bringing of a law suit. Wallace v. Southern Pacific Co., 106 F.Supp. 742. But even if such is the correct doctrine, California law would be applicable and controlling. See Transcontinental & Western Air., Inc., v. Koppal, 345 U.S. 653, 73 S.Ct. 906, 97 L.Ed. 1325. It is clear by that law that administrative remedies must be exhausted prior to taking recourse to the courts. 2 Cal.Jur.2d 304 et seq., Admin.Law § 184 et seq., and cases cited therein."

In Cone v. Union Oil Co., 129 Cal.App. 2d 558, 277 P.2d 464, the collective bargaining agreement involved provided for grievance procedures consisting of seven detailed and specific steps, from initiation of the grievance to final arbitration in the event settlement of the dispute should not be effected. On defendant's motion for summary judgment it was undisputed that plaintiff had not first exhausted the arbitration procedures available to him under the agreement. In affirming the judgment the court said in 129 Cal.App.2d at pages 563–564, 277 P.2d at page 468, "It is the general rule that a party to a collective bargaining contract which provides grievance and arbitration machinery for the settlement of disputes within the scope of such contract must exhaust these internal remedies before resorting to the courts in the absence of facts which would excuse him from pursuing such remedies. [Citing cases.] This rule, which is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (2 Cal.Jur.2d 304, sec. 184), is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. Utah Const. Co. v. Western Pac. R. Co., 174 Cal. 156, 159, 162 P. 631. The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations. Myers v. Richfield Oil Corp., 98 Cal.App.2d 667, 671, 220 P.2d 973. Such procedures, which have been worked out and adopted by the parties themselves, must be pursued to their conclusion before judicial action may be instituted unless circumstances exist which would excuse the failure to follow through with the contract remedies. [Citing cases.]"

In Holderby v. International Union etc., Engrs., 45 Cal.2d 843, at page 846, 291 P. 2d 463, 466, the court said:

> "It is the general and well established jurisdictional rule that a plaintiff who seeks judicial relief against an organization of which he is a member must first invoke and exhaust the remedies provided by that organization applicable to his grievance. [Citing cases.] This rule is analogous to the rule requiring the exhaustion of administrative remedies as a condition precedent to resorting to the courts (see 2 Cal. Jur.2d 304), and to the rule requiring the parties to a contract for arbitration of disputes to exhaust those remedies before seeking judicial relief. See Cone v. Union Oil Co., 129 Cal.App.2d 558, at page 563, 277 P.2d 464 and cases collected. Such rules are based on a practical approach to the solution of internal problems, complaints and grievances that arise between parties functioning pursuant to special and complex agreements or other arrangements. They make possible the settlement of such matters by simple, expeditious and inexpensive procedures, and by persons, who, generally, are familiar therewith. Such internal remedies are designed not only to promote the settlement of grievances but also to promote more harmonious relationships, and the courts look with favor upon them."

[2] In the instant case, plaintiffs having failed to allege either that they had exhausted their administrative remedies by submitting the dispute to an arbitration committee, as provided in the agreement, or the existence of any circumstance which would excuse the failure to follow through with the contract remedies, the trial court properly sustained the demurrer and granted defendant's motion to dismiss upon the plaintiffs' refusing to amend their complaint.

Judgment affirmed.

WHITE, P. J., and DORAN, J., concur.

147 Cal.App.2d 76

Leta FOLEY, Plaintiff, Cross-Defendant and Respondent,

v.

Thomas J. FOLEY, Defendant, Cross-Complainant and Appellant.

Civ. 16999.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1956.

Husband's suit for divorce. The Superior Court, County of Santa Clara, Leonard R. Avilla, J., granted the husband a divorce on ground of extreme cruelty, but entered an order granting a new trial, restricted to issues of extent and disposition of property of parties, and the husband appealed. The District Court of Appeal, Per Curiam, held that timely filing of notice of motion for new trial was effective, notwithstanding fact that filing fee was not paid within statutory period.

Affirmed.

1. New Trial 🔑153

Filing with clerk, of notice of intention to move for new trial, within 10 days after receiving written notice of entry of judgment, is jurisdictional. West's Ann.Code Civ.Proc., § 659.

2. Officers 🔑103

Not every act of an official in violation of mandatory statute need necessarily be held totally void.

3. Action 🔑66

The filing of procedural documents subject to time limit need not be considered void merely because filing fee has not been paid within limited period.

4. Divorce 🔑151

Timely filing of notice of motion for new trial, in divorce case, was effective, notwithstanding fact that filing fee was not paid within statutory period. West's Ann.Code Civ.Proc., § 659.

5. New Trial 🔑9

Court may, in an appropriate case, grant new trial on limited issues.

6. Divorce 🔑252

Nonoffending party is entitled to more than one-half of community property, where divorce is decreed on ground of extreme cruelty, but extent of award in excess of 50 per cent is largely in discretion of trial court.

7. Divorce 🔑151

Court which had granted husband divorce on ground of extreme cruelty could grant new trial restricted to issues of extent and disposition of property of parties, notwithstanding his contention that he was entitled to show degree of impropriety of conduct of wife and her relations with other men as relevant to correct disposition of property.

* * *

W. Gordon Eustice, Los Altos, for appellant.

Antonio J. Gaudio, South San Francisco, for respondent.

PER CURIAM.

[1–4] This is an appeal from an order granting a new trial in a divorce action on the issue of the property of the parties and its disposition only. An interlocutory decree in favor of cross-complainant, husband, on the ground of extreme cruelty was entered on April 15, 1955. Notice of Entry of Judgment, dated and mailed on April 15, 1955, was filed on April 18, 1955. Notice of Motion of the wife for a new trial was filed and served by mail on April 22, 1955, but the filing fee was not paid until April 29. It is the position of the husband, appellant, that the late payment of the filing fee caused the motion for a new trial to be tardy so that the court had no jurisdiction to grant it and that the granting on the limited issues only was error prejudicial to appellant. We have found both contentions without merit.

It is true that the filing with the clerk of the notice of intention to move for a new trial within 10 days after receiving written notice of the entry of judgment is jurisdictional. Code Civ.Proc. § 659;

Neale v. Morrow, 174 Cal. 49, 51, 161 P. 1165. Appellant relies upon Kientz v. Harris, 117 Cal.App.2d 787, 257 P.2d 41, for his contention that the payment of the filing fee within that period is also jurisdictional. In that case the notice was mailed to the clerk and received in time, but no filing fee was forwarded with it; the clerk did not stamp the notice as filed, but mailed back an invoice acknowledging receipt and requesting the filing fee. The fee was received after the statutory time had run and the notice was stamped as filed at that late date only. The court held that the provisions of the Government Code which provide for collection of all fees in civil cases by the county clerk in advance of the services to be performed by him, §§ 6100, 24350.5, are mandatory, that the clerk properly refused to file until he had received the fee and that the mailing to and receipt by the clerk without his filing could not be considered to comply with section 659, supra, because otherwise such action would compel the clerk to treat the notice as filed without payment of the fee, contrary to the provisions of the Government Code. The court relies on Davis & Son v. Hurgren & Anderson, 125 Cal. 48, 51, 57 P. 684, 685, which in an analogous situation stated: "The notice * * * was not filed in time. The mere fact that the clerk received it * * * did not constitute a filing. It was not his duty to file it without the fee. He did not file it, and he could not have been compelled to file it, on that day." Our case is distinguished from the above two authorities by the fact that the clerk actually filed the notice in time without having received the fee and therefore presents the question, not decided in the above cases, whether the filing by the clerk is ineffective so long as he has not received the filing fee. There is no express provision in our codes to that effect and no case so holds. Code of Civil Procedure section 659 states the requirement of filing and serving of the notice within the statutory period but does not mention payment of the filing fee. The applicable provisions of the Government Code are purely financial and directed to the County Clerk or to the acting officers only. If it had been the legislative intent that the effectiveness of certain official acts would depend on the payment of fees by the persons interested in them, a provision directed to those interested persons and in our case contained in the Code of Civil Procedure could have been expected. Not every act of an official in violation of a mandatory statute must necessarily be held totally void. In a related field it has been said in Wilson v. Stearns, 123 Cal.App.2d 472, 480, 267 P.2d 59, 65: "In determining whether a contract is invalid the courts should strive to deal with the transaction so as to give effect to the fundamental purpose of the legislature and to a wise public policy." We do not believe that the fundamental purpose of the Legislature or a wise public policy requires that the filing of a procedural document subject to a time limit be considered void if the filing fee has not been paid within the limited period. Responsibility of the officer to whom the legislative mandate is directed will sufficiently insure compliance, without endangering important legal remedies. In the absence of express authority to the contrary we hold that the timely filing of the notice by the County Clerk was effective notwithstanding the fact that the filing fee was not paid within the statutory period.

[5–7] Appellant does not deny that the court in an appropriate case may grant a new trial on limited issues, Johnstone v. Johnson, 38 Cal.App.2d 700, 702, 102 P.2d 374, but contends that in this case the restriction of the issues to the extent and disposition of the property of the parties was erroneous because he was entitled to show the degree of impropriety of the conduct of respondent and her relations with other men as relevant to the correct disposition of the property. Although appellant as the nonoffending party is entitled to more than one-half of the community property where the divorce is decreed on the ground of extreme cruelty, the extent of the award in excess of 50 percent is largely in the discretion of the trial court. Louknitsky v. Louknitsky, 123 Cal.App.2d 406, 411, 266 P.2d 910. Conceding the correctness of the rule as to the disposition of the property, we disagree with appellant's conclusion therefrom. Appellant does not contend that so far as his right to a divorce itself is concerned there is any error in the interlocutory decree or in the trial on which it is based, the transcript of which is not brought before us. There is then no reason why said issue should be retried. If facts relating to the personal behavior of the parties will be considered relevant by the trial court to the disposition of the property which will be retried and redecided, such facts can be brought out on the retrial ordered.

Order affirmed.

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147 Cal.App.2d 74

Eva Nell BENNETT, Plaintiff and Appellant,

v.

PACIFIC GREYHOUND LINES and Robert L. Buford, Defendants and Respondents.

Civ. 16983.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1956.

Action by driver and occupant of automobile for injuries sustained in collision with defendants' bus. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered judgment on a verdict for defendants, and injured occupant of automobile appealed. The District Court of Appeal held that denial of occupant's motion for new trial on ground of newly discovered evidence that she was not the wife of automobile driver and that hence his contributory negligence was not imputable to her was not abuse of discretion, in absence of affidavit showing that at time of trial, occupant was not aware of such fact and the manner in which it could be proved.

Judgment affirmed.

1. New Trial 🔑150(4)

In action by driver and occupant of automobile for injuries sustained in collision with defendants' bus, denial of motion by injured occupant of automobile for new trial on ground of newly discovered evidence that driver was not her husband because his former marriage to another had not been dissolved by divorce or annulment and that hence his contributory negligence was not imputable to occupant as his wife was not abuse of discretion, in absence of affidavit showing that at time of trial, occupant was not aware of fact that driver was not her husband and the manner in which such fact could be proved.

2. New Trial 🔑150(4)

Party moving for a new trial on ground of newly discovered evidence must show by his own affidavit that he did not know of such evidence at time of trial and could not have obtained it by diligence.

◆

Morgan & Beauzay, Ted Finman, San Jose, for appellant.

Carroll, Davis & Burdick, San Francisco, for respondents.

PER CURIAM.

This is an appeal by one of two plaintiffs from a judgment on a verdict for defendants in a negligence action for personal injuries suffered by plaintiffs when their car collided with a Greyhound bus. The action was instituted by Leslie Bennett and Eva Nell Bennett. Defendants alleged as an affirmative defense contributory negligence of plaintiff Leslie Bennett and that said negligence was imputable to plaintiff Eva Nell Bennett, as his wife. Leslie Bennett testified that he married Eva in Reno, Nevada on January 8, 1954. The court instructed accordingly that if the husband was found contributorily negligent, neither of the plaintiffs might recover. After the adverse judgment both plaintiffs moved for a new trial on all statutory grounds except excessive damages, which motion was denied. The only error complained of by Eva, the appellant, is that the court abused its discretion in not granting the motion on the ground of newly discovered evidence. We have found said contention without merit because of insufficiency of the affidavits filed in support of said ground.

[1, 2] Two such affidavits were filed, one of Leslie Bennett to the effect that on September 25, 1943 he married Pearl Bennett and separated from her on April 11, 1950, that he believed that Pearl had instituted an action of divorce or annulment, that after the trial the relatives of Pearl informed him that his marriage with Pearl had not been terminated by divorce or annulment so that therefore he is not married to Eva Nell and his negligence, if any, is not imputable to her; the other of Pearl Bennett stating the same dates of marriage and separation as the first one, and that she is the wife of Leslie Bennett, not having annulled said marriage. There is no affidavit whatever of the appellant. It may be assumed, although it was not expressly stated in the affidavits or otherwise, that the newly discovered evidence on which appellant based her motion for a new trial was the evidence of Pearl Bennett that she still was the wife of Leslie so that appellant could not be his wife. However, no affidavit shows that appellant was not aware of that fact and the manner in which it could be proved at the time of the trial. The party moving for a new trial on the ground of newly discovered evidence must show by his own affidavit that he did not know of the evidence and could not by diligence have obtained it. Arnold v. Skaggs, 35 Cal. 684, 686–687; People v. Buck, 46 Cal.App.2d 558, 567, 116 P.2d 160; People v. Lindsey, 90 Cal.App.2d 558, 568, 203 P.2d 572.

It is said in Arnold v. Skaggs, supra: "Applications for new trials upon the ground of newly discovered evidence must be looked upon with suspicion and disfavor, because the temptation to make a favorable showing after having sustained a defeat is great." 35 Cal. at page 688. In this case the statement of Leslie Bennett that he married appellant believing that his former wife had instituted an action of divorce or annulment, without indicating any grounds for said belief or any time and place of said supposed action or its culmination in a judgment, would be most suspicious and insufficient even if affiant were considered the moving party. However, this ground for a new trial relates to the position of appellant only and as regards her knowledge she herself knows best and must give her sworn statement. Arnold v. Skaggs, supra, 35 Cal. at page 687. There was no abuse of discretion in denying the new trial.

Judgment affirmed.

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147 Cal.App.2d 179

Charles H. VANOLI and Joseph F. Vanoli and Paul Parmiani, Petitioners and Appellants,

v.

Russell S. MUNRO, Director of Alcoholic Beverage Control of the State of California, Department of Alcoholic Beverage Control of the State of California, and Jerry M. O'Brien, District Liquor Control Administrator of the Department of Alcoholic Beverage Control of the State of California, Respondents.

Civ. 17080.

District Court of Appeal, First District, Division 1, California.
Dec. 26, 1956.

Proceeding by persons whose liquor licenses had been suspended by State Board of Equalization on ground that premises were licensed in violation of statute precluding operation of such premises within one and one-half miles of a university, for writ of mandate against Director of Alcoholic Beverage Control and others. From an adverse judgment rendered by the Superior Court, County of Santa Clara, John D. Foley, J., plaintiffs appealed. The District Court of Appeal, Peters, P. J., held that determination by State Board of Equalization and Board of Appeals that determination by Stanford University that its campus was a 1,054-acre tract and that it included four tracts which were used for, inter alia, intermural athletics and parking of automobiles, was not an abuse of power.

Judgment affirmed.

1. Intoxicating Liquors ⚷59(2)

For purposes of statute prohibiting sale or gift of intoxicating liquors within 1½ miles of university grounds or "campus" upon which are located the principal administrative offices of the university, "campus" includes lands surrounding administrative offices and buildings used for educational purposes and not only the land on which they are located but does not include area disconnected therefrom. West's Ann.Pen.Code, § 172a.

See publication Words and Phrases, for other judicial constructions and definitions of "Campus".

2. Intoxicating Liquors ⚷59(2)

For purposes of statute forbidding sale or gift of intoxicating liquors within 1½ miles of university campus on which is located principal administrative office of university, the determination of the extent of such campus is, in the first instance, for the governing board of the university, whose determination is entitled to some weight but is not conclusive. West's Ann. Pen.Code, § 172a.

3. Intoxicating Liquors ⚷59(2)

In proceeding for suspension of liquor licenses on ground that they had been issued in violation of statute precluding sale of liquor within 1½ miles of campus of university, determination by State Board of Equalization and Board of Appeals approving determination by Stanford university that its campus was a 1,054-acre tract out of the 9,000 acres of land it held and included four tracts which were used for intermural athletics, parking, polo field, golf instruction, hitching spare polo ponies, and site of cottage, shed and barn, was not an abuse of power. West's Ann.Pen.Code, § 172a.

4. Intoxicating Liquors ⚷59(2)

Under statute prohibiting sale of liquor within 1½ miles of campus of university on which is located principal administrative office of university, issue as to what is the university campus is a matter for administrative determination, which, in the absence of abuse, cannot be controlled by courts. West's Ann.Pen.Code, § 172a.

5. Intoxicating Liquors ⚷59(2)

In view of constitutional and statutory provisions limiting Stanford university's tax exemption to 100 acres, its failure to claim as tax exempt certain lands used for university purposes did not preclude their inclusion in campus for purposes of statute precluding sale of intoxicating liquor within 1½ miles of any campus on which is located principal administrative offices of university. West's Ann.Pen.Code, § 172a; West's Ann.Education Code, § 21341; West's Ann.Const. art. 9, § 10; art. 13, § 1a.

◆

John G. Evans, San Francisco, for appellants Charles H. Vanoli, Joseph F. Vanoli and Paul Parmiani.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondents.

PETERS, Presiding Justice.

The appellants are the holders of off-sale liquor licenses attached to premises located near Stanford University. The State Board of Equalization found that such premises were located so near the Stanford campus as to violate the law, and ordered the licenses indefinitely suspended. This was affirmed by the Appeal Board. The Superior Court denied a petition for a writ of mandate, and entered its judgment accordingly. From that judgment the license holders appeal.

The sole question presented is whether the premises operated by appellants are within one and one-half miles of the Stanford campus within the meaning of section 172a of the Penal Code. If so, the licenses were properly suspended.

Section 172a of the Penal Code provides, in part: "Every person who, upon or within one and one-half miles of the university grounds or campus, upon which are located the principal administrative offices of any university having an enrollment of more than 1,000 students, more than 500 of whom reside or lodge upon such university grounds or campus, sells, gives away or exposes for sale, any intoxicating liquor, is guilty of a misdemeanor * * *."[1]

Stanford University owns some 9,000 acres of land in Santa Clara and San Mateo Counties. In 1918, and again in 1934, the Board of Trustees of Stanford designated 1,054 acres of this area "as the official campus boundary that was set aside for educational purposes." There is a concrete monument now located at the southeast corner of that 1,054-acre tract. A recent survey in which measurements were taken from that monument proved that the premises of the appellants are located within one and one-half miles of this monument, the measurements having been taken in a straight line from the monument. Appellant Parmiani's premises are located 33 feet within one and one-half miles of the monument, while appellant Vanoli's premises lie 472 feet within the statutory limit.

Appellants do not contend that their premises are not within a mile and one-half of the monument.[2] Their claim is that, included within the 1,054-acre tract, are four plots of land which are not part of the "university grounds or campus" as those terms are used in section 172a of the Penal Code. These four plots are located between the premises of appellant and the actual administrative buildings of the university. The question involved is whether these four plots are properly included within the campus area within the meaning of section 172a.

The four plots are contiguous. Plot number one is farthest from the concrete monument. It begins at San McDonald Road and runs for 377 feet along El Camino Real. There are no buildings on this lot. It has two uses: It is used for intermural athletics, and for parking automobiles during football games. Plot number two has a frontage of 410 feet on El Camino Real. It has no buildings on it but has some hitching racks to which the extra polo ponies are hitched during polo games. The third plot runs about 460 feet along El Camino Real. This lot is used for three purposes—it is the polo field; it is used by the Department of Athletics for golf instruction; and it is used for parking automobiles during football games. The fourth plot extends for about 627 feet along El Camino Real and ends at the concrete monument here under discussion. On this plot is a cottage, shed and barn. The cottage is occupied as a residence by some of the cashiers employed at the University. "[A]ctually this residence * * was for many years used as a part of the operation of the university." The whole plot is sparsely covered with trees, and occasionally the Superintendent of the athletic grounds cuts the volunteer hay that grows on it.

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[1] It was stipulated at the oral argument that Stanford University has an enrollment of more than 1,000 students, more than 500 of whom reside on the University grounds.

[2] Appellants have owned their respective licenses for several years. Apparently, the licenses were secured in the good faith belief that the premises of appellants were outside the mile and one-half limit. However, there is no evidence that the Board of Equalization represented to appellants that their premises were outside the mile and one-half limit, nor is there any other evidence upon which a claim of estoppel could be based.

It is appellants' main contention that none of the four plots between Sam McDonald Road and the concrete monument are properly part of the "university grounds or campus, upon which are located the principal administrative offices of any university" as those terms are used in section 172a of the Penal Code.

It should be noted that the 1,054 acres designated by the Board of Trustees "as the official campus" in 1918 and 1934, and which include the four lots above described, is an undivided area, and that the "principal administrative offices" of Stanford are located on this 1,054 acres. It should also be noted that all parties to this appeal agree that the one and one-half miles noted in section 172a is to be measured from the boundary of the campus "upon which are located the principal administrative offices" of Stanford, and that such measurement is to be by air line from such boundary. See Board of Trustees v. State Bd. of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775; Gunn v. State Board of Equalization, 123 Cal.App.2d 283, 266 P. 2d 840.

In support of their contention that the 1,054-acre area includes lands not within the purview of section 172a, appellants place their main reliance on Petition of Burke, 160 Cal. 300, 116 P. 755. That case held section 172a to be constitutional under the police power, and also held that there were certain, though quite indefinite, limits to the "campus" contemplated by the code section. In so holding, the court stated, 160 Cal. at page 305, 116 P. at page 756: "'Principal administrative offices' is not a fortunate phrase in a penal law such as this, since very clearly it requires construction. * * * The phrase is used as descriptive of the character of the grounds or campus to which the penal law is made to apply. It is not made to apply to university grounds or a university campus generally. Thus, treating of the University of California, it would not apply to its subordinate grounds, where special educational activities were in progress. It would not apply to the Lick Observatory. It would not apply to the Affiliated Colleges. It would not apply to its agricultural stations, but would apply only to those grounds and that campus which form the center of its activities, and where, because they are the center of its activities, the 'principal administrative offices,' within the meaning of the law, must be located. In this sense the 'principal administrative offices' does not mean those offices and those activities through which the university, as an institution, is organized and financed. It means the principal place of business of the university *as a university,* where the principal educational functions of the university are carried out. So construed, the law means to limit the inhibition upon the sale of liquor to what we may designate the university proper, and the language is so chosen to avoid any possible application of the law to any outlying grounds or campuses, and, so construed, there is nothing unreasonable in the phrase 'principal administrative offices.'"

It is contended by appellants that the four plots here under discussion are "outlying," or "subordinate" grounds within the meaning of the Burke case.

Respondents place considerable reliance on the case of Board of Trustees v. State Bd. of Equalization, 1 Cal.2d 784, 37 P.2d 84, 96 A.L.R. 775, which involved the proper application of section 172a to the campus of Stanford. In that case, over the protests of the Board of Trustees, a liquor permit was granted to a drug store in Palo Alto. This authorization was cancelled by the Supreme Court on the ground that the drug store was within the mile and a half limit fixed by section 172a. It was stipulated by the parties that the drug store was .7 of a mile in the usual course of travel, and shorter by direct line "from the nearest point on the boundary of the aforesaid campus of the universtiy, as that boundary was defined and established by the board of trustees of the university on December 27, 1918." 1 Cal.2d at page 786, 37 P.2d at page 85. Thus, the parties in this case stipulated, in effect, that, if the boundary of the campus was to be used to start the measurement, it was the boundary of the 1,054 acres fixed by the trustees in 1918. The main contention was that the measurement should be from the site of the principal administrative offices of the University. It was stipulated that the drug store was 2.25 miles from such offices in the usual course of travel, but 1.345 miles from said offices measured in a straight line. The court concluded, 1 Cal.2d at page 786, 37 P.2d at page 85: "We are of the view that the distance is to be measured from the campus limits, and by a direct and straight line."

It will be noted that, measured in a straight line, the drug store was within the one and one-half mile limit not only from the campus boundary but from the administrative offices of the University. Moreover, in that case, it was not challenged that if the boundary of the campus should be used as the starting point, it should be the boundary as fixed by the trustees in 1918. So far as the opinion discloses, there was no contention that any "outlying" or "subordinate" lands were improperly included in that area thus fixed. For these reasons we agree with appellants that this case is not a controlling authority in the case at bar.

[1] In discussing the purpose of section 172a, it is apparent that the Legislature decided to limit the sale of intoxicants to a certain area, being one and one-half miles from the boundaries of the "campus, upon which are located the principal administrative offices of any university." It is equally clear that such campus includes more than the areas actually occupied by the "principal administrative offices" of the university. Obviously, the lands surrounding such offices, and the lands surrounding the buildings used for educational purposes, actually form an integral part of the campus. The question is, how much surrounding land can be included in the campus within the meaning of section 172a? In this connection the Burke case, supra, is of relatively little help. We do know from that case that disconnected areas cannot be considered. But that is not this case. We also know from that case, and the case in Board of Trustees v. State Board of Equalization, 1 Cal.2d 784, 37 P.2d 84, supra, that the lands surrounding the administrative offices and the buildings used for educational purposes can properly be included in the area described in section 172a. The Burke case does use the language "principal place of business of the university *as a university*." 160 Cal. 305, 116 P. 757. The case also discusses the purpose of the statute: "The law under consideration is penal. It is passed in the exercise of the police power. Its very apparent design is to protect students in the formative periods of their lives from the temptations of alcoholic drink. There is no occasion to point out the evils to which such alcoholic indulgences lead, in the deterioration of the moral and physical fiber of the student, in the destruction of discipline, and in the general demoralization, not alone to the student, but to the educational institution itself, which follows." 160 Cal. at page 303, 116 P. at page 756.

[2–4] Thus, it seems clear that some surrounding area, in addition to that covered by the administrative offices, was intended to be included within the area described in section 172a. Obviously, a modern university, with its class rooms, its laboratories, its dormitories and its athletic and other facilities, covers an area in excess of the area covered by the administrative offices. This additional area is just as much a part of the campus, and as important to the university as a university as the administrative buildings themselves. The real question is, who shall decide the extent of the university campus? In the first instance, this question should be determined by the governing board of the university. That board knows the area necessary for university purposes. That board's determination is not conclusive, however. Such board could not include non-contiguous lands, nor lands obviously not connected with the university and not used for university purposes. In the instant case, the Board of Trustees decided in 1918, and again in 1934, that "the official campus boundary that was set aside for educational purposes" should encompass the 1,054 acres here involved. That determination, while not conclusive, is entitled to some weight. The hearing officer, the State Board, and the Appeals Board necessarily held that there was no abuse of discretion in thus fixing the boundaries of the campus. This was affirmed by the Superior Court. Under the facts, we cannot hold that these agencies abused their powers. It must be conceded that the connection of several of the four plots with the operations of the university as a university is somewhat vague, but certainly, none of the four plots is so unconnected with the university as to permit us to hold, as a matter of law, that they are not part of the university proper. This was a matter for administrative determination which, in the absence of abuse, cannot and should not be controlled by the courts.

[5] Appellants also point out, correctly, that neither the third nor fourth plots of land has been claimed by the university as exempt from real property taxation as lands devoted to educational purposes. Therefore, so it is argued, these two lots have not been used by the university for educational purposes. This is a *non sequitur*. Under the pertinent constitutional and statutory provisions, Art. IX, § 10, and Art. XIII, § 1a, of the Constitution, and § 21341 of the Education Code, Stanford is entitled to a tax exemption of but 100 acres, so that its failure to claim as tax exempt lands not entitled to the exemption, even though used for university purposes, is without legal significance.

In view of the claimed good faith of appellants the penalty—indefinite suspension of the licenses—may seem severe. But once it was determined that the licensed premises were within the area prohibited by section 172a of the Penal Code, and no facts sufficient to support an estoppel were offered, the liquor authorities had no discretion. They had no power to excuse the violation. If it is a fact that appellants acted in good faith and have invested large sums in reliance on the issuance of the licenses, it may be that they would be entitled to legislative relief. But such relief cannot be granted by the courts.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
UNION OIL COMPANY OF CALIFORNIA,
a corporation, Defendant and
Appellant. *
Civ. 8851.

District Court of Appeal, Third District,
California.
Dec. 5, 1956.

Rehearing Denied Dec. 27, 1956.

Hearing Granted Jan. 30, 1957.

Action to recover sum paid by plaintiff as interest on certain overpayments of franchise tax refunded to defendant. The Superior Court, Sacramento County, Grover W. Bedeau, J., rendered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Schottky, J., held that the 1947 amendment, preventing running of interest on tax overpayments not caused by error or mistake of Commissioner, operated prospectively and ap-

* Opinion vacated 310 P.2d 409.

plied only to overpayment of taxes made after its effective date.

Reversed with directions.

1. Statutes 🔑263

There is a presumption against the retroactive application of statute.

2. Taxation 🔑543(8)

The 1947 amendment, preventing running of interest on tax overpayments not caused by error or mistake of Commissioner, operated prospectively, and applied only to overpayment of taxes made after its effective date. West's Ann.Rev. & Tax. Code, § 26080.

On Petition for Rehearing.

3. Taxation 🔑535, 543(8)

When there is in effect, at time tax overpayments are made, a statute providing for payment of interest upon such overpayments, and right to refund is established by taxpayer's performance of acts prescribed by statute, an express contract arises for payment of interest as well as for payment of refund itself. West's Ann. Rev. & Tax.Code, §§ 24355, 26080.

◆

L. A. Gibbons, Douglas C. Gregg, A. Andrew Hauk, Lewis D. Lawrence, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., by Irving H. Perluss, Asst. Atty. Gen., for respondent.

SCHOTTKY, Justice.

Plaintiff commenced an action against defendant to recover $6,781.69, paid by plaintiff as interest on certain overpayments of franchise tax refunded to defendant for the income years 1942, 1943 and 1944. The first cause of action alleges that the interest was erroneously and improperly paid to defendant, and the second cause of action was for money had and received.

The case was presented to the trial court upon an agreed and stipulated statement of facts, supplemented by evidence at the trial. There is substantially no dispute in the evidence and the facts may be summarized as follows: Defendant overpaid its taxes for the income years 1942, 1943, and 1944; the overpayments were made without error or mistake on the part of the taxpayer or on the part of the commissioner; subsequently, defendant filed applications for refunds for the overpayment of its taxes, with interest thereon at 6 per cent per annum; State Controller warrants for the overpayments were drawn on August 13, 1948, and forwarded to defendant on August 18, 1948; the warrants included the amount of the overpayments, plus interest at 6 per cent per annum from the taxable income year to April 30, and May 15, 1948.

At the time the overpayments were made, and at all times thereafter, prior to July 10, 1947 section 27(c) of the Bank and Corporation Franchise Tax Act (now section 26080, Revenue and Taxation Code) provided as follows:

> "Interest shall be allowed and paid upon any overpayment of any tax, if the overpayment *was not made because of an error or mistake on the part of the taxpayer,* at the rate of 6 per centum per annum * * *." (Emphasis added.) St.1945, p. 1827.

In 1947, St.1947, p. 2862, the legislature amended section 27(c) to read in part as follows:

> "Interest shall be allowed and paid upon any overpayment of any tax, if the overpayment *was made because of an error or mistake on the part of the commissioner,* at the rate of 6 percentum per annum * * *." (Emphasis added.)

The amendment went into effect on July 10, 1947. Therefore, for the period of time subsequent to July 9, 1947, there was no statute authorizing the payment of interest on refunds for overpayment of taxes unless the overpayment was the error or mistake of the Commissioner. Thus the principal question presented for consideration was whether the 1947 amendment operated from its effective date to prevent the running of interest on overpayments of tax made prior thereto. Also, in a counterclaim, defendant claimed that it was entitled to recover additional interest by virtue of the fact that the Commissioner, in computing the interest payable on defendant's refunds, failed to follow the statutory requirement of computing interest to a date preceding the date of the refund warrants by not more than thirty days, which would be not earlier than July 13, 1948.

The trial court held that the 1947 amendment prevented the running of interest after its effective date and rendered judgment in favor of plaintiff as prayed for, and defendant has appealed from said judgment.

Appellant first contends that the court erred in making retroactive application of the 1947 amendment because it operates prospectively and applies only to overpayments of tax made after its effective date. Appellant argues that the word "overpayment" is the operative or key word in the amendment and therefore the amendment must apply only to cases where the basic determinative factor, namely, an overpayment, is made *on or after* the effective date, July 10, 1947, and does not apply to overpayments which occurred, as in the within matter, *prior* to July 10, 1947. In other words, because the language spells out that "upon any *overpayment* of any tax," rather than "upon an allowance of a refund," interest shall be allowed and paid, there is a clear expression of the legislature that the 1947 amendment was to apply only to *overpayments made after its effective date.*

[1,2] We have concluded that the court erred in making a retroactive application of the 1947 amendment, section 27(c). There is a presumption against the retroactive application of a statute, a presumption that where not expressly so declared or declared by necessary implication the legislature did not intend legislation to be given a retroactive effect.

As this court said in Botts v. Simpson, 73 Cal.App.2d 648, at page 650, 167 P.2d 231, at page 232:

> "It is a general rule of statutory interpretation that a statute will always be given prospective effect unless the intention is clearly shown that it should be considered to operate retroactively. Berg v. Traeger, 210 Cal. 323, 292 P. 495; O'Dea v. Cook, 176 Cal. 659, 169 P. 366."

And as stated by Chief Justice Gibson in Aetna Casualty & Surety Co. v. Industrial Accident Commission, 30 Cal.2d 388, at page 393, 182 P.2d 159, at page 161;

> "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent."

The amendatory legislation reading out of section 27(c) the provision for interest payment did not expressly declare that interest theretofore authorized by the preceding form of the section should not be paid thereafter, where the obligation to pay interest arose prior to the passage of the amendment.

Prior to the three years under which Union Oil's taxes accrued, that is years 1942, 1943 and 1944, the Franchise Tax Act provided that a taxpayer could elect to claim a deduction for amortization of emergency facilities under regulations prescribed by the Franchise Tax Commissioner. On November 11, 1945, the Commissioner issued an office regulation under the authority of said section 8(f) (now Rev. & Tax.Code, § 24355) dealing with the acceleration of amortization of emergency facilities and providing that the election to accelerate such amortization should be made by filing with him a statement of such election, and further providing that a taxpayer could file a claim for a refund based upon such acceleration within the later of (1) four years of the due date of the return for the year of refund, or (2) one year of September 29, 1945, and providing further that the provisions of the regulation were applicable to income years ending after October 6, 1940, for the purposes of the Bank and Corporation Franchise Tax Act. On December 21, 1945, the defendant duly filed with the Commissioner a statement of its election to accelerate such amortization for the amortization period ending September 30, 1945. Subsequently, and on the following dates the defendant herein filed its claims for refunds of franchise taxes overpaid for the income years 1942, 1943 and 1944. After some adjustments based not upon the election but upon claimed improper computations of the basic tax as paid, the office of the Commissioner commenced checking the company's claims for refunds, and by process which appears in the stipulation of facts, arrived at the proper amount of refund and obtained and mailed the warrants of the State Controller to the Oil Company on August 18, 1948. These warrants included in their amounts interest computed to sometime before August 18, 1948, and the total interest was computed as not having been cut off by the legislation effective July 10, 1947. The state then made a demand that it be reimbursed for what it claimed to be the excess interest, and upon refusal this action was begun.

It was not until the Oil Company elected to accelerate its amortizations on certain facilities that it had any claim against the state for overpayment of its taxes. Until it so elected, the state had no obligation to refund any of the taxes paid. The right to claim a refund, therefore, arose coincidentally with and because of the exercise of the election to accelerate amortization. The assumption is made, and the state has not argued otherwise, that section 27(c), the interest section, applied back to the time when the taxes were paid to the state, and the only argument between the parties is as to the cut-off date. We make the same assumption. By the statute giving the election to accelerate amortization and thereby to obtain a right to recompute taxes theretofore paid, the state made an offer to its taxpayers that if it did so, if they so elected, it would refund any amount of overpayment arrived at by the new basis of computation together with interest. The Union Oil Company's right to recoup from the state the overpayment plus interest under the new computation vested in it upon the service of its notice to the state that it elected to accelerate amortization. The state now says that by legislation passed thereafter it can cut interest off at the date of the last legislative act. Without regard to the constitutionality of such an attempt we do not believe that the legislature made the attempt. There is no express declaration in the statute to that effect, and we find no necessary implication that such intent existed. Herein, one can draw upon the familiar arguments that if the legislature had intended such a result, it would have said so, and if it did not, then it did not so intend. We believe the trial court erred in retroactively applying the amendatory legislation, and that the judgment must be reversed. Our conclusion upon this issue makes it unnecessary to discuss the other contentions of appellant as to the admissibility of testimony, the constitutionality of the legislation, or the statute of limitations.

In the stipulation of facts it was stipulated that in the event of final judgment for defendant said defendant would be entitled to additional interest as prayed for in its counter-claim in the sum of $1,743.59. In view of our conclusion that the judgment in favor of respondent must be reversed, appellant is entitled to judgment for said additional interest.

The judgment is reversed with directions that judgment be entered that respondent State of California take nothing by reason of said action and that appellant have judgment for the additional amount of interest in accordance with said stipulation.

VAN DYKE, P. J., and PEEK, J., concur.

On Petition for Rehearing.

PER CURIAM.

Respondent has filed a petition for rehearing in which it contends that our decision is in conflict with the decision in Gregory v. State of California, 32 Cal.2d

700, 197 P.2d 728, 4 A.L.R.2d 924, and states that we have not distinguished or even cited the Gregory case.

We did not discuss the Gregory case because we did not consider that it had any relevance to the facts of the instant case, and also because we felt that our conclusion that the trial court erred in retroactively applying the amendatory legislation adequately disposed of the case.

We do not believe that there is any merit in respondent's contention that the case of Gregory v. State of California, 32 Cal.2d 700, 197 P.2d 728 demonstrates that the payment of interest to defendant subsequent to July 10, 1947, the effective date of the 1947 amendment to section 27(c), is unwarranted. In the Gregory case a gift tax recovery action was pending at the time the taxing act was amended to allow interest on overpayments, the payment of such interest not previously being permitted. It was held that the taxpayer in obtaining judgment for the amount of the tax was entitled to interest from the effective date of the amendment. In the course of its opinion the court said, 32 Cal.2d at page 703, 197 P.2d at page 729:

> "Moreover, it should be noted that whatever the law may be elsewhere it has always been the rule in California that there is no implied contract of any kind that the State will pay interest on its indebtedness for it is liable only when made so by statute."

We agree with appellant that the facts in the case at bar differ significantly from the facts in Gregory v. State of California, supra. In the Gregory case there was involved only the general relationship between a government sovereign and a taxpayer who had sued to recover an asserted overpayment of taxes. At the time Gregory made the overpayment of gift tax on November 11, 1943, there was no statutory authorization for interest on refunds and in fact the statute then in effect positively prohibited interest, 1943 amendment. After Gregory commenced his action the statute was changed to provide for interest, 1945 amendment, Rev. & Tax.Code, § 16271, and the Supreme Court properly allowed interest from and after the effective date of the change, May 18, 1945.

[3] When, however, as in the case at bar, there is a statute providing for the payment of interest upon overpayments of tax at the time the overpayments are made and the right to refunds is established by the taxpayer's performance of the acts prescribed by statute—which acts constitute the contractual acceptance of the continuing offer of the statute, secs. 8(f) and 27(c) of the Bank and Corporation Franchise Tax Act—then an express contract arises for the payment of interest as well as for payment of the refund itself. To this situation the decision in the Gregory case has no application.

The petition for rehearing is denied.

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147 Cal.App.2d 16

Fred B. REED et al., Plaintiffs and Appellants,
v.
OROVILLE–WYANDOTTE IRRIGATION DISTRICT, a municipal corporation, Defendant and Respondent.
Civ. 8842.

District Court of Appeal, Third District, California.

Dec. 17, 1956.

Rehearing Denied Jan. 10, 1957.

Hearing Denied Feb. 13, 1957.

Action against irrigation district to have declared void the assessment of such district. The Superior Court, Butte County, Albert Ross, J., upheld the assessment as equalized by board of directors of district, sitting as a board of equalization, but, as to certain of the plaintiffs, whose assessments had been increased during the equalization proceedings, declared the increase invalid, and plaintiffs appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence was not sufficient to establish that the board had acted in arbitrary manner or had used an invalid method of equalization.

Judgment affirmed.

1. Waters and Water Courses ⇨231

Under statute requiring that notice be given of receipt of assessment book and of time, fixed by board of directors of irrigation district, when the board, acting as board of equalization, will meet to equalize assessments, implicit in such notice is notice that, in exercising its powers as a board of equalization, the board may change the valuations fixed by the assessor either by way of increasing or by decreasing them. West's Ann.Water Code, § 25550.

2. Taxation ⇨482(1)

Generally, where statute fixes date for meeting of a board of equalization, taxpayers are bound to take notice thereof, and no other notice is necessary, unless expressly required by the statute, in order for the board to increase a taxpayer's assessment.

3. Waters and Water Courses ⇨231

Where, after receiving the assessment book, board of directors of irrigation district gave required statutory notice that board would meet as a board of equalization, notice given was sufficient to permit board to change the individual parcel assessments by way of increase or decrease, even though the statutory notice given did not specifically state that board intended to raise any of the assessments. West's Ann. Water Code, §§ 25500 et seq., 25550.

4. Waters and Water Courses ⇨231

Where equalizing resolution of board of directors of irrigation district, sitting as a board of equalization, was addressed to correction of all inequalities in assessments, board was not obligated to give notice of intention to make a blanket reduction in valuation of lots and homesites. West's Ann.Water Code, § 25500 et seq., 25550.

5. Waters and Water Courses ⇨231

In action against irrigation district to have certain assessments of district declared void, evidence was not sufficient to establish that directors of district, in equalizing the assessments, had acted without evidence, except that many parcels were not the subject of specific testimony. West's Ann.Water Code, § 25500 et seq.

6. Waters and Water Courses ⇨231

In determining assessments to be made by directors of irrigation district, specific testimony, however valuable, was not required as to each of the many parcels. West's Ann.Water Code, § 25500 et seq.

7. Taxation ⇨459

Conclusion of assessing officers as to value of property for taxation purposes cannot be set aside in absence of fraud or malicious abuse of power.

8. Waters and Water Courses ⇨231

Where assessments arrived at by board of directors of irrigation district, sitting as a board of equalization, were not necessarily discriminatory and inequitable, board's findings were conclusive upon the court. West's Ann.Water Code, § 25500 et seq.

9. Taxation ⇨449(2)

A board of equalization possesses great powers as to raising or lowering of assessments and is sole judge of questions of fact and of property values, and it is given such power for purpose of doing equal justice to each and every taxpayer, and, in order to do justice to all, it must of necessity have power to raise or lower assessments as may be warranted.

10. Waters and Water Courses ⇨231

In action against irrigation district to have assessment of district declared void, evidence was not sufficient to establish that board of directors of district, sitting as a board of equalization, had exercised power of board of equalization without hearing any evidence. West's Ann.Water Code, § 25500 et seq.

11. Waters and Water Courses ⇨231

In action against irrigation district to have assessment of the district declared void, evidence was not sufficient to establish that board of directors of district, sitting as a board of equalization, had acted in arbitrary manner or had used an invalid method of equalization.

12. Waters and Water Courses ⚷231

To sustain contention that assessments or reassessments of board of equalization of irrigation district were made by adoption of an illegal formula, it would have to be shown that the board acted either arbitrarily or in such grossly inequitable and palpable disregard of actual valuation of the properties that action of board was either actually or constructively fraudulent.

13. Waters and Water Courses ⚷231

Fact that, by application of formula used by board of directors of irrigation district, sitting as an equalization board, to determine proper assessment of property within district, assessment of property owned by one board member was reduced by a total of $46,000 would raise question for the trial court, in action to have assessment made by such board declared void, whether the other taxpayers involved had been subjected to fraud.

14. Waters and Water Courses ⚷231

In action against irrigation district to have declared void the assessment of the district, trial court was limited to declaring the levy, as equalized by the board of directors of the district sitting as a board of equalization, either valid or invalid and could not grant to plaintiffs relief as to individual assessments, and, therefore, plaintiffs would not be heard to complain that, because they sued in a representative capacity, relief granted to them would have to be granted to all property owners whose assessments had been increased. West's Ann.Water Code, §§ 22670–22700.

15. Waters and Water Courses ⚷231

Evidence which may be used by board of directors of irrigation district, sitting as an equalization board, may come from various and informal sources, and the directors may use their own knowledge as to values and kinds of property in the district. West's Ann.Water Code, § 25500 et seq.

16. Waters and Water Courses ⚷231

In action to have declared void assessment of irrigation district, trial court's finding that resolution of board of directors of district, sitting as board of equalization, had been adopted without evidence having been received except for personal investigation made by two members of board, that such investigation did not take place in presence of taxpayers, that results thereof were not placed before board in public meeting or in presence of taxpayers, save a limited number, that adoption of resolution took place without opportunity to protestants to make objections thereto, and that resolution had been adopted without evidence received in presence of other persons constituted immaterial findings and did not necessarily conflict with general finding of court upholding the assessment.

17. Waters and Water Courses ⚷231

Fact that resolution of board of directors of irrigation district, sitting as board of equalization, setting forth board's conclusions as to how the assessment was to be equalized was adopted by vote of three directors who had theretofore secretly agreed to vote for the resolution would not make such resolution void, in view of fact that actions of the board were found to have been neither actually nor constructively fraudulent.

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Clewe, Blade & McDonald, Oroville, for appellants.

Minasian & Minasian, Oroville, for respondent.

VAN DYKE, Presiding Justice.

This action was brought by 45 persons who alleged they sued in a representative capacity for the purpose of having the 1953 assessment of the district declared void. The trial court upheld the assessment as equalized by the Board of Directors of the Oroville-Wyandotte Irrigation District; but as to 23 of the plaintiffs whose assessments had been increased during the equalization proceedings the court declared the increase invalid.

From the time of the organization of the district in 1919 to the assessment year 1952–53 an assessment of $100 per acre and $100 per lot with only a few exceptions had been made. In 1953 the district employed a Mr. Ernst to appraise the property in the district. The assessment was then made by the assessor in accordance with the appraisals made by Mr. Ernst. The result was that the values arrived at varied greatly from the values fixed in the previous assessments. Residential lots were valued as high as $1,200 per lot. Lands planted to olives were assessed at $165 per acre, to oranges at $150. The assessment aroused much controversy. Some members of the board of directors believed the assessments not only lacked uniformity, but were illegal because improvements on the lands were assessed in contravention to the provisions of Section 25500 et seq. of the Water Code, which direct that improvements shall not be included in determining the value of the land. The word "improvements" as used in the statute includes trees, vines, alfalfa, all growing crops, and all buildings and structures.

After receiving the assessment book, the board gave the required statutory notice that it would meet as a board of equalization. At the conclusion of the last equalization meeting a resolution was adopted by a divided vote which declared that the board had considered and investigated the valuation placed on each parcel of property to which an objection to the assessment had been made and had compared them with valuations placed on comparable land; that in addition members of the board had spent several days examining the lands in the district; that the members of the board possessed extensive knowledge of the properties and the land values; that the board concluded that the complaints disclosed that the lands throughout the district had been erroneously assessed; that uncultivated land had been assessed at less than its true value; that cultivated land had been assessed at more than its true value because the value of improvements had been included; that residential and commercial land was being assessed at a value higher than its true value. The resolution concluded by ordering the assessments changed to conform to a formula adopted by the board. The effect of the formula on acreage property was to raise the value of all lands valued at less than $125 an acre and to reduce it on all lands valued over that amount. The assessment on all parcels of commercial and residential land less than one acre was reduced by 75% of the assessor's valuation, though in no case was it reduced to less than $100 per lot. Except for a few individual assessments which were changed, the formula assessments became the final assessments.

The plaintiffs have appealed from the judgment of the trial court which declared the assessment valid. The district has not appealed from that part of the judgment which lowered some of the assessments.

[1–3] Appellants' first assignment of error is that the board was without power to raise any of the assessments because there was no specific notice that the board intended to do so. A complete answer to this contention is found in the requirements of the statute as to notice. The statute merely requires that notice be given of the receipt of the assessment book and of the time, fixed by the board, when the board, acting as a board of equalization, will meet to equalize assessments. Water Code, § 25550. Implicit in such notice is notice that in exercising its powers as a board of equalization the board may change the valuations fixed by the assessor. The change may be either an increase or a decrease. The authorities cited by the appellants that valuations may not be increased without specific notice to the owners of the parcels whose valuations are changed are cases where the governing statutes specifically required notice of increase. The general rule is that where a statute fixes the date for the meeting of a board of equalization, taxpayers are bound to take notice thereof, and no other notice is necessary, unless expressly required by the statute, in order for the board to increase the assessment of a taxpayer. (51 Am.Jur. p. 706.) The statutes in question here do not require any other notice. Therefore, the notice given was sufficient to permit the board to change the individual parcel assessments whether the change was by way of increase or decrease.

[4] Appellants' second contention is that the board was obligated to give notice of intention to make a blanket reduction in valuation of lots and homesites and to give to all an opportunity to be heard. They contend that failure to give such notice rendered the action of the board wholly invalid. It appears from the record that as soon as the assessor's rolls were placed in public view as required by the statute, almost all of the valuations fixed therein gave rise to bitter controversy, and that as a result great numbers of dissatisfied taxpayers appeared at each of the board's sessions and expressed their views; that during the period the board was sitting as a board of equalization two members of the board went about the district examining into the various contentions made and inspecting properties, particularly with regard to the classifications ultimately adopted in the resolution as a basis for formula change of assessments, and that discussions ensued among the members of the board concerning what ought to be done by way of equalizing assessments. Several public meetings of the board were held. Various groups of contending taxpayers were represented by counsel who presented arguments to the board both of fact and of law. It is clear from the record here that the board labored long and assiduously before the equalizing resolution was adopted. Since the equalizing resolution was addressed to the correction of all inequalities, there is no more reason for requiring notice of the proposal to adopt the so-called blanket changes or formula adjustments than there was to give individual notice to various affected parcel owners of changes in individual assessments.

[5-8] Appellants next contend that there was no evidence of market or cash values of individual parcels before the board and, therefore, it acted without evidence and had no power to take the action it took. This assignment of error is without support in and is contradictory to the record. It appears that the first meeting was attended by over 100 taxpayers, most of whom were lot owners. Almost the entire meeting was devoted to complaints of overassessment by lot owners who substantiated their contentions by statements as to the value of their properties. At another meeting subdividers of areas within the district testified as to the value of their lots and as to various sales made of lots which had been improved and as to the costs per lot of the improvements. Persons appeared before the board and compared valuations of respective parcels, one with another, and group by group. Unsworn testimony was taken as to the various valuations of improved and unimproved acreages, and the assessor's valuations on large areas of undeveloped land were compared with the valuations placed on lands planted to pasture, orchards, and other crops. The record reflects that much of the testimony and much of the personal investigation in the field made by the members of the board were addressed to the broad questions of equality of benefit and burden between the various classifications of property, such as unimproved acreage, improved acreage, small and large holdings, homesites and areas of lot size. In our view the charge that the directors acted without evidence is unsubstantiated except as it may be said that many parcels were not the subject of specific testimony. But specific testimony was not necessary, however valuable it might have been. A court may not set aside the conclusion of assessing officers as to the value of property for purposes of taxation in the absence of fraud or malicious abuse of its powers. Wores v. Imperial Irrigation District, 193 Cal. 609, 227 P. 181. In the instant case the evidence shows that the members of the board made a good faith effort to equalize the assessments. The assessments arrived at are not necessarily discriminatory and inequitable. The find

ings of the board are conclusive on a court in such a case.

[9, 10] Appellants also contend that the board was not vested with plenary powers and could not reassess property on its own volition and on its own opinion without hearing evidence. A board of equalization possesses great powers as to raising or lowering assessments. It is the sole judge of questions of fact and of values of property. The power is given for the purpose of doing equal justice to each and every taxpayer. In order to do justice to all it must of necessity have the power to raise or lower assessments as may be warranted. The record does not support the contention that the power was exercised without hearing any evidence.

[11, 12] Appellants next contend that assessments or reassessments by the adoption of a formula are illegal. In support of this contention they cite Rancho Santa Margarita v. San Diego County, 126 Cal. App. 186, 14 P.2d 588, and Shasta County v. Mountain Copper Company, 9 Cir., 278 F. 155. The actions of the board here are not subject to the criticism voiced in the cited cases. In this case we have such a general attack by so many taxpayers representing every classification of property in the district that any attempt at individual assessment adjustment was impractical if not impossible within the 10 days allowed by statute. There were in the view of the board as expressed in its resolution basic objections to the assessor's list which required equalizing action and demanded a reexamination of the entire roll. Under the circumstances the board did not exceed its jurisdiction in the approach to the problem before it. As will be seen from a consideration of the resolution the board passed, the board concluded that acreage holdings assessed below $125 per acre were underassessed and that acreage holdings assessed above that amount were overassessed. Without naming individual parcels, it broke these acreage holdings down into classifications and set up a schedule intended to equalize the assessments. Certainly it cannot be said from this record that the board's findings were so lacking in support that the board acted in an arbitrary manner. The same thing is true of the percentage reduction in the assessments of the individual parcels of land less than one acre in size. In the absence of fraud which was found not to have existed this court may not dispute the factual findings made by the board of equalization. We think that the result arrived at is not subject to the attack that it was the result of an invalid method of equalization. In order to sustain such an attack it must be shown that the board acted either arbitrarily or in such grossly inequitable and palpable disregard of the actual valuation of the properties that the conclusion must be reached that the action of the board was either actually or constructively fraudulent. Wores v. Imperial Irrigation District, supra, 193 Cal. at page 630, 227 P. 181. The record does not support such a conclusion.

[13] Appellants also contend that the adoption of the resolution constituted at least a constructive fraud on the taxpayers because one of the members of the board owned property which was reduced by a total of $46,000 by application of the formula assessment. Whether such facts constituted fraud was a question for the trial court to determine and, giving such facts their full operation, they do no more than raise a conflict in the evidence which was decided adversely to the appellants.

Appellants also contend that the judgment of the trial court is erroneous because it did not grant to all the property owners whose assessments were increased the relief granted those who were plaintiffs. Appellants claimed they sued in a representative capacity and that it follows that the relief granted to them should have been granted to all.

[14] But appellants overlook the effect of special statutory provisions governing representative suits attacking the validity as a whole of assessments levied by irrigation districts. It is of the utmost importance to irrigation districts that if it be

claimed an assessment roll is wholly invalid the issue be speedily brought before a court by anyone desiring to object. The legislature has provided a special method for such determination. Sections 22670-22700, inclusive, of the Water Code provide as follows: "A district may at any time after * * * the levy of any assessment bring an action in the superior court * * * to determine the validity of * * * the levy." "If no proceedings have been brought by the district * * *, any district assessment payer may * * * within 30 days after the levy of any assessment or authorization of any bonds bring an action in the superior court * * * to determine the validity of the assessment * *. The district shall be a defendant." "In a contest provided for by this article the court shall disregard any irregularity or omission which does not affect the substantial rights of the parties." "The judgment shall declare the * * * levy either valid or invalid." "No contest of any thing or matter herein provided shall be made other than in the time and manner herein specified." This action was brought within the time limited by the statute and as to all attacks made upon the validity of the assessment as a whole is governed by the foregoing statutory provisions. It is expressly declared that the adjudication in response to such a suit shall be limited to declaring the levy either valid or invalid. In such an action it is beyond the jurisdiction of the court to grant any other relief and particularly to grant therein to the plaintiff or plaintiffs who bring the action relief as to individual assessments.

[15-17] Finally, appellants contend that certain findings of fact made by the court are in conflict with the general findings upholding the assessment and that these findings, being special, so control the general as to necessitate a reversal of the judgment. We do not agree. A treatment of this contention requires at least a summary statement of the special findings referred to. The trial court found that no intention to adopt the resolution was given prior to convening the last meeting of the board. We have already said no such notice was required. The finding is immaterial. The court found the resolution was adopted without evidence having been received, save that two members of the board had made a limited investigation of market values of a limited number of properties, expending not in excess of two days for one member and one day for the other in so doing; that no other director made such an investigation or did such viewing; that this investigation did not take place in the presence of taxpayers and the results thereof were not placed before the board in a public meeting or in the presence of taxpayers, save a limited number; that the adoption of the resolution took place without opportunity to protestants to make objections to the adoption thereof; that the resolution was adopted without evidence being received in the presence of plaintiffs or other persons. To begin with, the "evidence" which may be used by the board of directors sitting in equalization may come from various and informal sources and the directors may use their own knowledge as to values and kinds of property in the district. The record shows that much evidence, using the word in this broad fashion, was received. Aside from this, however, the special findings we have above summarized are immaterial findings, the truth of which does not necessarily conflict with the general findings of the court upholding the assessment. From this point of view it matters not that two members of the board made a limited investigation in the field; that they did or did not do so in the presence of protestants; that they did not disclose what they learned at public meetings in the presence of protestants; that they gave no opportunity to debate the final resolution before its adoption or that the board took no special evidence directed at the resolution as proposed and adopted. The general findings referred to are safe against the claim made that these findings invalidate them. The court found further that the board took no evidence that the actual cash value of any specific parcel of land differed from the specific valuations placed in the assessment

book. While we think this broad finding is not supported by the record, nevertheless it was not jurisdictional to the action of the board that it take evidence as to the values of specific lots as compared to the values placed thereon by the assessor. The trial court found that three directors shortly before the last meeting of the board secretly agreed on the adoption of the resolution, but this finding is immaterial in view of the court's finding that the actions of the board were neither actually nor constructively fraudulent. The record shows that the resolution was regularly adopted in open meeting. It was adopted by the vote of the three whom the court found had theretofore secretly agreed to vote for it. That fact did not make the resolution void.

We think none of the other findings need special treatment.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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146 Cal.App.2d 792

Carol Ann DUMM and Mary Jane Dumm, Minors, by their legal guardian, Marion M. Collins, Plaintiffs and Appellants,

v.

PACIFIC VALVES, a corporation, Charlotte M. Dumm, Howard C. Dumm, Helen I. Dumm, Irving M. Dumm, Elizabeth M. Dumm, Robert J. Dumm, Grace Dumm, and Irving M. Dumm III, Defendants and Respondents.

Civ. 21854.

District Court of Appeal, Second District, Division 1, California.

Dec. 14, 1956.

Rehearing Denied Jan. 2, 1957.

Hearing Denied Feb. 6, 1957.

Action against a corporation and certain of its officers and directors, for a declaration of the rights of certain individual minor plaintiffs with respect to a number of shares of stock in the corporation. The Superior Court, Los Angeles County, Ralph K. Pierson, J., entered an order sustaining defendants' demurrer and entered judgment for defendants, and plaintiffs appealed from such judgment and attempted an appeal from such order. The District Court of Appeal, White, P. J., held that complaint for a declaration of rights of certain individual minor plaintiffs with respect to certain shares of corporate stock over which an actual controversy existed concerning the rights of respective parties to possession of the stock and receipt of dividends thereon, stated a cause of action for declaratory relief, even though the corporation might have had an action against its corporate officers and directors who were also named as defendants, growing out of their alleged appropriation of corporate profits.

Attempted appeal from order dismissed; judgment reversed and cause remanded with directions.

1. Appeal and Error 🔑102, 254, 870(5)

An order sustaining a demurrer is not appealable, is deemed excepted to, and will be reviewed upon appeal from judgment. West's Ann.Code Civ.Proc., §§ 647, 963.

2. Pleading 🔑218(4)

The provision of Code of Civil Procedure that an action may be dismissed when, after a demurrer to a complaint has been sustained, plaintiff fails to amend within time allowed by court and defendant moves for such dismissal, relieves the court of the duty to dismiss the action upon its own motion, but does not require that notice of the motion be given to plaintiff. West's Ann.Code Civ.Proc., § 581, subd. 3.

3. Appeal and Error 🔑854(3)

Where order sustaining demurrer did not specify the ground or grounds upon which the ruling was based, if the complaint was insufficient on any ground properly specified in the demurrer, judgment of dismissal entered after the order sustaining the demurrer would not be reversed on appeal. West's Ann.Code Civ.Proc., § 581, subd. 3.

4. Declaratory Judgment ⚷318

Complaint for a declaration of rights of certain individual minor plaintiffs with respect to certain shares of corporate stock over which an actual controversy existed concerning the rights of respective parties to possession of the stock and receipt of dividends thereon, stated a cause of action for declaratory relief even though the corporation might have had an action against its corporate officers and directors who were also named as defendants, growing out of their alleged appropriation of corporate profits. West's Ann.Code Civ.Proc., §§ 1060, 1061.

5. Pleading ⚷192(2)

As against special demurrers, facts must be alleged with sufficient clarity to inform defendants of the issues to be met.

6. Pleading ⚷192(2)

A demurrer for uncertainty is directed at allegations actually made, and a demurrer for uncertainty does not lie as to immaterial matter, and it also does not lie where the facts are presumptively within the knowledge of the demurring parties.

7. Declaratory Judgment ⚷325

Where no cause of action other than one for declaratory relief was stated in a complaint, it was not subject to demurrer for misjoinder, notwithstanding that there was unessential matter in the complaint.

◆

James C. Webb, Long Beach, for appellants.

Albert D. White, Walter Desmond, Jr., Long Beach, for respondents.

WHITE, Presiding Justice.

Plaintiffs appeal from a judgment and attempt to appeal from an "order hereinbefore made on or about the 10th day of October, 1955, sustaining the defendants' demurrer to plaintiffs' Third Amended Complaint herein".

[1] An order sustaining a demurrer is not appealable. Code Civ.Proc. § 963; Jeffers v. Screen Extras Guild, Inc., 107 Cal. App.2d 253, 254, 237 P.2d 51. It is deemed excepted to, Code Civ.Proc. § 647, and will be reviewed upon appeal from the judgment. The minute order of October 10, 1955, is that the demurrer of all of the named defendants to the Third Amended Complaint "is sustained, with ten days allowed plaintiff in which to amend".

The demurrer specifies the following grounds: (1) "said Third Amended Complaint does not state facts sufficient to constitute a cause of action for declaratory relief against these defendants, or any of them"; (2) "the court is without judisdiction of the subject of this action, in that it appears on the face of the Third Amended Complaint that plaintiffs have failed to comply with the requirements of Section 834 of the Corporations Code * * *"; (3) "the plaintiffs, as mere beneficiaries of a trust consisting of a minority of corporate shares, are without capacity or right to commence or maintain the said action against the directors of the corporation"; (4) said complaint is uncertain for eight reasons, to wit: (a) it cannot be ascertained therefrom how defendants Charlotte M. Dumm, Helen I. Dumm, Elizabeth M. Dumm and Grace Dumm are concerned; (b) it cannot be ascertained how the defendants took, appropriated, and distributed the money among themselves and converted it to their own use; (c) that there are no sufficient and specific allegations of fact constituting the elements of fraud; (d) that the identity of the testamentary trustees has been deleted; (e) that the terms of the trusts or the duties of the trustees cannot be ascertained from the complaint; (f) that it cannot be ascertained how or in what manner the 180 shares "belong to" the minors; (g) that the complaint does not show "upon what supporting facts" it is alleged there is an "existing controversy"; and (h) that the complaint fails to allege the lack of a plain, speedy and adequate remedy at law; (5) "several causes of action have been improperly united or not separately stated, to-wit, an alleged matter of probate and a testamentary trust, purely and exclusively under the jurisdiction of the Probate Court, to wit, the testamentary trust referred to in paragraph IX of the plaintiffs' Third Amended Complaint, to wit, In the Matter of the Estate of John F. Dumm, also known as Jack F. Dumm, deceased, No. LB P–22262, united with a derivative suit by alleged minority shareholders of a corporation, and against its directors thereof"; (6) the complaint is ambiguous for the same reasons it is uncertain; and (7) it is unintelligible for the same reasons it is ambiguous and uncertain.

The order sustaining the demurrer gives ten days to amend the Third Amended Complaint. Plaintiffs failed to amend. Defendants served upon them notice of the ruling on the demurrer, and about 40 days later moved for dismissal pursuant to Section 581, subd. 3 of the Code of Civil Procedure. The motion was granted and judgment was entered that plaintiffs take nothing, the action be dismissed, and defendants have their costs.

[2] Appellants contend that the court was without jurisdiction to grant the judgment in the instant action "without notice to appellants, and said judgment is void upon its face". No cases are cited by them in support of that contention. By plaintiffs' failure to amend, in effect they refuse to amend, perhaps because they prefer to stand upon the complaint as it is, or perhaps because they have pleaded every fact they are prepared to prove in support of their action. Their failure to amend leaves nothing to be done by the court except the making and entry of the judgment. The requirement that the judgment be made "when * * * the defendant moves for such dismissal", Code Civ.Proc. § 581, subd. 3, relieves the court of the duty to dismiss the action upon its own motion, but does not require that notice of the motion be given to plaintiffs.

[3] In the instant action the order sustaining the demurrer to the Third Amended Complaint does not specify the ground or grounds upon which the ruling is based. Therefore, if the complaint is insufficient on any ground properly specified in the demurrer, the judgment entered after the order sustaining the demurrer will not be reversed on appeal. Moxley v. Title Insurance & Trust Co., 27 Cal.2d 457, 462, 165 P.2d 15, 163 A.L.R. 838; Stowe v. Fritzie Hotels, Inc., 44 Cal.2d 416, 425, 282 P.2d 890.

Plaintiffs' "Third Amended Complaint in Equity for Declaratory Relief" alleges that plaintiffs are minors, acting by their duly appointed, qualified and acting guardian; that defendant Pacific Valves is a California corporation with its principal office in Signal Hill, Los Angeles County; that defendants Howard C. Dumm and Irving M. Dumm are the president and secretary-treasurer and they and defendants Robert J. Dumm and Irving M. Dumm III are the directors of said corporation; that said corporation has issued only 25,000 shares of no par value capital stock, all of the same class; and that 22,855 shares thereof are owned and controlled by the defendants, 22,050 shares by defendants Irving M. Dumm, Howard C. Dumm and Robert Dumm.

"VIII. That continuously since on or about the 1st day of December, 1951, 180 certain shares of stock of said corporation belonging to these minor plaintiffs, have been, and still are, held in the possession of the defendants, Howard C. Dumm, Irving M. Dumm and Robert J. Dumm.

"IX. That on the 26th day of March, 1951, John F. Dumm, Sr., who was the father of these plaintiffs, died, having made his will wherein he devised and bequeathed in trust 1,250 shares of stock of said corporation, to be held for these minor plaintiffs during their minority, and to be delivered over to said minor plaintiffs upon the attainment of their majority; that said testamentary trust was thereafter duly approved by the above entitled Court in the Matter of the Estate of John F. Dumm, Sr., deceased, No. LB P–22262; that by reason thereof these plaintiffs, and each of of them, were at all of said times, and still are, beneficiaries of said testamentary trust.

"X. That continuously from, on or about the 26th day of March, 1951, to and including the present time, the defendants, and each of them, excepting the defendant, Irving M. Dumm III did, from and out of the profits and earnings of said corporation, take, appropriate and distribute among themselves, and convert to their own use and conceal from these plaintiffs large sums of money, the exact amount of which is unknown to plaintiff, but that plaintiff is informed and believes, and upon those grounds alleges said sum to be in excess of the sum of $250,000.

"XI. That a controversy exists between these minor parties plaintiff and parties defendant, and each of them, in that:

"(a) Plaintiffs contend that the monies received and held by said defendants, and each of them, as alleged hereinbefore in Paragraph X, are dividends payed by said defendant corporation, and that these minor plaintiffs are entitled to have and receive a portion therefrom.

"(b) Plaintiffs contend that as beneficiaries under said testamentary trust that they are entitled to receive the income accruing to, or produced by the shares of stock of said corporation in which they hold beneficiaries interest under said testamentary trust.

"(c) That these minor plaintiffs are entitled to the possession, through their guardian, of the said 180 shares of stock of said corporation, and also to receive the income of said 180 shares of stock.

"That the defendants contend:

"(a) That the monies received and held by themselves, as alleged heretofore in Paragraph X, belong to themselves absolutely.

"(b) That the plaintiffs herein are not entitled to any of the income produced by the shares of stock referred to herein.

"(c) That neither the plaintiffs nor their guardian are entitled to the possession of the aforesaid 180 shares of stock of said corporation, but that the defendants, Howard C. Dumm, Irving M. Dumm and Robert J. Dumm are entitled to hold said 180 shares, in trust, for said minor plaintiffs until they each shall attain their majority.

"(d) That plaintiffs are not entitled to have or receive any dividends or income from the said corporation."

Since appellants submit that a cause of action has been stated, and that it is not within the purview of section 834 of the Corporations Code, we will not here discuss the decisions cited by respondents regarding appellants' failure to comply with the conditions required for maintenance of a derivative action by corporate stockholders.

While appellants' brief is not clear, it seems to be their contention that the action stated is one for the declaration of the rights of the individual minor appellants with respect to certain personal properties—shares of stock in the respondent corporation.

[4] Even though the corporation may have an action against the individual defendants growing out of their alleged appropriation of its profits, that does not affect the right of these appellants, as individuals, to maintain the instant action. Sutter v. General Petroleum Corporation, 28 Cal.2d 525, 530, 170 P.2d 898, 167 A.L.R. 271. Therefore, the demurrer should not have been sustained on the second or third grounds therein specified.

> "Any person * * * who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property * * * may, in cases of actual controversy relating to the legal rights and duties of the respective parties, bring an action * * *. He may ask for a declaration of rights or duties, either alone or with other relief; and the court may make a binding declaration of such rights or duties, whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or

negative in form and effect * * *." Code Civ.Proc. § 1060.

The complaint contains allegations that 180 shares "belonging to" the appellants have been since about December 1, 1951, and now are "held in the possession of" respondents Howard C. Dumm, Irving M. Dumm and Robert J. Dumm, who contend that they are entitled to hold said 180 shares in trust for appellants until they shall attain their majority; that appellants contend that they are entitled to possession thereof through their guardian "and also to receive the income of said 180 shares of stock".

By the complaint it is also alleged that appellants are beneficiaries of a testamentary trust created by their deceased father, in which 1,250 shares are "held for these minor plaintiffs during their minority"; that appellants contend that "as beneficiaries under said testamentary trust they are entitled to receive the income accruing to, or produced by, the shares of stock of said corporation in which they hold beneficiaries interest under said testamentary trust"; that respondents contend that appellants "are not entitled to any of the income produced by the shares of stock referred to herein".

It is further alleged that the defendants (excepting Irving M. Dumm III) appropriated and distributed among themselves "dividends payed by said defendant corporation" from its profits and earnings, and appellants contend that they are entitled to receive a portion thereof.

Since the complaint alleges the existence of the property which is the subject of the action, to wit 180 and 1,250 shares of stock in the defendant corporation, that the other defendants are officers, directors and stockholders of said corporation, and the existence of an actual controversy concerning the rights of the respective parties to possess the stock and to receive the dividends thereon, the general demurrer should not have been sustained. Code Civ.Proc. §§ 1060, 1061; La Hue v. Dougherty, 34 Cal.2d 1, 5, 206 P.2d 640; Maguire v. Hibernia S. & L. Soc., 23 Cal.2d 719, 728, 146 P.2d 673, 151 A.L.R. 1062; Columbia Pictures Corp. v. DeToth, 26 Cal.2d 753, 870, 161 P.2d 217, 162 A.L.R. 747.

[5, 6] As against special demurrers, the facts must be alleged with sufficient clarity to inform defendants of the issues to be met. Roberts v. Wachter, 104 Cal.App.2d 281, 290, 231 P.2d 540; Merlino v. West Coast Macaroni Mfg. Co., 90 Cal.App.2d 106, 108, 202 P.2d 748. Many of the uncertainties specified by the demurrer in the instant action are with regard to matters not alleged, which, if essential to the cause of action, are grounds for general demurrer, not special. Demurrer for uncertainty is directed at the allegations actually made. Butler v. Sequeirra, 100 Cal.App.2d 143, 145, 223 P.2d 48. Demurrer for uncertainty does not lie as to immaterial matter. Swasey v. L'Etanche, 17 Cal.App.2d 713, 717, 62 P.2d 753. Nor will a demurrer for uncertainty lie where the facts are presumptively within the knowledge of the demurring parties. Swasey v. L'Etanche, supra, 17 Cal.App.2d 718, 62 P.2d 753; Turner v. Milstein, 103 Cal.App.2d 651, 658, 230 P.2d 25.

[7] With regard to respondents' fifth ground of demurrer, while there is much unessential matter in the complaint, no causes of action other than one for declaratory relief have been stated. The surplusage cannot be dealt with by demurrer for misjoinder.

The sixth and seventh grounds of demurrer, that the complaint is ambiguous and unintelligible, will not lie for the same reasons hereinbefore given as to the demurrer for uncertainty.

The attempted appeal from the order sustaining the demurrer is dismissed. The judgment is reversed and the cause remanded, with directions to the court below to overrule the demurrer and grant a reasonable time within which defendants may answer if so advised.

DORAN and FOURT, JJ., concur.

147 Cal.App.2d 54

Arthur Deflay DAVIDSON, Plaintiff and Appellant,
v.
COUNTY OF MARIN, Frank Lewis Machado, Defendants and Respondents.
Civ. 16885.

District Court of Appeal, First District, Division 2, California.
Dec. 19, 1956.

Action arising out of intersection collision between plaintiff's automobile and a fire truck responding to an emergency call. The Superior Court, Marin County, Jordan L. Martinelli, J., rendered judgment adverse to plaintiff, and plaintiff appealed. The District Court of Appeal, Kaufman, J., held that fire truck driver who has given required warning cannot be held liable for ordinary negligence, such as failing to keep a proper lookout.

Affirmed.

1. Automobiles 🔑175(5)

Fire truck driver who has given required warning cannot be held liable for ordinary negligence, such as failing to keep a proper lookout. West's Ann.Vehicle Code, § 454.

2. Automobiles 🔑227(1)

Last clear chance doctrine is not applicable merely because driver of emergency vehicle could have and should have seen that collision could be prevented only in event that he took immediate action, but applies only to discovered peril. West's Ann.Vehicle Code, § 454.

3. Appeal and Error 🔑882(12), 1033(5)
Automobiles 🔑227(1), 246(38)

Recovery could be had, under last clear chance doctrine, in action arising out of intersection collision between plaintiff's automobile and a fire truck, only if fire truck driver had knowledge that plaintiff was in position of peril and knew, or in exercise of ordinary care should have known, that plaintiff could not escape; and instruction not requiring actual knowledge of plaintiff's perilous position was erroneous; but such error, being favorable to unsuccessful plaintiff, would not require reversal, especially where plaintiff had asked for instruction which was erroneous in same respect.

4. Automobiles 🔑175(1, 5)

There is negligent operation of an authorized emergency vehicle responding to an emergency call only where driver of such vehicle fails to give timely warning or is guilty of wilful misconduct. West's Ann. Vehicle Code, § 454

5. Automobiles 🔑244(41)

In action arising out of intersection collision between plaintiff's automobile and a fire truck responding to an emergency call, evidence would sustain finding of contributory negligence in failing to hear siren and in failing to keep proper lookout.

Thomas L. Berkley, Robert P. Brorby, Craig Z. Randall, Berkeley, for appellant.

W. O. Weissich, Dist. Atty. of Marin County, San Rafael, Haley, Thomas & Buresh, San Rafael, for respondents.

KAUFMAN, Justice.

This is an appeal by plaintiff, Arthur Deflay Davidson, from a judgment, after jury verdict in favor of defendants and respondents, Marin County and Frank Machado in an action for damages for the death of Youler Davidson, wife of appellant, and for personal injuries to appellant, alleged to have arisen out of a collision between appellant's automobile and respondent county's fire truck driven by respondent Machado. No personal judgment was sought against respondent Machado. Judgment was rendered in favor of appellant on respondents' cross-complaint.

The accident occurred on August 22, 1953, at about 7:30 p. m. at the intersection of U. S. Highway 101 and the Tiburon-Mill Valley Road (State Route 52), known as the Alto Wye intersection. Appellant Davidson and his wife were driving in a southerly direction on U. S. Highway 101 and Frank Machado, Captain of a Marin County Fire Department sub-station, was driving a half-ton pick up truck, owned by Marin County in an easterly direction on Route 52 in response to a call reporting a fire. The truck was equipped with two red lights, front and rear, and a siren on the front. U. S. Highway 101 at the Alto Wye intersection with State Route 52 was on the date of the accident six lanes wide, having two northbound and two southbound lanes for through traffic, a storage lane for northbound traffic for left turns westward, as well as a storage lane for southbound traffic for traffic turning eastward. Some distance north of this intersection a service road extends from the westerly edge of U. S. Highway 101 in a southwesterly direction to intersect State Route 52 at a point west of the Alto Wye intersection, forming a triangular area between said road and the highway which is generally used for parking vehicles. There is a hill to the north of the intersection, and at a point between its crest and the Alto Wye intersection there is a flashing amber light facing southbound traffic. The highway is downgrade from the crest of the Alto hill to the intersection. State Route 52 is generally level having but a slight incline in its approach to the intersection. All traffic at the intersection is controlled by signal lights. The posted speed limit on U. S. Highway 101 in this area is 45 miles per hour.

When respondent Machado received the call that there was a fire at a restaurant known as the Blue Fountain, located on the easterly side of U. S. Highway 101, he left his home which was some 8 blocks northwest of the Alto Wye intersection. He drove the fire truck down Tower Drive to its intersection with State Route 52, turned east on State Route 52, passing to the right of several vehicles which were stopped thereon, headed in an easterly direction. Machado testified that he believed that he had been traveling at between 30 to 35 miles per hour as he entered the intersection, but slowed down upon entering it. In the hospital after the accident, Machado stated that he had been traveling between 5 and 10 miles per hour. When he was 400 to 500 feet from the intersection the signal light showed amber. The witness Williams, who resided to the northeast of the intersection, had observed that all traffic about the intersection had stopped as the fire truck entered it with the exception of one vehicle proceeding southward in the inside fast lane of U. S. Highway 101. This was appellant's car which collided with the left front of the fire truck.

Machado testified that the blinking red lights on the truck were placed in operation when he left his home. He sounded the siren continuously for the last two hundred feet up to the intersection. Several witnesses who observed the approach of the truck for several hundred feet saw the red lights burning. The witness Thompson who followed the truck stated that the siren was sounding on Tower Drive, and that he heard it as he followed. Kirkpatrick, whose car was parked in the northbound storage lane heard the siren. The witness Williams, referred to above, heard the siren, although he was inside his home on the opposite side of the intersection. The Perrys in the car some 120 feet behind appellant's, heard the siren. Mr. Perry saw the fire truck approaching on State Route 526. Perry stated that the signal for southbound traffic was green before appellant entered the intersection and was green at the time of the collision. Witnesses placed the speed of the fire truck as it entered the intersection variously at 8 to 10, 12 and 15 miles per hour.

Appellant testified that as he drove over the crest of the hill north of the Alto Wye intersection he heard a siren, but that he heard no siren after that. He was traveling at a speed of 30 miles per hour, and when he was about 300 or 400 feet from the intersection, the traffic signal turned green, that he looked both east and west, saw only one or two cars headed easterly, and continued on to the point of collision. He did not at any time prior to the collision apply his brakes. Machado was rendered unconscious as a result of the crash. When Machado later spoke to appellant in Marin

General Hospital, appellant said "my wife told me so." Appellant's wife died as a result of her injuries.

[1] Appellant contends that the trial court erroneously instructed the jury that there is a negligent operation of an emergency vehicle only where the driver of such vehicle fails to give a timely warning or otherwise makes an arbitrary exercise of the exemption from the rules of the road which can be said to be wilful misconduct. It is appellant's contention that even though the required warnings are given, ordinary negligence, such as failing to keep a proper lookout, may be sufficient to impose liability upon the county. Section 454, motor Vehicle Code provides as follows:

> "The driver of an authorized emergency vehicle shall be exempt from those provisions of this code herein set forth under the following conditions:
>
> "(a) Said exemptions shall apply whenever any said vehicle is being driven in response to an emergency call or when used in the immediate pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm.
>
> "(b) Said exemptions shall apply only when the driver of said vehicle sounds a siren as may be reasonably necessary and the vehicle displays a lighted red lamp visible from the front as a warning to others. Under the circumstances hereinabove stated, any said driver shall not be required to observe those regulations contained in Chapter 3 or in Chapters 6 to and including Chapter 13 of Division 9 of this code, but said exemptions shall not relieve the driver of any said vehicle from the duty to drive with due regard for the safety of all persons using the highway, nor shall the provisions of this section protect any such driver from the consequences of an arbitrary exercise of the privileges declared in this section."

Having read the foregoing section to the jury, the court instructed that the exemption applied to those sections of the Vehicle Code regulating speed, use of different lanes, overtaking and passing, rights-of-way, rights and duties with respect to pedestrians, street cars, safety zones, standing and parking, and then stated:

> "It follows that when there exist the conditions which said statute requires as a basis for said exemption it is not negligence for the driver of such an emergency vehicle to disregard the rules from which he thus is exempted, unless he is guilty of an arbitrary exercise of the privileges embraced in that exemption. * * *
>
> "It is equally important to note, however, that the exemption does not apply if any one of the conditions upon which it is based is, in fact, absent, and in such a case the driver of the emergency vehicle has no privileges over other drivers on the highway. It then is his duty to obey the laws that apply generally to the use of the highway and he is held to the same duty of exercising ordinary care."

The jury was then instructed as to what would constitute an arbitrary exercise of the privileges given an emergency vehicle by Section 454, and told that "Whether or not the driver of an emergency vehicle has complied with all the conditions necessary to bring him within Section 454 of the Vehicle Code, and whether or not he arbitrarily exercises his privileges as granted to him under said section is a question of fact for you, the jury, to determine." It is clear, therefore, that the court left to the jury the determination of whether or not the driver of the fire truck had fulfilled the conditions which gave him the exemption, and whether, if he did enjoy the exemption, he had arbitrarily exercised the privilege.

Despite the clear language of Section 454, appellant argues that even though the fire truck may have given the statutory warning, which would give the driver the benefit of the exemption, he can still be held liable for ordinary negligence for failing to keep a proper lookout. The Supreme Court cases have, however, clearly held to the contrary. In Lucas v. City of Los Angeles, 10 Cal.2d 476, 75 P.2d 599, 604, it was held that when the statutory signals have been given, all matters concerning "speed, right of way, and all other 'rules of the road' are out of the picture; the only questions of fact, in so far as the public owner is concerned, are first, whether there was an emergency call within the terms of the statute; second, whether the statutory warning was given; and third, whether there was an arbitrary exercise of these privileges." And, see, Raynor v. City of Arcata, 11 Cal.2d 113, 77 P.2d 1054. In Reed v. Simpson, 32 Cal.2d 444, 196 P.2d 895, 899, it was argued that if the driver of the emergency vehicle was proceeding at a moderate speed, his "failure to keep on the lookout and avoid the dangers of traffic, which was concededly heavy at the time, contributed proximately to the fatal collision." But the court there stated that since the driver in the performance of his official duty was exempted from the restriction of speed, right of way, and all other " 'rules of the road' ", his lack of due care cannot be predicated on those elements if the "reasonably necessary" warning contemplated by the statute was given. The Peerless Laundry Service v. City of Los Angeles, 109 Cal.App.2d 703, 241 P.2d 269, cited by appellant, was one in which a fire truck ran over the curb and sidewalk and crashed into a building because of defective brakes, and loss of control by the driver. The court stated that the defective brakes plus the driver's relaxation of vigilance could be found to be negligence which was not the result of the disregard of any regulation as to which the driver was given immunity by Section 454. The case then went on to point out that Section 454 was never intended to apply to this type of situation, since screaming sirens and flashing red lamps could not help respondent protect his building against such an accident. Obviously the statute was intended to open a path *on the street* for emergency-bound vehicles which would be free of pedestrians and vehicles. This case is clearly distinguishable from the case now before the court. Furthermore, as noted above, the failure to keep a proper lookout was held by the Supreme Court in Reed v. Simpson, supra, to be one of the rules of the road to which the exemption applies.

Appellant claims that prejudicial error was committed in instructing the jury that the expression "with due regard for the safety of all persons using the highway" as used in Vehicle Code, Section 454(b) means *only* that the driver of an emergency vehicle must, by suitable warning, give others a reasonable opportunity to yield the right of way. The court in defining "with due regard for the safety of all persons using the highway" as used in Section 454, instructed that it meant that the driver of an emergency vehicle must, by suitable warning, give others a reasonable opportunity to yield the right of way. The court instructed, "The giving of the audible signal by siren and the display of a red light visible from the front is the measure of care on the part of the operator of the emergency vehicle, and if this is done his duty of care is performed, subject to the limitation that he may not make an arbitrary exercise of the privileges given him by the exemption." That the above instruction is a correct statement of the law cannot be doubted. The expression "with due regard for the safety of all persons using the highway" has been thus defined in Lucas v. City of Los Angeles, 10 Cal.2d 476, 483, 75 P.2d 599; Raynor v. City of Arcata, 11 Cal.2d 113, 117, 77 P.2d 1054; Reed v. Simpson, 32 Cal.2d 444, 449–450, 196 P.2d 895.

[2] Appellant maintains that the last clear chance doctrine as applied to Vehicle Code, Section 454 cases is not limited to the doctrine of discovered peril but is applicable where the driver of an emergency vehicle could have and should have seen that a collision could be prevented only in the event that he took immediate action. He cites language from Washington v. City and County of San Francisco, 123 Cal.App.

2d 235, 266 P.2d 828, a case in which a bystander was injured when a police car and another collided and were thrown against him. Judgment was had against the city and the driver of the other vehicle. The briefs in this case show that the city's argument that the instruction as to last clear chance was erroneously given, was based on the fact that although there was evidence that the driver of the police car saw the other car before the collision, the time element was too short to give him a last *clear* chance. The instruction complained of therein was practically identical with the instruction in this case to the effect that there is an arbitrary exercise of the privilege granted by Section 454, (1) if the vehicle is not being operated in relation to an emergency and under circumstances that would entitle it to the exemption; (2) that "after seeing that some other person has not heard or heeded the warning given * * * or seeing that there is no way in which any other person can reasonably be expected to prevent a collision, the driver of the emergency vehicle nevertheless, having both the means and reasonable opportunity to avoid such a result, proximately causes an accident producing injury to another." It is therefore clear, that the instruction given in the cited case, did limit the jury's consideration to situations of discovered peril, and that this is the correct rule is settled by the Supreme Court decisions heretofore cited. The court did make a statement in the Washington case to the effect that on the evidence before it the court could not say as a matter of law that the jury could not have believed that by the exercise of ordinary care the driver of the police car could have and should have seen the other car and have observed that the driver was making no effort to slow down and that there would be a collision unless some immediate action were taken. Regardless of this language, the last clear chance doctrine in this state is applicable only to cases of discovered peril. Starck v. Pacific Elec. Ry. Co., 172 Cal. 277, 282, 156 P. 51, L.R.A.1916E, 58; Peterson v. Burkhalter, 38 Cal.2d 107, 110–111, 237 P.2d 977. In the Washington case there was also substantial evidence that the police car was not on an emergency call. The fact that a hearing was denied by the Supreme Court does not give blanket approval to all of the language used in the opinion of the District Court of Appeal.

[3] It is argued that the last clear chance instruction given by the trial court subsequent to the earlier instruction concerning arbitrary exercise of the privilege, which was in the nature of last clear chance, did not cure the error in the earlier instruction. However, as determined above, there was no error in that instruction. There was evidence, though perhaps slight, that would have justified the usual last clear chance instruction. If the jury decided that appellant's evidence that he heard no siren as he approached the intersection was to be accepted by them as evidence that none was then being sounded, the exemption would not apply and the usual rules of the road would be in effect. If the jury presumed that the driver of the car was within Machado's clear range of vision, that Machado saw that the automobile would not stop in time to avoid a collision and that he was traveling at 8 or 10 miles per hour and could have stopped in time, the last clear chance instruction could properly be given. The instruction given was, however, incorrect in that it told the jury that "if the defendant had, *or by the exercise of ordinary care ought to have had,* actual knowledge of plaintiff's perilous situation", the remainder of the instruction applied. The law in this state is that the defendant *has knowledge* that plaintiff is in a position of peril, and knows, or in the exercise of ordinary care should know, that plaintiff cannot escape. Peterson v. Burkhalter, 38 Cal.2d 107, 110, 237 P.2d 977. While the instruction was in this respect erroneous, the error was in favor of appellant. Furthermore, appellant cannot complain when he asked for an instruction on the last clear chance doctrine which, though refused, was erroneous in the same respect.

[4] The following instruction is complained of as constituting prejudicial error: "There is a negligent operation of an authorized emergency vehicle responding to an emergency call only where the driver of such vehicle fails to give a timely warning or otherwise makes an arbitrary exercise of the exemption from the rules of the road which can be said to be wilful misconduct." In Lucas v. City of Los Angeles, supra, an arbitrary exercise of the statutory privilege was stated to be a charge similar to the charge of "wilful misconduct." It then discussed the elements of such conduct as being something greater than gross negligence, quasi criminal in nature, the intentional doing of something with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of the possible consequences. This was reaffirmed in Raynor v. City of Arcata, supra, 11 Cal.2d at page 118, 77 P.2d 1054. We find no error in the instruction.

[5] Finally, it is contended that there was no substantial evidence in the record that would support a finding of contributory negligence on the part of appellant. There was evidence that appellant heard a siren when he was at the crest of the hill; that almost all traffic at the Alto Wye intersection had come to a halt; that despite the fact that he heard a siren a short while before, he did not slacken his speed; that although because of the physical evidence that appellant ran into the left front side of the slower moving truck which must have entered the intersection first, appellant did not apply his brakes. There was abundant evidence from which the jury could have concluded that appellant was negligently inattentive in not hearing the siren just prior to the collision, and that he was not keeping a proper lookout.

There was no error committed by the trial court which was in any way prejudicial to appellant. Accordingly, the judgment must be affirmed.

Judgment affirmed.

DOOLING, Acting P. J., and DRAPER, Justice pro tem., concur.

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146 Cal.App.2d 780

In the Matter of the ESTATE of Bertha K. NEWMAN, Deceased.

Parker N. HOWARD, Appellant,

v.

WELLS FARGO BANK, Trustee of the Trust created by the Last Will of Bertha K. Newman, Deceased; Gerald Wayne Bonner and Claire Margaret Montgomery, Beneficiaries under the Will of Edith A. Bonner, Deceased; Edna Horner Matthiesen, as Executrix of the Last Will and Testament of Rachel F. Anderson, Deceased; and Dorothy Anderson Whitehead, Residuary Devisee and Legatee under said Will, Respondents.

No. 17017.

District Court of Appeal, First District, Division 1, California.

Dec. 14, 1956.

As Amended Jan. 10, 1957.

Hearing Denied Feb. 6, 1957.

Proceeding for construction of decree of distribution. The Superior Court, City and County of San Francisco, T. I. Fitzpatrick, J., entered order and remainderman appealed. The District Court of Appeal, Fred B. Wood, J., held that where final decree of distribution expressed terms of trust as providing that after death of life beneficiary of income therefrom, the "trust shall terminate and trust estate shall vest in and the trustee shall pay, transfer and deliver the same" to three named remaindermen in equal shares, estates in remainder vested upon death of testatrix and portion of remainder payable to remaindermen who survived testatrix but predeceased life beneficiary should go to respective personal representatives of deceased remaindermen for purposes of administration.

Affirmed.

Executors and Administrators ⟹315(5)

Where terms of will creating trust were expressed in final decree of distribution as providing for payment of income to life beneficiary and at her death, the "trust shall terminate and trust estate shall vest in and the trustee shall pay, transfer and deliver the same" to three named remaindermen, at death of testatrix remaindermen had an indefeasibly vested remainder in trust and portion payable to remaindermen who survived testatrix but predeceased life beneficiary should go to their respective personal representatives for the purposes of administration. West's Ann.Civ.Code, § 694; West's Ann.Prob.Code, §§ 28, 92.

Chas. N. Douglas, San Francisco, for appellant.

Heller, Ehrman, White & McAuliffe, San Francisco, for respondent, Wells Fargo Bank.

W. M. Pinney, Jr., San Francisco, for respondent, Bonner, etc.

George Devine, San Francisco, for respondent, Matthiesen.

Carlisle D. Nielsen, Oakland, for respondent, Whitehead.

Guernsey Carson, San Francisco, of counsel, for respondents.

FRED B. WOOD, Justice.

The testatrix created a trust the terms of which as expressed in the decree of distribution (rendered in 1942 and long since final) were as follows: "To pay the net income thereof unto Bertha C. Howard until her death; at the death of said Bertha C. Howard the trust shall terminate and the trust estate shall vest in and the trustee shall pay, transfer and deliver the same unto Rachel F. Anderson, Edith A. Bonner and Parker N. Howard in equal shares."

Each of these beneficiaries survived the testatrix but two of the remaindermen (Anderson and Bonner) predeceased the life tenant. Parker Howard is the sole surviving remainderman.

The question is whether these estates in remainder vested upon the death of the testatrix and creation of the trust or were contingent until termination of the trust upon the death of the life tenant.

This question was presented to Honorable T. I. Fitzpatrick shortly after termination of the trust in 1954. He determined that Anderson, Bonner and Howard "each had at the death of the * * * testatrix. * * * an indefeasibly vested remainder in the trust * * *, and that the portion of the remainder payable to the deceased remaindermen should go to their respective personal representatives for the purpose of administration."

This appears to us a reasonable interpretation and we see no basis for our undertaking to disturb it. Each of the remaindermen was in being at the inception of the trust period and the will as expressed in the final decree indicated no intent upon the part of the testatrix to terminate any remainderman's interest by anything that might subsequently occur, such as the death of the remainderman during the period of the trust. This seems to fit the legislative formula declared in section 694 of the Civil Code: "A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest"; aided by the declaration in section 28 of the Probate Code that testamentary dispositions "are presumed to vest at the testator's death." We conclude that the words "shall vest" as used in this decree refer to the time of enjoyment, the right to possession, of the property, not to the vesting of title.

The case law lends support to this view. In Keating v. Smith, 154 Cal. 186, 97 P. 300, the decree of distribution distributed the residue of the estate to Alfred Vincent Keating and declared that, upon termination of the trust, the property "'then to go as follows, to wit: One-third thereof to Isabell Keating, the widow * * *.'" 154 Cal. at page 189, 97 P. at page 303. In holding this a vested, not a contingent remainder, the court said: "The question resolves itself, primarily, into one of construction. Did the terms of the decree of distribution establish in the widow a present interest, which could pass, upon her death, to her heirs or devisees? By the provisions of the clauses above quoted, one-third of the residue is, upon the termination of the minority of the children, to go to the widow. Her right to the possession of the principal of this third is postponed; but, under the language of the decree, she is to receive it in any event. Except in regard to the time when it may come into her possession, there is no uncertainty. The gift is not made contingent upon the occurrence or nonoccurrence of any event whatever. There is no gift over in the event of her death, as there is in the case of the minor children. Furthermore, she is, during the existence of the trust, to receive one-third of the income of the property. That, at common law, this provision for the wife would have been regarded as creating in her a vested estate, and that, in the absence of statutory rule to the contrary, such estate, whether legal or equitable, would pass from her by inheritance or devise, are propositions that are not, and cannot be, questioned. 1 Jarm. on Wills, (6th Ed.) 756 et seq.; 28 Am. & Eng. Ency. of Law, (2d Ed.) 933. Nor is it disputed that, under our Code, the estate or interest of the wife, if she took any interest or estate, vested at once. Civ.Code, § 694." 154 Cal. at pages 191–192, 97 P. at page 302.

In Re Estate of Wallace, 11 Cal.2d 338, at page 339, 79 P.2d 1094, at page 1095 the "final decree of distribution entered in decedent's estate followed closely the provisions of his will concerning the creation of a trust and the payment by the trustee of the net income from the trust property to decedent's widow and two daughters, and further provided: 'Upon the death or remarriage of said widow, the said trust shall terminate and said trustee *shall distribute* (Italics added) the balance remaining in said trust fund to the two abovenamed daughters of decedent, in equal proportions, share and share alike.'" One of the daughters died during the period of the trust. The trial court and the District Court of Appeal held that hers was a contingent interest; the Supreme Court, that it was vested. After discussing In re Estate of Dumphy, 147 Cal. 95, 81 P. 315, and other authorities, the Supreme Court said: "Here, by the decree of distribution there was created a prior interest in the trustee, measured by the widow's life for a period of years terminating with her remarriage, for the purpose of paying over the income as designated, and upon the expiration of such prior limited interest, the absolute ownership was to pass to then identifiable persons (testator's two daughters); hence each daughter, under the decree of distribution, by the application of the above stated rule and illustration, acquired an indefeasible *vested remainder* which did not lapse upon the death of either daughter prior to the expiration or termination of the prior limited estate in the trustee." At page 342 of 11 Cal.2d, at page 1096 of 79 P.2d.

In Randall v. Bank of America, 48 Cal. App.2d 249, 119 P.2d 754, 755 a declaration of trust which stated that upon the death of the trustor (lifetime beneficiary) all unpaid principal and interest "shall vest in" a certain designated person, created a vested, not a contingent remainder. The court said: "It is not inconsistent with a present transfer of interest that the words 'shall vest' are used. In Kinney's Estate v. Commissioner of Internal Revenue, 9 Cir., 80 F.2d 568, the trust instrument provided that 'Upon the termination of this trust * * * the title to the whole of said property, so held in trust, shall immediately vest in the above named beneficiaries by title absolute.' One of the beneficiaries died before the termination of the trust and the question arose whether her beneficial interest was taxable as an asset of her estate. The court determined that a present estate passed upon the creation of the trust and said:

"'It is contended that the trustor intended the trust property to vest in the beneficiaries at the termination of the trust, and not before. "But it is important to note the distinction between the interest transferred and the enjoyment of that interest. The enjoyment of the cestui may be made to commence in the future, and to depend for its commencement upon the termination of an existing life or lives, or of an intermediate estate." Nichols v. Emery, supra, 109 Cal. 323, at page 330, 41 P. 1089, 1091, 50 Am.St.Rep. 43.

"'Having in mind these rules and the California Code provisions, we are brought, after study of the declaration of trust, to the conclusion that the legal title to the remainder vested at once in the beneficiaries, and that possession was to vest in them at the termination of the trust.'

"Without extending the discussion further as to the effect of the words 'shall vest' we refer to Gray v. Union Trust Co., 171 Cal. 637, 154 P. 306; Miller v. Oliver, 54 Cal.App. 495, 202 P. 168, and In re De Vries' Estate, 17 Cal.App. 184, 119 P. 109, supporting the existence of a vested remainder even though enjoyment is postponed and even though the power of revocation or substitution might divest the beneficiary at any time of the right to possession which otherwise would upon the trustor's death pass to him." At pages 254–255 of 48 Cal.App.2d at page 757 of 119 P.2d. See also the discussion in Bochte v. Chess, 124 Cal.App.2d 321, at page 325, 268 P.2d 493.

Rhoda v. County of Alameda, 134 Cal. App. 726, 26 P.2d 691, is readily distinguishable from our case upon the ground that the testator expressly provided for a gift over of the share of any remainderman who died during the life tenancy.

In re Estate of Easter, 24 Cal.2d 191, 148 P.2d 601, is not so readily distinguishable. In analyzing the Easter case we start with the consideration of *a combination of several factors:* (1) a decree of distribution, not a will, was being interpreted, (2) a class or group[1] was involved, not specifically named persons, and (3) words of futurity were used. The pivotal point of difference between that case and the instant case appears in item (2), for in the instant case specifically named persons (not a group or class) are involved. In the Easter case, the "decree of distribution, dated October 3, 1923, set forth directions for administering the trust and provided that '*Upon the death of the said Catherine Easter,* the trust hereinbefore referred to shall terminate and *all of the property* then in the hands of the trustee or in its possession or control, *shall go to and vest in* the heirs at law of the said Alfred Easter, deceased, in accordance with the statute of succession of the State of California in force in the month of March, 1920, and the trustee is directed to convey, deliver and pay over all the corpus of said trust funds then in its possession or under its control unto such heirs in accordance with the statute of succession of the State of California in force in the month of March, 1920.' (Italics added.)" 24 Cal.2d at page 193, 148 P. 2d at page 602.[2]

The testator died in February, 1923, leaving his wife and his four children as his heirs. The widow died in 1942. Two of the children predeceased her; two survived her.

The crucial question was "whether the identity of the 'heirs at law' (who were to take on termination of the trust) is to be determined as of the time of death of the testator or the time of termination of the trust." 24 Cal.2d at page 193, 148 P.2d at page 602.

The decree of distribution controlled as the final and conclusive adjudication of the testamentary disposition which the deceased made of his property. The use of words of futurity are especially significant in a decree in contrast to their use in a will. "From their nature, wills are made to take effect at a future time, i. e., at the death of the testator, and hence it may be proper to construe the future tense when used in a will as applying to the time of the testator's death, and not to a still later time. A decree of distribution, on the other hand, normally speaks as of its own date, for it is usually an order for the present delivery of property, and the use of the future tense must ordinarily connote future action. In our opinion, such was the intention here." 24 Cal.2d at page 195–196, 148 P.2d at page 603.

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[1] Some of the factors to be considered when a gift is to a class instead of to specifically designated persons, are mentioned in Re Estate of Clark, 64 Cal.App. 2d 636, 641–642, 149 P.2d 465.

[2] The will, executed in March, 1920, expressly adopted "the present statute of succession" for the indicated purpose. At page 192 of 24 Cal.2d at page 601 of 148 P.2d.

In short, at the time of the rendition of the decree, the time as of which the decree spoke, the identity of the "heirs" of the testator (determined as of the date of his death) was known. If the court had them in mind as vested remaindermen it could readily have mentioned them by name or as heirs already ascertained. It did not do so. Instead, it referred to them simply as "heirs" without any description except that which the words of futurity connoted: "Upon the death" of the life tenant all the property "shall go to and vest in" the "heirs * * * of * * * Alfred Easter, * * * in accordance with the statute of succession * * * in force in the month of March, 1920."

Those words were used in 1923. They fell considerably short of determining who the "heirs" were, a determination which it was the duty of the writer of the decree to make if in his opinion the will created vested remainders.[3] Consonant with the opposite opinion (the view that these were contingent remainders) the writer of the 1923 decision refrained from any attempt to identify the "heirs" at that time and by his words of futurity inferentially said they would include only those persons who might be in being and able to qualify as heirs upon the termination of the trust.

If this is a correct view of the holding in the Easter case, it would seem to follow that that holding does not preclude the interpretation we have placed upon the dispository words of the decree of distribution in the instant case: The ascertainment and designation of three specifically named individuals (not the mere mention of a class whose members, inferentially, are yet to be determined), aided by the declaration made in section 694 of the Civil Code, the presumption expressed in section 28 of the Probate Code, and the supporting authorities which we have cited.

If we were in doubt as to the meaning of the decree, that doubt could and would be resolved by reference to the will itself, which declared: "At the death of Bertha C. Howard, the trust shall terminate and the amount distributed equally among the following: Rachel F. Anderson, Edith Bonner * * * and Parker Nelson Howard * * *." This formula is so like that involved in Re Estate of Wallace, supra, 11 Cal.2d 338, 79 P.2d 1094, as to leave no doubt that these were vested remainders.

Appellant has also advanced the argument that the gifts to Anderson and to Bonner lapsed because of the provisions of section 92 of the Probate Code, a point not well taken because that section applies only if the devisee or legatee "dies during the lifetime of the" testatrix. Bonner and Anderson, as well as the appellant, survived the testatrix.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

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147 Cal.App.2d 49

Joe R. SPANGLER, Plaintiff, Cross-Defendant and Appellant,

v.

Daniel S. CASTELLO et al., Defendants, Cross-Complainants and Respondents.

Civ. 5346.

District Court of Appeal, Fourth District, California.

Dec. 18, 1956.

Purchaser's action for specific performance of escrow agreement to sell certain lands in which vendors cross-complained to quiet their title to such lands. The Superior Court of Fresno County, Philip Conley, J., entered judgment quieting vendors' title to land and purchaser appealed. The District Court of Appeal,

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[3] In this connection, we note particularly the quotation from Luscomb v. Fintzelberg, 162 Cal. 433, 438, 123 P. 247, which appears on pages 194 and 195 of 24 Cal.2d at page 603 of 148 P.2d.

Griffin, J., held that where escrow agreement required deposit of $20,000 by purchaser as well as Federal Housing Administration or Veterans' Administration approval of subdivision and provided that agreement could be cancelled at end of seven months if not performed, and vendors at end of such period gave written notice of cancellation, purchaser was not entitled to specific performance even though he claimed that the undeposited $20,000 was available and that he would waive requirement of F.H.A. or V.A. approval of subdivision.

Affirmed.

1. Escrows 🔑9

Ability without performance does not amount to compliance with escrow agreement.

2. Escrows 🔑9

There can be no effective offer of partial performance of escrow agreement. West's Ann.Civ.Code, § 1486.

3. Contracts 🔑279(2)

Before an offer to do an act in fulfillment of an agreement can bind the offeree it must conform to the terms of the very agreement or its new conditions must be accepted by the other party.

4. Specific Performance 🔑99

Where escrow agreement for purchase of land for subdivision, provided for deposit of $20,000 by purchaser as well as Federal Housing Administration or Veterans' Administration approval of subdivision and provided that agreement could be cancelled at option of vendors at end of seven months if not performed, and at end of such time vendors, who had always insisted upon strict performance, gave written notice of cancellation, purchaser was not entitled to specific performance of agreement even though he claimed that the undeposited $20,000 was available and that he would waive F.H.A. or V.A. approval.

Stutsman, Hackett & Nagel, Fresno, for appellant.

Lopez & Hyde, Fresno, for respondents.

GRIFFIN, Justice.

Plaintiff, cross-defendant and appellant Joe R. Spangler (hereinafter referred to as plaintiff) brought this action against defendants, cross-complainants and respondents Daniel S. Castello and wife (hereinafter referred to as defendants) for specific performance of an escrow agreement to sell certain acreage near Fresno for subdivision purposes. The escrow agreement, dated May 6, 1954, and signed by the parties, provided generally that plaintiff would buy it for $64,600, subsequently changed to $68,000, would pay $20,000 into escrow and execute a trust deed and note to defendants for the remaining $48,000. It also provided that the cross-defendant Home Title Company "may release any lot in the proposed subdivision" under certain conditions. It then specifically provided, in the offer, that the "escrow is contingent upon F.H.A. and V.A. approval" and "if you are unable to comply with these instructions within 7 months from this date said money and instrument shall thereafter be returned to me on demand. In the event that the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same at the earliest possible date thereafter, unless I shall have made written demand upon you for the return of all instruments or money deposited by me." On November 12, 1954, it was amended to change the sale price to $68,000.

It appears that in connection with the financing of the $20,000 payment above mentioned, plaintiff, on October 25, 1954, entered into a separate escrow agreement in another title company with Mr. and Mrs. Woo (a copy of which is in evidence) whereby they would loan plaintiff this sum, on this same property, when title passed to plaintiff, and he was to execute a *first* trust deed and note on the property to them as security. A grant deed executed by defendants on November 19, 1954, was placed in escrow and was accompanied by a letter authorizing its delivery upon certain conditions, including the delivery to defendants by plaintiff of a *first* trust deed and note in the sum of $48,000 on the property here involved. On November 19, 1954, plaintiff placed in said escrow such a note and first trust deed. The $20,000 was never placed in escrow and no F.H.A. or V.A. approval was obtained. On December 7, 1954, more than seven months after the execution of the escrow agreement, defendants filed with the Home Title Company a notice of rescission, cancellation of escrow, and a demand for return of documents, stating that the escrow instructions had not been complied with and that the time agreed upon had elapsed without the closing of the escrow.

Plaintiff brought this action for specific performance and claimed that he had been doing considerable work in preparation for the subdivision; that the provision in the escrow agreement in reference to the F.H.A. and V.A. approval was placed in there at his request; that he had waived that provision, placed there solely for his benefit; that he was entitled to waive it; and accordingly was not in default in this respect.

Plaintiff produced the testimony of the escrow agent who said on November 6, 1954, plaintiff insisted on closing the escrow and he informed him it could not be closed without a waiver of that provision; that plaintiff orally agreed to such a waiver but he was informed it would be necessary to have the waiver of defendant; that he called Mr. Castello and told him about it and he said he had given Spangler long enough to comply and he was not inclined to agree to waiving that part of the agreement. He then testified he called the other title company and they indicated the $20,000 "was available" but he did not know the arrangements in reference to that escrow.

Plaintiff testified to a similar conversation with Mr. Castello in which plaintiff said he waived that provision and wished Castello to do the same but Castello refused and wanted an entirely new deal. He then testified he made certain soil tests of the property in conjunction with the F.H.A., and it required the fencing of the property from the irrigation ditch. Apparently no approval was secured from the F.H.A.

Mr. Castello testified this provision was placed in the escrow by mutual agreement; that plaintiff asked that it be placed there; that plaintiff explained its purpose was to enable them to obtain proper financing and "we would have to have F.H.A. approval", and that plaintiff agreed to obtain it; that on December 7, plaintiff called and asked for a "waiver" of 20 days, which he rejected because he had already taken seven months; that he then had his attorney serve the notice indicated. At the hearing it was agreed that if Mrs. Woo were present she would testify, subject to objection, that on December 6, 1954, she would have taken a second trust deed and turned over the $20,000 to plaintiff. The records of this title company show that she deposited $20,000 under that escrow which provided for a *first* trust deed on this property as security.

That escrow agent testified he was not authorized to accept any incumbrance other than the one specified in the escrow agreement (such as a second trust deed) and that the $20,000 was never deposited in escrow with the Home Title Company but if the escrow provisions had been carried out and it was ready to close, the custom was for each title company to record the proper documents and pay over the money at the time

Defendants produced an expert real estate appraiser who testified that the approval of the F.H.A. and V.A. played an important part in fixing the value of subdivision property and particularly in financing it and, if not obtained, conventional financing is necessary and if that is not obtained, the subdivision project itself may prove to be a failure for many reasons. He indicated that this feature would be of particular interest to one holding a first trust deed on the property.

The trial court found generally in favor of defendants and specifically found that the sale price was the fair market value of the property at the time; that plaintiff did not obtain an F.H.A. or V.A. approval, as required by the agreement; that this provision was not inserted in the escrow agreement solely at the request of and to protect plaintiff's interest therein but defendants were concerned with its inclusion; that it is true that on December 6, 1954, plaintiff orally agreed to waive that provision but defendants refused to consent to do so; that said provision was in fact a condition for the benefit of both plaintiff and defendants and that the failure to close the escrow was due to plaintiff and not to defendants; that at the expiration of the seven months the obligations of plaintiff had not been complied with in this respect and he had not deposited in said escrow the $20,000 required and therefore defendants were entitled to terminate the agreement; that the escrow agreement is incapable of being specifically enforced by plaintiff and accordingly defendants' title to said property is quieted under their cross-complaint.

It is now claimed by plaintiff on this appeal that since defendants did not indicate the particulars in which plaintiff was claimed to be in default or upon what basis plaintiff refused to complete the escrow, the necessity of plaintiff to actually tender the F.H.A. and V.A. approval or tendering or placing the $20,000 in escrow was waived, citing Fogler v. Purkiser, 127 Cal. App. 554, 16 P.2d 305. These claims are not supported by the evidence. That sum admittedly, was not placed in the escrow. Under the agreement, at the end of seven months, upon failure to comply with its provisions, without notice and upon demand, defendants were entitled to the return of the instruments. Leiter v. Handelsman, 125 Cal.App.2d 243, 251, 270 P.2d 563. Plaintiff's offer of performance was conditioned upon defendants' waiving F.H.A. and V.A. approval. Plaintiff was in default in reference to the placing of the $20,000 in escrow within the time required. It is apparent, under the terms of the two escrow agreements, each trust deed was to be a *first* trust deed upon this same property. The impossibility of this needs no explanation. The testimony of Mrs. Woo that she later may have consented to loan that sum on a second trust deed bore only on the question of plaintiff's ability to perform the terms of his agreement and deposit that sum in escrow.

[1-4] Ability without performance does not amount to compliance. Watts v. Mohr, 86 Cal.App.2d 256, 194 P.2d 758. The court was authorized to reject this claim. There can be no effective offer of partial performance. Sec. 1486, Civ.Code. Before an offer to do an act in fulfillment of an agreement can bind the offeree it must conform to the terms of the very agreement or its new conditions must be accepted by the other party. Bullock v. McKeon, 104 Cal. App. 72, 285 P. 392. Throughout the seven months' period defendants insisted on strict performance. It was fully performed by them and plaintiff was not excused from performing within that time. Accordingly, Fogler v. Purkiser, supra, and the sections of the Civil Code upon which plaintiff relies are inapplicable. The trial court was justified in finding that plaintiff was not entitled to specific performance. Ward v. Downey, 95 Cal.App.2d 680, 213 P.2d 523; Lind v. Baker, 48 Cal.App.2d 234, 119 P.2d 806.

Judgment affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

146 Cal.App.2d 708

In the Matter of the Application of DOWNER CORPORATION, a California Corporation, for an order directing arbitrators to proceed and for the appointment of a third arbitrator.

DOWNER CORPORATION, Petitioner and Respondent,

v.

UNION PAVING COMPANY, Respondent and Appellant.

Civ. 8800.

District Court of Appeal, Third District, California.

Dec. 11, 1956.

Rehearing Denied Jan. 3, 1957.

Hearing Denied Feb. 6, 1957.

Arbitration proceeding. The Superior Court, San Joaquin County, George F. Buck, J., entered order confirming award of arbitrators, and respondent appealed from such order and judgment entered thereon. The District Court of Appeal, Peek, J., held that respondent failed to sustain burden of proving that award was erroneous.

Order and judgment affirmed.

1. Arbitration and Award ⚷2

By enatment of the arbitration statutes, Legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate, and to abolish in such cases doctrines applicable to common law arbitration. West's Ann.Code Civ.Proc., §§ 1282, 1283, 1288.

2. Contracts ⚷284(1)

Parties who voluntarily agree in writing to arbitrate should be bound by the arbitration statute and should not as an afterthought be permitted to escape from their contract through the portals of the common law. West's Ann.Code Civ.Proc., §§ 1282, 1283, 1288.

3. Joint Adventures ⚷4(1)

Under arbitration agreement entered into by joint adventurers, providing that portions of interpretation of the agreement or any matter arising therefrom should be left to determination of board of arbitrators and that the decision of any two arbitrators should be binding upon both parties thereto, arbitrators were authorized to decide any question concerning the joint venture agreements or arising therefrom as well as the interpretation of the agreements and parties agreed to accept award as final and binding on them.

4. Arbitration and Award ⚷73

Jury ⚷12(3)

Where neither party to arbitration agreement was in default as each had already appointed its arbitrator, and the two arbitrators appointed had commenced their arbitration pursuant to the agreement, only issue before the trial court was that there had been a failure to agree upon the third arbitrator and consequently demand by a party to the agreement for a jury trial was properly refused. West's Ann.Code Civ. Proc., §§ 1282, 1283.

5. Arbitration and Award ⚷29

Where, under arbitration agreement, arbitrators were authorized to determine any matter arising out of joint venture agreements, arbitrators could also properly consider interest due one of the parties under the contracts involved.

6. Arbitration and Award ⚷76

Fact that only two of three arbitrators were present at meeting to execute formal arbitration award was not such misconduct as would permit vacation of award. West's Ann.Code Civ.Proc., § 1288.

7. Appeal and Error ⚷1010(1)

Arbitration and Award ⚷72

The Superior Court, upon motion to confirm the arbitration award, and the District Court of Appeal, on appeal, has no power to review the sufficiency of the evidence to sustain the award, and in fact the evidence produced before the arbitrator is not even made part of the record on appeal.

8. Arbitration and Award ⚷66

Every intendment of validity must be given arbitration award and burden is upon the one claiming error to support his contention.

9. Arbitration and Award ⚿73

The merits of an arbitration award, either on questions of fact or of law, may not be reviewed except as provided in the statute. West's Ann.Code Civ.Proc., § 1288.

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Henry C. Clausen, Richard G. Burns, San Francisco, for appellant.

Gordon J. Aulik, Stockton, for respondent.

PEEK, Justice.

This is an appeal from an order confirming an award of arbitrators and from the judgment entered thereon.

On August 2, 1948, the parties entered into two written joint venture agreements, referred to as the Hagginwood and Contra Costa jobs, respectively. Each contract provided that respondent-appellant Union Paving Company, referred to herein as Union, would furnish the capital; that petitioner-respondent Downer Corporation, referred to herein as Downer, would furnish the machinery, equipment and labor necessary for the performance of two construction contracts which had been awarded to Downer; and that profits or losses would be borne equally by the parties. Both contracts were successful. The Hagginwood job showed a net profit of over $170,000 and the Contra Costa job netted more than $47,000 or an overall total net profit in excess of $217,000, all of which was represented by six percent sanitary district bonds. The bonds from the Contra Costa job bore interest from January 1, 1950, and those from the Hagginwood job from May 1, 1950. On May 8, 1951, the bonds were delivered to Mr. Dowling, president of Union, who converted them to his own use and refused to remit any of the proceeds to Downer.

Downer placed the matter in the hands of its attorney, Mr. Macomber, who unsuccessfully carried on settlement negotiations for approximately six months with Mr. Dowling. Mr. Macomber then advised Union that Downer had appointed him its arbitrator pursuant to the provisions contained in the joint venture agreements "* * * to the end that the said arbitrators shall appoint a third and the said matter shall proceed to arbitration." Thereafter, by a telegram dated December 18, 1951, Mr. Clausen, attorney for Union, advised Mr. Macomber that he had been designated by that corporation as its arbitrator, but nearly three months elapsed before he was available for a meeting with Mr. Macomber. It then appeared that Mr. Clausen had not talked with Mr. Dowling and knew nothing concerning the matter. Also at that meeting Mr. Dowling stated that he was busy and did not know when he would get around to going over Downer's specifications of objections to the accounting of the joint ventures.

It is contended by Union that immediately following the appointment of the two arbitrators the contemplated arbitration was abandoned in favor of the conduct of negotiations for the settlement by the lawyer-arbitrators on behalf of their respective clients. However, on March 13, 1952, Downer filed petitions seeking an order appointing a third arbitrator and directing arbitration under each contract. Union demurred and moved to strike on the grounds that the court had no jurisdiction; that the California arbitration statutes were not applicable; that there was another action pending; and that Downer had waived its right to arbitration. At the time of the hearing Union filed an answer and return in which it alleged that it had not failed to name an arbitrator nor that the one appointed had been unable to agree with Downer's arbitrator on the appointment of a third, and that Downer was not aggrieved by such failure. Additionally it was alleged that the arbitration clause in the contracts called for common law arbitration, and hence the court had no power to compel the same. Union further alleged that it had not refused to cooperate in naming a third, that the arbitrators could settle the matter between them without the necessity of a third, that in any event Downer had waived its right to arbitration, and concluded its answer with a demand for a jury trial. The contentions of Union were denied, and the court appointed Mr. Kenneth G. McGilvray, an attorney of Sacramento, to act as the third arbitrator.

Thereafter the arbitrators met, went over the evidence and chose Mr. McGilvray to prepare the proposed findings and award. Several hearings were had during the following year, and the matter was eventually submitted for decision on October 9, 1953. Mr. McGilvray completed his work on June 2, 1954, and shortly thereafter sent the transcripts and exhibits to Mr. Clausen with the suggestion that they meet with Mr. Macomber during the week of July 5 to make the final award. Mr. Clausen did not answer that communication. On July 7 Mr. McGilvray wrote to him and to Mr. Macomber setting a meeting at the latter's office in Stockton for July 14. On July 9 Mr. Clausen replied that such time was unsatisfactory; that he had had no opportunity to review the evidence and the proposed award; and that he was preparing for a jury trial and would suggest a meeting in his San Francisco office on August 17. He also noted in his letter that he would object to any meeting of the arbitrators unless all three were present. Thereafter, on July 12, Mr. Gilvray again addressed a letter to Mr. Clausen stating that in view of the fact that the matter had been submitted on October 9, 1953, and that the proposed award together with all exhibits had been in Mr. Clausen's hands for more than a month, he proposed to meet with Mr. Macomber in his office on July 14 and sign the award. Mr. McGilvray and Mr. Macomber met on July 14, modified the award to a degree and signed the same as modified. On that same day Downer filed in the superior court of San Joaquin County a notice of motion for an order confirming the award. Union thereupon filed objections to the motion for an order confirming the award and moved for an order vacating the same and also moved for an order staying the proceedings to enforce the order. After a hearing at which evidence was introduced and briefs filed, the court denied both motions by Union and confirmed the award.

The first source of disagreement relates to the arbitration clause contained in each of the joint venture agreements, which is as follows:

> "*If any question should arise concerning the interpretation of this Agreement or any matter arising therefrom,* said question or matter shall be left to the determination of a Board of Arbitrators. Each party shall appoint one arbitrator and these two shall appoint a third arbitrator. *The decision of any two arbitrators shall be binding upon both parties* hereto, and *the cost of arbitration shall be borne equally between both parties.*" (Emphasis added.)

It is Union's contention that the court lacked jurisdiction to order the appointment of a third arbitrator or to direct the arbitrators to proceed, since the joint venture agreements did not contemplate statutory arbitration. In support of such contention it is argued that the first phrase of the quoted provisions negates any thought that the parties had in mind statutory arbitration, and that therefore the court lacked jurisdiction to entertain the proceeding.

[1-3] It should be noted that it is now well established "* * * by the adoption of the 1927 statute, the Legislature intended to adopt a comprehensive all-inclusive statutory scheme applicable to all written agreements to arbitrate, and that in such cases the doctrines applicable to a common law arbitration were abolished." Crofoot v. Blair Holdings Corp., 119 Cal.App. 2d 156, 260 P.2d 156, 169. This same question was discussed in 38 Cal.L.Rev. 799. The author notes that while the common law may be applicable to oral contracts, he suggests that it is not applicable to agreements in writing. The writer further states that no special language is required but that the arbitration clause should provide that parties agree to accept the award as final and binding. "It is reasonable that parties who voluntarily agree in writing to arbitrate should be bound by the statute and

should not as an afterthought be permitted to escape from their contract through the portals of the common law." (Page 809, 38 Cal.L.Rev.) Thus, in Snyder v. Superior Court, 24 Cal.App.2d 263, 74 P.2d 782, it was agreed that in the event of a dispute between the parties, such dispute would be submitted to a named arbitrator "for determination." This court there held that to submit a dispute for determination is a tacit agreement to abide by that agreement. For as was there noted, there would be no reason to submit the dispute to an arbitrator other than for determination. Hence it necessarily follows that while the paragraph in question could probably have been drafted with more precision, there can be little question but that as the trial court found, the words "any matter arising therefrom" relate back to the word "Agreement," and that thereby the arbitrators were authorized to decide any question concerning the joint venture agreements or arising therefrom, as well as the interpretation of the agreements; and that by the words, "the decision of any two arbitrators shall be binding upon both parties," the parties agreed to accept the award as final and binding on them. In this regard the court specifically found that in using the quoted phrases, it was the intent of the parties that any dispute arising under the agreements should be determined by arbitration, and that all of the matters and disputes which were submitted to and determined by the board of arbitrators arose out of said agreements and the performance thereof. In support of such findings the record shows that both parties submitted to the arbitrators exhaustive specifications of its claims against the other. These claims, for the most part, dealt with what were and what were not proper charges against the joint ventures. In this regard the trial court further noted that to arrive at a proper determination of such charges, including interest, it was necessary to interpret the agreements in light of the claims presented.

It is Union's next contention that the arbitration provisions heretofore quoted are so indefinite and uncertain that they are incapable of specific performance. Its argument in this regard is but a restatement of its arguments in support of its first contention. It follows that what we have said before is likewise determinative of this contention.

[4] Union next contends that the trial court erred in dening its demand for a jury trial pursuant to the provisions of section 1282 of the Code of Civil Procedure, since it had placed in issue the question of whether or not it was in default in failing to arbitrate. The pertinent portion of that section provides as follows:

> "A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of the hearing of such application shall be served personally upon the party in default. The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default be in issue an order shall be made directing a summary trial thereof. Where such an issue is raised, the party alleged to be in default, may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, said court shall make an order referring the issue or issues to a jury called and impaneled in the manner provided for the trial of actions at law * * *"

In answer to the contention so made, Downer argues that section 1282 is not controlling in that its petition alleged the completion of the work contemplated by the joint venture agreements, the submission of conflicting claims by both parties, Downer's demand that Union proceed to arbitrate, the appointment by each party of an arbitrator, the inability of the two arbitrators so appointed to agree upon the matters to be arbitrated, their inability to agree upon a third arbitrator, and the request that the court appoint a third arbitrator as provided in section 1283 of the Code of Civil Procedure. That section reads in part as follows:

> "* * * [I]f a method be provided and any party thereto shall fail to avail himself of such method, or for any reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, or in the failure or refusal of any arbitrator or arbitrators or umpire to attend or fulfill his or their duties, then, upon application by either party to the controversy, the court mentioned in section 1282 of this code shall designate and appoint an arbitrator or arbitrators, or umpire, as the case may require * * *."

From an examination of the pertinent portions of the two sections, it appears that section 1282 relates to and concerns only the acts of the parties prior to the commencement of the arbitration proceedings. If, however, as here, arbitration proceedings have been commenced and there has been a failure to appoint a third arbitrator, then the provisions of 1283 apply. Here the trial court was cognizant of the difference in the situations contemplated by the two sections when at the conclusion of the hearing upon plaintiff's petition it observed, "The petition contains certain allegations within the provisions of Section 1283. There are other matters alleged in the reply. My view of the issues raised in the reply is that the grounds therein stated do not simply on the face raise any issues under the provisions of Section 1282, the Section that gives a right to a trial by jury. 'The making of the agreement' is not an issue. 'The failure to comply therewith.' The only failure to comply therewith that I can find in the pleadings and under the evidence is the failure to name the third arbitrator, an issue under Section 1283."

We are in complete agreement with that statement. Neither Union nor Downer was in default since each had already appointed its arbitrator, and the two so appointed had commenced their arbitration pursuant to the agreement. Hence the only issue which was before the court was that there had been a failure to agree upon the third arbitrator. It follows that Union's demand for a jury trial was quite properly refused by the trial court.

[5] Union next contends that the award must be vacated since the arbitrators exceeded their powers in determining claims as to breach of other contracts and in awarding interest and fixing their own fees. The essence of the argument in support of this contention by Union's counsel is but a restatement of his argument in support of his first contention; that is, the meaning of the arbitration paragraph. If, as we held in regard to that question, the arbitrators were authorized to determine any matter arising out of the joint venture agreements, then it would necessarily follow that they quite properly considered the interest due Downer, since Union held all of the bonds from the issuance thereof, and the costs and expenses of the arbitration and fees of the arbitrators were necessarily a part of the duties contemplated by the arbitration provision.

[6] Union further contends that the arbitrators were guilty of misconduct in refusing to postpone the meeting of July 14 at which the award was signed by Mr. Macomber and Mr. McGilvray in the absence of Mr. Clausen. However, as Downer points out, the meeting on July 14 was not a hearing as contemplated by subsection (c) of section 1288, Code of Civil Procedure, but a meeting to execute the formal award.

[7–9] Finally Union attacks the sufficiency of the evidence and charges miscalculation of the arbitrators. However, it is the rule that,

> "* * * [T]he superior court upon motion to confirm, and this court on appeal, has no power to review the

sufficiency of the evidence to sustain the award, and in fact the evidence produced before the arbitrator is not even made a part of the record on appeal. Under the 1927 statute, it is well settled that both before the superior and appellate courts every intendment of validity must be given the award and that the burden is upon the one claiming error to support his contention. * * * It has been held that the arbitrator need not make findings or give reasons for his conclusions. * * * Certainly it is settled that the courts have no power to review the sufficiency of the evidence. [Citations.] The law is not quite so clear as to a court's powers of review over questions of law. The earlier cases held that the court had the power to review errors of law, at least where they appeared upon the face of the award. [Citations.] The later cases have gone much farther in granting finality to the award even as to questions of law. In Pacific Vegetable Oil Corp. v. C. S. T., Ltd., 29 Cal.2d 228, 233, 174 P.2d 441, it was bluntly held that 'The merits of the controversy between the parties are not subject to judicial review.' * * * 'Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action.' [Citing cases.] * * *.

"Under these cases it must be held that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute." Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d 156, 185–186, 260 P.2d 156, 171.

Therefore since every intendment is in favor of the validity of the award, the burden is upon the one claiming error to sustain his contention. Under the facts and circumstances disclosed by the record before this court, it cannot be said that Union has sustained the burden so cast upon it.

The order and judgment are affirmed.

VAN DYKE, P. J., and McMURRAY, J. pro tem., concur.

146 Cal.App.2d 744

The PEOPLE of the State of Califorina, Plaintiff and Respondent,
v.
Charles M. HEAD, Defendant and Appellant.
Cr. 1114.

District Court of Appeal, Fourth District, California.

Dec. 12, 1956.

Rehearing Denied Dec. 21, 1956.

Hearing Denied Jan. 7, 1957.

Defendant was convicted of permitting his wife to remain in a house of prostitution. The Superior Court of San Bernardino County, Martin J. Coughlin, J., entered judgment, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence sustained conviction.

Judgment affirmed.

1. Prostitution 🔑4

Evidence sustained conviction of defendant for permitting his wife to remain in a house of prostitution. West's Ann.Pen. Code, § 266g.

2. Prostitution 🔑1

"Prostitution" is the common, indiscriminate, illicit intercourse of a woman for hire. West's Ann.Pen.Code, § 266g.

See publication Words and Phrases, for other judicial constructions and definitions of "Prostitution".

3. Prostitution ⚿1

A "house of prostitution" within meaning of statute making it an offense for a defendant to permit his wife to remain in a "house of prostitution" is one in which a prostitute plies her trade. West's Ann. Pen.Code, § 266g.

See publication Words and Phrases, for other judicial constructions and definitions of "House of Prostitution".

4. Prostitution ⚿1

A "prostitute" is a woman who offers herself indiscriminately to sexual intercourse for hire. West's Ann.Pen.Code, § 266g.

See publication Words and Phrases, for other judicial constructions and definitions of "Prostitute".

5. Prostitution ⚿4

In prosecution of defendant for permitting his wife to remain in a house of prostitution, consent of defendant could be inferred from evidence of his failure to object to his wife's activities as a prostitute. West's Ann.Pen.Code, § 266g.

6. Prostitution ⚿4

In prosecution of defendant for permitting his alleged wife to remain in a house of prostitution, evidence was sufficient to establish that defendant was legally married to his alleged wife. West's Ann.Pen.Code, § 266g.

7. Criminal Law ⚿558

A trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it.

8. Prostitution ⚿1

Where husband actively participated in maintaining residence involved as a house of prostitution, and he procured customers, conducted them to the place, and evidently shared in proceeds obtained by his wife from prostitution conducted therein, he could be convicted of permitting his wife to remain in a "house of prostitution," though it was their residence. West's Ann.Pen.Code, § 266g; West's Ann.Civ. Code, § 157.

9. Criminal Law ⚿810

In prosecution of defendant for permitting his wife to remain in a house of prostitution, instruction that if defendant's wife resorted to acts of prostitution in their residence without knowledge of defendant, jury should acquit defendant, and instruction that if jury found that defendant's wife was in a house of prostitution, defendant could avoid the penalty of the law by showing that he had in good faith used all lawful means to cause the removal of his wife from the house of prostitution, or, that he was anxious to have her leave and tried in all reasonable ways to induce her to do so, were not conflicting. West's Ann.Pen. Code, § 266g.

10. Criminal Law ⚿781(2)

In prosecution of defendant for permitting his wife to remain in a house of prostitution, wherein there was evidence that when defendant was arrested he stated to officer that he knew that he had done wrong and had been caught doing so, trial court properly instructed jury concerning confession or admission concerning crime. West's Ann.Pen.Code, § 266g.

11. Criminal Law ⚿1131(4)

Where defendant made no motion for a new trial, and there was therefore no order denying motion for new trial, attempted appeal from order denying motion for new trial would be dismissed.

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George H. Sullivan and Julien R. Bauer, San Francisco, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Defendant was charged with the crime of permitting his wife to remain in a house of prostitution (Violation of Penal Code, § 266g). The information further alleged that defendant had twice previously been convicted of felonies, to wit, the crimes of robbery and larceny from person and that he had served terms of imprisonment in state prisons for said convictions. A jury returned a verdict finding him guilty of the crime of permitting his wife to remain in a house of prostitution, as charged in the information, and he was sentenced to imprisonment in the state prison for the term prescribed by law. Defendant admitted the two prior felony convictions, as alleged, and appeals from the judgment of conviction.

Defendant owned and operated a shoe shining stand in Barstow, in San Bernardino county, and was also employed as a janitor. He and his wife, Clara, lived in a two room house in an area known as "River Bottom". On May 14, 1955, at about 2:00 a. m., one John Bevard, a member of the military police, dressed in civilian clothes, met the defendant in front of the Jack Frost Cafe, near the defendant's house. Defendant asked Bevard if "he wanted to get with it for the night." Bevard indicated that he did not particularly care and, after further conversation, Bevard walked with defendant to defendant's house, nearby, and as they went past, the defendant knocked on the side of the cabin and asked if the room was empty. Bevard heard a woman inside reply but did not know what she said. The two men then went around in back into a small closed-in porch, sat down and started "talking over the price." A dog started barking outside and defendant jumped up, turned the light off, opened the door into the front room of the house, and yelled that the police were outside. Defendant shoved Bevard into the front room, where defendant's wife was "getting dressed" and a man, named Stewart, was putting on his trousers. Defendant ordered Stewart to get under the bed, pushed Bevard down on the bed and told him to lie there as if he were asleep. Two deputies from the sheriff's office, Webb and Moore, then knocked on the door and, when no one answered, they forced it open and entered. Defendant's wife was dressed at that time and Stewart was under the bed. Defendant said, "This is my home and this is my wife; what are you doing here?" The defendant was then taken to the police station.

Officer Webb testified that he told the defendant he had heard rumors that the defendant had said he could do anything he wanted because they were too dumb to catch him; that when asked if he had made such a statement, defendant said, "Well, let's stop harping on it, I know I done wrong and I got caught. I am not mad." Webb further testified that for three or four evenings before the morning of the arrest they had that cabin under observation and had observed the premises with a pair of seven fifty coated lens night glasses; that on the three nights immediately before the night of the 13th of May, he had seen Charles Head; that Head was seen standing in front of the Jack Frost Cafe four or five times and was observed approaching Marines and soldiers, talking to them and taking them to his house; that he had seen approximately 10 men going with Head to this house.

Officer Moore testified that when he entered defendant's house, he got defendant's wife out of bed; that she was lying on the bed in the small room, fully clothed, and with her face to the wall, "like she was asleep"; that he took the defendant and his wife outside and later returned to the room, where he found Stewart under the bed; that he heard officer Webb talking to the defendant at the police station and heard the defendant say, "Yeah, I got caught. I am not mad at you guys. I wish I had a half a dozen girls down there."

The defendant, when arrested, had approximately $150 on his person and an additional $200 in bills, which, he testified, he had in his shoe. When he was asked about it, he said he got it shining shoes.

Stewart testified that in the early morning hours of May 14th he was in the vicinity known as the "River Bottom" and had been drinking at the cafe; that he started home in his car at about 2:00 a. m. and that as he drove along the street, a colored lady "hollered" at him and he stopped his car; that he went with the woman into the house and gave her $4.00; that she was then fully dressed and that she partially disrobed after receiving the money; that he heard a voice saying "Is the room vacant or open?"; that the lady said, "Just a minute", and closed the door; that he heard voices coming from the other room and the officers entered; that he had gotten under the bed because he was ashamed and embarrassed.

A member of the Marine Corps at Barstow, identified People's exhibit four (a photograph of defendant's wife) as a picture of the woman with whom he had intercourse in the early part of May, 1955. He testified that he had given her $5.00 and identified the defendant's residence as the place where the act of intercourse had taken place. Two other Marines testified as to similar acts with the defendant's wife, consummated at the same house during May, 1955, and each testified that he paid defendant's wife the sum of $5.00.

A certified copy of a marriage certificate, showing the marriage of the defendant to Clara Luzetta Durant (the woman living with defendant at the time of his arrest), was received in evidence as proof of defendant's marriage to her on June 23, 1952.

The defendant testified that on May 14, 1955, he owned and operated a shoe shining stand in Barstow; that the shack shown in People's exhibit two was where he was staying at the time and that People's exhibit four was a photograph of the woman who was staying with him; that he did not know of the prostitution activities of Mrs. Head; that he and his wife had been on the "outs" and that he had stayed in one room of the house, while she stayed in the other; that he met his wife in 1950 in Texas; that she was then living with a man named Young and that he did not know whether Young had obtained a divorce from her or not. He admitted that he had married Clara, as shown by the certified copy of the marriage certificate in evidence, and admitted meeting the witness Bevard on the morning of May 14th. He stated that as they went by the house involved, he (Head) tapped on the window and asked if anybody was home. He testified that they then went into the house, that a dog started to bark, and he saw two officers outside, and that he did not know that the witness Stewart was in the house.

[1] The foregoing evidence amply supports the verdict of the jury finding the defendant guilty of the crime of permitting his wife to remain in a house of prostitution, as alleged.

[2-4] Prostitution is defined to be the common, indiscriminate, illicit intercourse of a woman for hire, and a house of prostitution is one in which the prostitute plies her trade. People v. Mitchell, 91 Cal.App.2d 214, 217, 205 P.2d 101. A prostitute is a woman who offers herself indiscriminately to sexual intercourse for hire. People v. Phillips, 70 Cal.App.2d 449, 452, 160 P.2d 872.

[5] There was substantial evidence that Clara Head was the wife of the defendant. This was shown by a certified copy of the marriage certificate, by the statements of the defendant to the officers that she was his wife, and by his testimony at the trial. There was competent testimony that defendant's wife committed indiscriminate and illicit acts of intercourse on the premises involved. The evidence shows that the defendant not only knew of the activities which were being carried on by his wife in the house, but that he actively engaged in assisting her by procuring customers for her and warning her of the police officers. Moreover, his consent may be inferred from the evidence of his failure to object to his wife's activities. People v. Bosquet, 116 Cal. 75, 78, 47 P. 879.

[6] Defendant first contends that the conviction must be reversed because he claims that the proof shows that the defendant was not legally married. This contention has no merit. The proof relied upon in this connection consisted of the testimony of the defendant that Clara and one Herman Young were living together in Texas and held themselves out to be married; that she was known as Mrs. Young; that she introduced herself as Mrs. Young, and Mr. Young introduced her as Mrs. Young, and that she and Young resided together as husband and wife. Appellant

argues that this evidence was not contradicted and was sufficient to prove that a common law marriage existed under the law of Texas. In this connection he cites In re Estate of McKanna, 106 Cal.App.2d 126, 129, 234 P.2d 673, 675, where it is pointed out that a common law marriage is valid in Texas and that there are but three essentials therefor; the first being a mutual consent which "need not be expressed or evidenced by any particular form of words"; the second being that "the parties cohabit together as man and wife"; and the third that "the parties publicly hold themselves out as man and wife"; that under the evidence and the authority of People v. Mock Yick Gar, 14 Cal.App. 334, 111 P. 1039, a conviction for violation of section 266g of the Penal Code could not be sustained. In that case the judgment of conviction under Penal Code, § 266g was reversed where the uncontradicted testimony of the defendant and his uncle was that the defendant had previously been married to a Chinese woman in China in 1897; that they had lived together as husband and wife; and that a child was born to them; that the woman was still living; that he had never been divorced from her, and since his return to the United States he had sent her support all the time; that ever since the ceremony was performed he had treated her as his lawful wife. In a concurring opinion, Presiding Justice Cooper stated that in his opinion the testimony of the prosecutrix was such that it was extremely doubtful if it would support the verdict. However, in the instant case the only testimony relied upon by appellant in support of his contention is his own, and the jury was not bound to believe it. His credibility was impeached by proof of his two prior felony convictions; by his testimony that he lived with Clara as man and wife; that she represented herself as Mrs. Head and he introduced her to persons in the community as Mrs. Head. It further appears that when the officers entered defendant's house on May 14, 1955, his first words were "This is my home and this is my wife; what are you doing here." It also appears from the certificate of marriage in evidence that the defendant was not then claiming that Clara was married to Young.

In People v. Menne, 4 Cal.App.2d 91, 107, 41 P.2d 383, 390, the court said:

> "It is further contended that the testimony of the defendant in the particulars where it was uncontradicted, should have been accepted by the jury as a truthful statement of the facts, basing the argument upon the case of People v. Mock Yick Gar, 14 Cal.App. 334, 111 P. 1039. In making this contention appellant overlooks or disregards the testimony to the effect that the reputation of the defendant was such as to render his statements unworthy of belief. In the face of such testimony it was within the province of the jury to determine what credence should be given to the testimony of the defendant, and whether they should accept as truthful any part of his testimony."

[7] And as is said in Lohman v. Lohman, 29 Cal.2d 144, 149, 173 P.2d 657, 660: "* * * a trial judge is not required to accept as true the sworn testimony of a witness, even in the absence of evidence directly contradicting it * * *."

In the instant case we cannot say as a matter of law that the testimony of the defendant was uncontradicted and it clearly appears that there were substantial reasons to support its rejection by the jury.

[8] The next contention of appellant is that where a wife engages in acts of prostitution in the residence occupied by her and her husband, the husband cannot be convicted of allowing or permitting his wife to remain in a house of prostitution. In this connection appellant cites section 157 of the Civil Code, which provides that "Neither husband nor wife has any interest in the property of the other, but neither can be excluded from the other's dwelling." Appellant argues that he could not exclude his wife from their family residence even though she may have engaged in acts of

prostitution there, with or without his consent. However, appellant overlooks the evidence that he actively participated in maintaining the house involved as a house of prostitution. He procured customers, conducted them to the place, and evidently shared in the proceeds obtained from the illicit business conducted therein.

[9] The trial court instructed the jury that neither a husband nor wife can be excluded from the other's dwelling and that "if you find from the evidence that the defendant and Clara Head were husband and wife and were the sole occupants of the same, and that the wife resorted to acts of prostitution therein without the knowledge of the defendant husband, you should acquit the defendant." The defendant testified that when he found out about Clara's activities in the house with another girl and three or four soldiers, "I snatched her out of there and I whupped her about it." In this connection the court instructed the jury as follows: "In the event you find that Clara Head was defendant's wife and that she was in a house of prostitution, the defendant may avoid the penalty of the law by showing that he has in good faith used all lawful means to cause the removal of his wife from the house of prostitution, or, that he was anxious to have her leave and tried in all reasonable ways to induce her to do so." Appellant contends that these instructions were confusing in that "On the one hand the court instructed the jury that the defendant could be acquitted if he tried to evict his wife from their residence, and on the other hand instructed the jury that he could not do so." We are not in accord with this contention. There is no apparent conflict in the criticized instructions, for the jury was instructed concerning eviction from a residence by one spouse, and it was also told that the defendant could avoid the penalty of the law if he used in good faith all lawful means to have her leave and tried in all reasonable ways to induce her to do so. It is clear that the instructions do not constitute "a direction to return a verdict of guilty" as is contended by the appellant.

[10] Finally, it is argued that "Where defendant has made no confession or admissions concerning the crime with which he is charged, it is reversible error for the trial court to instruct the jury that a confession or admissions have been made." This contention is likewise without merit. The trial court told the jury that "Evidence has been received in this case *tending* to show that on another occasion other than this trial the defendant made a statement *tending* to prove his guilt of the alleged crime for which he is on trial." (Italics ours.) The court then instructed the jury that such a statement might be either a confession or admission and proceeded to define both. In this connection the court further instructed the jury that "The law of this state admonishes you to view with caution the testimony of any witness which purports to relate an oral admission of the defendant or an oral confession by him." These instructions were proper as there was testimony of statements tending to show guilt made to the witness Bevard and to the officers who made the arrest. Defendant stated to officer Webb that he knew he had done wrong and got caught and made the following statement to officer Moore: "Yes, I got caught. I am not mad at you guys. I wish I had a half a dozen girls down there." We conclude that there was ample evidence of the guilt of defendant to support the judgment and that the court did not err in instructing the jury.

[11] Defendant states in his notice that he appeals from the order denying his motion for a new trial. However, such a motion was not made and there was, therefore, no order denying his motion. The attempted appeal therefrom is therefore dismissed.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

147 Cal.App.2d 28

Rolf HAGEN, Plaintiff and Respondent,
v.
A. M. SHERMAN, etc., et al., Defendants,
A. M. Sherman, Defendant and Appellant.
Civ. 16989.

District Court of Appeal, First District,
Division 1, California.
Dec. 18, 1956.

Action for breach of a contract for sale of a crane to plaintiff. From a judgment of the Superior Court, Alameda County, A. T. Shine, J., for plaintiff, defendant appealed. The District Court of Appeal, Bray, J., held that evidence did not disclose, as a matter of law, that plaintiff agreed to defendant's rescission of contract, and was sufficient to support trial court's implied finding that defendant made no unilateral mistake of fact and court's findings that difference between contract price and reasonable market value of crane at time of execution of contract was $2,500 and that crane was worth $4,250.

Judgment affirmed.

1. Appeal and Error 🔑110

No appeal lies from an order denying a new trial.

2. Appeal and Error 🔑931(1)

On defendant's appeal from judgment for plaintiff, District Court of Appeal must state evidence and reasonable inferences therefrom most favorably to plaintiff.

3. Appeal and Error 🔑889(2)

Failure of defendant in action for breach of contract to plead defense of mutual rescission of contract is unimportant on appeal from judgment for plaintiff, where transcript shows that such rescission was treated as issue in case without objection.

4. Appeal and Error 🔑1010(1)

Whether a contract has been cancelled, rescinded or abandoned is mixed question of law and fact for trial court, whose finding thereon will be upheld on appeal, if supported by substantial evidence.

5. Sales 🔑420

In action for breach of contract for sale of crane to plaintiff, evidence did not disclose as matter of law that plaintiff agreed to defendant's rescission of contract.

6. Sales 🔑422

In action for breach of contract for sale of crane to plaintiff, trial court's finding that defendant failed and refused to perform his part of contract was sufficient to constitute implied finding that there was no unilateral mistake of fact by defendant, in absence of pleading of such mistake and request for finding on subject. West's Ann. Civ.Code, § 1689, subd. 1.

7. Sales 🔑52(5)

In action for breach of contract for sale of crane to plaintiff, evidence supported trial court's implied finding that defendant changed his mind about selling crane and made no unilateral mistake of fact. West's Ann.Civ.Code, § 1689, subd. 1.

8. Evidence 🔑571(7)

In action for breach of contract for sale of crane to plaintiff, plaintiff's expert witness' testimony on cross-examination that reasonable market value of crane was around $5,000 when contract was made was sufficient to support trial court's finding that difference between contract price of $1,750 and reasonable market value of crane at such time was $2,500.

9. Evidence 🔑474(19)

In action for breach of contract for sale of crane to plaintiff, plaintiff, as owner of crane, was entitled to testify as to reasonable market value thereof in his opinion.

10. Sales 🔑417

In action for breach of contract for sale of crane to plaintiff, evidence was sufficient to support trial court's finding that crane was worth $4,250.

Smith & Parrish, Edwin A. Clancy, Jr., Oakland, for appellant.

Barbagelata, Zief & Carmazzi, Robert D. Barbagelata, Rinaldo A. Carmazzi, San Francisco, for respondent.

BRAY, Justice.

[1] Three questions are raised by this appeal by defendant from a judgment in favor of plaintiff in the sum of $2,500.[1] They are: (1) Was the contract rescinded by mutual consent? (2) Was it rescinded by defendant for unilateral mistake? (3) Does the evidence support the award of damages?

[2] Evidence.[2]

Defendant owned a war surplus crane. In early November, 1953, plaintiff saw it in defendant's yard. There were some negotiations then between the parties concerning its purchase without a bucket by plaintiff. He testified that he had agreed to buy it for $800 or $900 but that when he went to arrange for payment defendant informed him it had been sold. Defendant's version was that plaintiff offered him $800 for the crane and defendant refused the offer. Later an oral agreement was entered into between the parties for the purchase of the crane plus a clamshell bucket by plaintiff for $1,750. November 17th, plaintiff gave defendant a check for $1,802.50 (the purchase price plus tax). The same day defendant gave plaintiff a sales slip or "invoice" describing the crane, giving the terms as "cash" showing the charge of $1,802.50 and marked "Paid by check No. 1." Plaintiff then understood that the crane became his. The next day plaintiff arranged with a draying company to move the crane to his residence. The following morning defendant phoned plaintiff and told him that the crane had been sold by defendant's brother to another person and that plaintiff should come to defendant's office and pick up his check. Defendant refused to tell plaintiff to whom the crane was sold.[3] Plaintiff told defendant that he would come to see defendant. Defendant testified that when plaintiff offered him a check defendant said "That changes the deal altogether" as defendant considered it was no deal until defendant received the cash. Plaintiff assured him the check was good and then defendant said "* * * what can I lose. I still have the crane." Defendant testified that when he told plaintiff about the alleged sale by the brother plaintiff said he would be down to see defendant. Plaintiff went to defendant's office twice thereafter and left word for defendant to phone plaintiff, as defendant was not there. About a month after the sale to plaintiff, plaintiff stopped payment on the check. The crane is still in defendant's possession.

Plaintiff sued for breach of contract. Defendant denied the material allegations of the complaint and set up as a special defense that the contract was executed without any consideration. The court found against the special defense and in favor of plaintiff on the allegations of the complaint, awarding however, $2,500 as the difference between the contract price and the reasonable market value of the crane, instead of $12,500 asked for in the complaint as being the cost of procuring a similar crane and loss of profits.

1. Mutual Rescission.

[3] Defendant contends that the evidence discloses that, as a matter of law, plaintiff agreed to defendant's rescission of the contract. While the defense of mutual rescission is not pleaded, an examination of the transcript shows that without objection that theory was treated as an issue in the case. Therefore the failure to plead it is not important. See Malinow v. Doren-

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[1] Defendant also purports to appeal from the order denying new trial. As no appeal lies therefrom, the purported appeal will have to be dismissed.

[2] Primarily, as we are required to do, we are stating the evidence, and the reasonable inferences therefrom, most favorable to plaintiff.

[3] Defendant testified that his brother informed him he had sold the crane the morning of the 17th. (The sale to plaintiff was in the afternoon.) Defendant went to Texas shortly after phoning plaintiff. On his return he learned that the sale by the brother had not been consummated, that there actually never was a sale.

baum, 51 Cal.App.2d 645, 653, 125 P.2d 554. There was no finding made upon the specific issue of rescission. None was requested. From the tenor of the findings as a whole it must necessarily be implied that the court found that no rescission existed. See Schultz v. Los Angeles Dons, Inc., 1951, 107 Cal.App.2d 718, 724–725, 238 P.2d 73.

[4, 5] "The question of whether a contract has been cancelled, rescinded or abandoned is a mixed question of law and fact [citations], which is addressed to the trial court [citations] and the finding of the trial court will be upheld if it is supported by substantial evidence." Ross v. Frank W. Dunne Co., 119 Cal.App.2d 690, 698–699, 260 P.2d 104, 108–109; see also Kane v. Sklar, 122 Cal.App.2d 480, 482, 265 P.2d 29. In this case there was conflicting evidence, particularly the reasonable inferences to be drawn therefrom, upon this issue. Plaintiff's version was that when informed by defendant that the crane had already been sold plaintiff stated that he would come to see defendant. He did not ask for his check back. He did go to defendant's office on two occasions but as defendant was away he was unable to see him. The crane, or a substantial portion of it, was gone from defendant's place. Bearing in mind that plaintiff believed that on a previous occasion defendant had reneged on a sale to him of the crane, we see nothing inconsistent in his waiting for an opportunity to discuss with defendant the matter of the second refusal to deliver the crane. While plaintiff's actions might have supported a conclusion that he consented to a rescission or abandonment of the contract, such conclusion is not the only reasonable one which could be drawn. Applicable here is the following from Ross v. Frank W. Dunne Co., supra, 119 Cal.App.2d at page 699, 260 P.2d at page 109: "* * * the record shows that the parties did terminate their dealings, but respondent did so only because appellant failed and refused to live up to the agreement. This does not appear to amount to a mutual cancellation, rescission or abandonment."

McCreary v. Mercury Lumber Distributors, 124 Cal.App.2d 477, 268 P.2d 762, cited by defendant, differs from our case in that there the acquiescence in the abandonment of the contract was shown by a number of acts including negotiations for a new contract.

2. Unilateral Mistake.

[6, 7] Defendant contends that even though plaintiff did not consent to the attempted rescission, defendant was entitled to rescind upon the ground of unilateral mistake. Civ.Code, § 1689, subd. (1); M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 701, 235 P.2d 7. Here again this issue was not pleaded nor were findings on the subject asked. However, the transcript shows that the issue was presented at the trial. The court found that defendant "failed and refused to perform his part of the said contract." While not specifically a finding that there was no unilateral mistake, it is sufficient in the absence of a pleading and request for a finding on the subject, to constitute an implied finding to that effect. It is obvious that the court rejected defendant's testimony both as to the rescission and as to the alleged mistake. The evidence of a prior sale by the brother is very flimsy indeed. He took no order for the sale and received no deposit. The brother's testimony was that after showing the crane to the third person the brother "*assumed* * * * that he was about to purchase the crane, and I informed him [defendant] that I *thought* I had it sold." (Emphasis added.) The nebulous character of this alleged sale which admittedly was never consummated as testified to by both defendant and his brother, would support a conclusion that, just as happened on a prior occasion, defendant changed his mind about selling the crane to plaintiff and that there was no mistake of fact made by him.

3. Damages.

[8] Defendant contends that there is no evidence to support the court's finding that the difference in the value between the contract price of the crane and the reasonable

market value at the time of the execution of the contract was $2,500. (Defendant's evidence was that it was not worth more than the contract price, if it even was worth that much.)

Plaintiff called one Enge who admitted that he was a reluctant witness. No attack is made upon his competency as an expert witness on the value of cranes. Disregarding his testimony on direct examination in which he admitted that he had told plaintiff that sight unseen, a crane of that type was worth $2,500 for junk value, as defendant claims we must, see People v. Newson, 37 Cal.2d 34, 230 P.2d 618; Bassett v. Crisp, 113 Cal.App.2d 295, 248 P.2d 171, on cross-examination he testified that the crane's reasonable market value in November, 1953, was around $5,000. In spite of defendant's contention that the witness might have thought he was answering some other question, a reading of the transcript leaves no room for such interpretation, particularly in view of his testimony that his firm had purchased a similar type crane without bucket for around $4,500. This answer alone (and nowhere did he make any contrary answer) would support the court's finding.

[9, 10] Plaintiff, whose vocation was that of a probation officer, testified without objection that for some time he had been looking around for cranes of this type and got an idea of what cranes were selling for, and found that they cost $7,000 or $8,000. Plaintiff's counsel asked plaintiff, after he had told him what investigation he had made of cranes and their prices, if he felt that he could tell the reasonable market value of the crane. Defendant objected to the question as calling for the opinion and conclusion of the witness. The court overruled the objection. Then plaintiff's counsel stated: "I think he is qualified, Your Honor. He saw many people and they told him about—". Defendant's counsel immediately said "He said he could answer it. All right. So, go ahead." The witness said "Yes." Thereupon he was asked and gave his opinion as to the reasonable market value of the crane being $7,000. As owner he was entitled to give his opinion. See People v. Jones, 67 Cal.App.2d 531, 537, 155 P.2d 71; Spring Valley Water-Works v. Drinkhouse, 92 Cal. 528, 28 P. 681. Even without this answer, it is obvious that there was substantial evidence that the crane was worth the $4,250 value the court found.

Appeal from order denying new trial dismissed. Judgment affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

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146 Cal.App.2d 850

Lester H. FLETCHER, Plaintiff and Appellant,

v.

Curtis Aaron PIERCEALL, Defendant and Respondent.

Civ. 16946.

District Court of Appeal, First District, Division 1, California.

Dec. 17, 1956.

Rehearing Denied Jan. 16, 1957.

Hearing Denied Feb. 13, 1957.

Action for injuries sustained when automobile in which plaintiff guest was riding was struck from rear by overtaking automobile after automobile in which plaintiff was riding turned off of freeway and slowed down preparatory to letting off passenger. The Superior Court, County of Alameda, Ralph E. Hoyt, J., entered judgment on verdict for defendant and plaintiff appealed. The District Court of Appeal, Peters, P. J., held that evidence as to whether defendant was negligent and whether his negligence was proximate cause of the accident was sufficient to present questions for jury.

Judgment affirmed.

1. Automobiles 🔑245(15, 60)

In action against following motorist by guest for injuries sustained when automobile in which guest was riding was struck from rear after turning off freeway and slowing down with intention of stopping to let out passenger, evidence as to whether the following motorist was negligent and whether such negligence proximately contributed to accident were factual questions for jury. West's Ann.Vehicle Code, § 510.

2. Trial ⚷260(1)

Giving of general instruction which covers the subject in an abstract way does not justify refusal of a requested specific instruction on the subject.

3. Trial ⚷260(8)

In action by guest against owner and operator of overtaking automobile for injuries sustained when overtaking automobile struck rear of automobile in which guest was riding, refusal of trial court to give instruction that guest was entitled to verdict if operator of overtaking automobile was negligent and such negligence was found to be proximate cause of accident even though jury also found operator of automobile in which plaintiff was riding was also negligent, was not prejudicial error, where other general instructions adequately instructed jury on the matter.

4. New Trial ⚷82

Surprise, as a ground for motion for new trial, should be looked on with suspicion. West's Ann.Code Civ.Proc., § 657, subd. 3.

5. New Trial ⚷97

Where defendant made motion for new trial on ground that he was surprised by admission of certain testimony, but defendant made no effort to refute such testimony at trial and did not claim surprise at trial or ask for a continuance to check correctness of such testimony, and also made no showing of reasonable diligence in attempting to discover such evidence, trial court did not abuse its discretion in denying motion. West's Ann.Code Civ. Proc., § 657, subds. 3, 4.

6. Appeal and Error ⚷1072

Consideration by trial judge of counter-affidavits filed in opposition to motion for new trial on ground of surprise and newly discovered evidence was not prejudicial error even though filed later than the 10 day statutory period set for such filing, where counter-affidavits contained nothing additional to what trial judge already knew. West's Ann.Code Civ.Proc., § 659a.

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Robert Cramer and Harry Gonick, Oakland, for appellant.

Berry, Davis & Channell, Oakland, for respondent.

PETERS, Presiding Justice.

Plaintiff brought this action against defendant Pierceall to recover damages for personal injuries sustained when the car in which plaintiff was riding as a guest was hit from the rear by a car driven by Pierceall. The jury brought in a verdict in favor of defendant. From the judgment based on that verdict plaintiff appeals.

The accident happened on August 27, 1953, between 4 and 5 p. m. in the vicinity of where the 98th Avenue overpass crosses over the Eastshore Freeway in Oakland. The freeway runs east and west, has two traffic lanes in each direction, and down the middle of the freeway is a dirt strip. At 98th Avenue there is an overpass. East of the overpass, and continuing west of it, there is an asphalt turnout, which permits cars traveling west on the freeway to turn in an arc onto the overpass. The two cars came into collision about 40 feet east of the overpass and on the turnout lane.

[1] The major contention of plaintiff is that the evidence of defendant demonstrates, as a matter of law, that defendant was negligent, and that his negligence was at least one of the proximate causes of the accident. Defendant admitted that he was familiar with the area and considered it one of comparative danger.

The plaintiff was riding as the guest of one Horn in a Plymouth, proceeding west on the freeway. The defendant was also proceeding west on the freeway, following the Plymouth. In his deposition, defendant testified that he was proceeding about 45 miles an hour when he first observed the Plymouth in front of him, but at the trial testified that at such point he was going 25 to 35 miles per hour. When he struck the Plymouth it was in the turnout lane and slowed down, in anticipation of stopping. Admittedly, Horn had turned into the turnout lane, intending to stop to permit one of his passengers, other than plaintiff, to get off, then intending to continue west on the freeway.

Defendant testified that he first saw the Plymouth in front of him when he, the defendant, turned into the turnout lane; that he observed that he was rapidly gaining on it; that before turning into the turnout lane he took his foot off the accelerator and placed it on the brake; that when he turned into the turnout lane the Plymouth was about 30 feet in front of him; that he thought the Plymouth was turning off the freeway preparatory to going on the overpass; that he had no idea it intended to stop; that some 65 feet after he first saw the Plymouth he saw that car's red lights go on and he immediately applied his brakes, but was unable to avoid the collision.

Admittedly, after the accident, defendant pleaded guilty to a charge of violating section 510 of the Vehicle Code, the basic speed law. He testified at the present trial that he thus pleaded guilty in ignorance of the fact that he was charged with speeding, believing he was charged simply with hitting the Plymouth.

Defendant testified that for some time before he turned off the freeway he noted that he was followed by a Buick that was weaving from side to side, as if the driver were drunk, and gradually gaining on him; that while the automobiles involved were all on the freeway there was another car between him and the Plymouth which cut off his view of the Plymouth, and of any arm signals given by Horn; that when he turned off the freeway into the turnout lane the Buick was just opposite him and still weaving; that some 75 feet thereafter he ran into the Plymouth from the rear.

Horn, the driver of the Plymouth, testified that he pulled into the turnout lane intending to discharge one of his passengers, and that, when hit, he had his foot on the brake and his car was coming to a stop; that he had given the arm signal signifying a stop, and had slowed down from about 35 miles per hour when he left the freeway to about 10 miles per hour when he was hit; that when he heard the squeal of defendant's brakes he stepped on his own brakes hard; that the turnout was about 10 feet wide at the place of impact.

Defendant's witness O'Shea, an employee of the State Division of Highways, testified that at the time of the accident there were signs reading "No Parking at Any Time" and "Emergency Parking Only" along the freeway in the area of the accident; that two such signs were located in the vicinity of the 98th Avenue turnoff; and that the City of Oakland, by ordinance, had prohibited parking in the general area of the 98th Avenue turnoff.

As already pointed out, the jury came in with a defense verdict. Appellant contends that respondent's negligence was demonstrated by his own testimony, as a matter of law, and that the judgment, therefore, must be reversed.

Appellant has assumed a most heavy burden. The situations in which it can be said that a party was negligent and that such negligence, as a matter of law, contributed to the accident are rare. There are such cases, it is true, but they are not very frequent. Appellant places particular reliance on Gray v. Brinkerhoff, 41 Cal. 2d 180, 258 P.2d 834, where a jury verdict in favor of defendant was reversed on the ground that the evidence showed, as a matter of law, that defendant was negligent and that such negligence proximately contributed to the accident. That was a case where the defendant, without legal cause, ran down the plaintiff pedestrian, who had the right-of-way. The Supreme Court held that, under the facts there involved, there was no evidence of justification for the violation of plaintiff's legal rights. Closer on their facts to the instant case are Lowenthal v. Mortimer, 125 Cal.App.2d 636, 270 P.2d 942, and Turkovich v. Rowland, 106 Cal.App.2d 445, 235 P.2d 123, in both of which the plaintiffs were riding in automobiles that stopped suddenly and the cars driven by defendants that were following them hit the cars in which the plaintiffs were riding from the rear. In both cases the courts held that the questions as to whether the defendants were negligent and whether such negligence proximately contributed to the accident were questions of fact and not of law.

Other cases are cited by the parties. Obviously, the factual situation in one case is seldom identical with that in another. Each case must, of course, be decided on its own facts. In the instant case we think that the question as to whether defendant was negligent, and, if so, whether such negligence proximately contributed to the accident, were factual questions properly left to the jury.

[2, 3] Appellant next complains of the failure of the trial court to give his proffered instruction to the effect that he was entitled to a verdict if respondent was negligent and such negligence was found to be a proximate cause of the accident even though the jury also found "that the operator of the car in which the plaintiff was riding was also negligent, because the negligence of said operator is not imputed to the plaintiff and would not bar a verdict in his favor." This instruction, undoubtedly, stated a correct principle of law, and it is equally clear that appellant was entitled to have the jury informed that he was entitled to recover if respondent was negligent and such negligence contributed to the accident, even though the jury also found the driver of appellant's car was also negligent and such negligence also contributed to the accident. Krupp v. Los Angeles Ry. Corp., 57 Cal.App.2d 695, 135 P.2d 424; Lund v. Pacific Electric Ry. Co., 25 Cal.2d 287, 153 P.2d 705. Thus, it would have been quite proper if the trial court had given the proffered instruction. But that is not the question here presented. The question is whether or not the jury was told that the negligence of Horn, if any, would not bar a judgment against respondent, if the jury found that respondent also was negligent. If so, the fact that this was not done in the language offered by appellant would, of course, be immaterial. In considering this question it is the law that the giving of a general instruction which simply covers the subject in an abstract way does not justify the refusal of a requested specific instruction. Barnett v. Garrison, 93 Cal.App.2d 553, 209 P.2d 426.

In the instant case we think that the jury was told, although not in the language desired by appellant, that the negligence of Horn was not imputed to appellant, and that appellant was entitled to a verdict against respondent if negligence on his part proximately caused, concurred in, or contributed to the accident. The jury was also properly told that appellant was not entitled to recover if Horn's negligence was found to be the sole proximate cause of the accident.

The jury was instructed that, in order to impose liability on respondent, "his negligence must have been *a* proximate cause" of appellant's injury. Proximate cause was then properly defined and the jury told that such cause "is *an* efficient cause—one that necessarily sets in operation the factors that accomplish the injury." Then, immediately thereafter, the jury was told that the law recognizes more than one proximate cause, and that the "acts and omissions of two or more persons may work concurrently as the efficient cause of an injury, and in such case each of the participating acts or omissions is regarded in law as *a* proximate cause." Then the court properly instructed on the legal effect of the violation of provisions of the Vehicle Code, read certain pertinent sections, and concluded this phase of its instructions with the statement that "However, in this action, a violation of law is of no consequence unless it was a proximate cause of, or contributed in some degree as a proximate cause to, an injury found by you to have been suffered by the plaintiff."

After some general instructions the jury was told that "If you believe from the evidence that negligence, if any, on the part of John Horn constituted the sole proximate cause of [appellant's] injury, *without concurring fault on the part of* [*respondent*] *Curtis Pierceall,* then, and in such event, [respondent] Pierceall is not liable herein." Then the jury was directly instructed that if it was found that respondent was negligent and "that such negligence was a *proximate cause* of" the accident a verdict should be brought in in favor of appellant. Then the converse of that instruction was given, that is, that if it should be found that respondent was not negligent or that his negligence, if any, "was not *a* proximate cause" of the accident, then a verdict for respondent should be returned.

The situation thus presented is quite similar to that involved in Lund v. Pacific Electric Ry. Co., 25 Cal.2d 287, 153 P.2d 705. In that case passengers riding in a car sued the driver of a car that ran into them. Defendant's defense, which, unlike the present case was expressly pleaded, was that the accident was caused solely by the negligence of the plaintiff's driver. As in the instant case no express instruction was given to the effect that the negligence of plaintiff's driver was not to be imputed to plaintiff. The Supreme Court was of the opinion that such an instruction should have been given, but held that the failure to give it was not prejudicial error. After summarizing the given instructions, the court concluded that the instructions taken as a whole were not prejudicial because, when so considered, they negatived the theory that the negligence of plaintiffs' driver could be imputed to the plaintiffs. The instructions there involved were very similar to those in the instant case, and, as in that case, it must be held that the required subject matter was adequately covered. This being so, there was no prejudicial error in the failure to give the specific instruction requested by appellant.

The other claimed errors in the instructions do not require discussion. Any minor errors there appearing could not possibly have been prejudicial.

The last major contention of appellant is that the trial court erred in denying the motion for a new trial on the ground of surprise and newly-discovered evidence. As already pointed out, Jerry O'Shea, district traffic engineer for the State Division of Highways, testified as an expert for respondent. He testified that on the day of the accident the freeway where the accident occurred was signposted with "No Parking at Anytime," and "Emergency Parking Only" signs, and that the city of Oakland had passed an ordinance prohibiting freeway parking in the area in question. On motion for a new trial the witness averred that "on August 27, 1953, [the date of the accident] there were no signs posted on said portion of the Eastshore Freeway restricting or affecting parking * * * that I have been able to find no special order or regulation, nor do I know of any special order or regulation, which restricted or affected parking on said portion of the Eastshore Freeway as of August 27, 1953."

Thus, quite apparently, this witness discovered, after he had testified, that the ordinance and no parking regulations were not in effect on the date of the accident and that the area was not then signposted. Appellant claims that at the trial he was surprised by O'Shea's testimony, and that, considering the official status of O'Shea, no reasonable man could have doubted the testimony or would have challenged it. Thus, at the trial, he made no effort to refute such testimony. Admittedly, appellant made no claim of surprise at the trial, nor did he ask for a continuance to check the correctness of such testimony. Admittedly, some time after the accident, appellant's counsel took pictures of the scene of the accident and such pictures showed no signs in the area. Appellant states, in his closing brief, that "they were convinced that their photographs taken much later than the day of the accident were in error."

The question is, was the court required, as a matter of law, to grant the new trial on O'Shea's affidavit? In deciding this question cases affirming an order granting a new trial, such as Celli v. French, 107 Cal.App.2d 599, 237 P.2d 536, cited by appellant, are not in point. We are interested only in cases where the motion was made on the grounds here involved and was denied, and the appellate court reversed. We have been referred to no such cases. On the other hand, in Kauffman v. De Mutiis, 31 Cal.2d 429, 189 P.2d 271, the Supreme Court reversed an order granting a new trial on the ground of surprise. The court there quoted authorities to the effect that "the 'right to a new trial on the ground of surprise is waived if, when the surprise is discovered, it is not made known to the court, and no motion is made for a mistrial or continuance of the cause.' " 31 Cal.2d at page 432, 189 P.2d at page 273.

[4] In addition, it must be remembered that the statutory grounds are "accident or surprise, which ordinary prudence could not have guarded against", § 657, subd. 3, Code Civ.Proc., and "newly discovered evidence" which the moving party "could not, with reasonable diligence, have discovered and produced at the trial." § 657 subd. 4, Code Civ.Proc. From a very early date—1866—it has been held that surprise, as a ground for a motion for a new trial, should be looked on with "suspicion." Schellhous v. Ball, 29 Cal. 605. As pointed out in 3 Witkin on California Procedure, page 2057, a motion on this ground "is seldom successful" because the moving party to be entitled to a granting of the motion must make a showing of injury, a showing of diligence, and a showing that he did not unduly delay seeking redress. Under subdivision 4 of the section a motion, to be successful, requires the evidence not only to be newly discovered but that, had "strict diligence" been used, it would not have been discovered sooner.

[5] It is quite apparent that appellant has not met this heavy burden so as to require the reversal of the discretionary order of the trial judge denying the motion for a new trial. Reasonable diligence would seem to have required that the attorney, before trial, should have investigated to determine whether the highway was or was not posted. If it be held that such diligence was here shown by the taking of pictures showing no signs in the area, when O'Shea testified that such signs in fact were there, the pictures should have raised sufficient doubt so that counsel should then have preserved his legal rights by claiming surprise and asking for a continuance. This he did not do, claiming that O'Shea's testimony made him believe that his "photographs * * * were in error." Thus, it does not appear as a matter of law that appellant's counsel exercised due diligence. That being so, the discretionary order of the trial judge denying the motion cannot be disturbed.

[6] No reference has been made to the counter-affidavits filed by respondent on this issue because they were filed later than the ten-day period fixed by section 659a of the Code of Civil Procedure. Assuming that they were improperly considered by the trial court (although the record does not show the appellant at any time objected), no prejudice was suffered by appellant because an examination of the counter-affidavits shows that they contained nothing additional to what the trial judge already knew.

The other points raised do not require discussion.

The judgment appealed from is affirmed.

BRAY and FRED B. WOOD, JJ., concur.

147 Cal.App.2d 7

The PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Henry GOODO, Jr. and Eugene Miller,
Defendants,

Henry Goodo, Jr., Appellant.
Cr. 5729.

District Court of Appeal, Second District,
Division 2, California.
Dec. 17, 1956.

Hearing Denied Jan. 16, 1957.

Defendant was convicted of unlawful possession of marijuana. The Superior Court of Los Angeles County, Charles W. Fricke, J., rendered judgment, and defendand appealed. The District Court of Appeal, Fox, J., held that defendant was arrested without reasonable or probable cause to believe that he was guilty of a felony and that search incident to such arrest was unlawful and marijuana obtained by such search was inadmissible in evidence.

Judgment reversed.

1. Arrest ⚷63(4)

Information, volunteered by a person with whom officers had had no previous dealings and concerning whose past record and reliability they knew nothing, that occupant of same apartment building had a pound of marijuana in his room coupled with officers' observation of such occupant leaving his room with a brown paper bag in his hand did not constitute reasonable or "probable cause" for his arrest without a warrant, in absence of pressing emergency.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

2. Arrest ⚷71
Criminal Law ⚷395

Search incident to arrest of defendant without a warrant or probable cause was unlawful and marijuana obtained by such search was inadmissible in prosecution for unlawful possession thereof. West's Ann. Health & Safety Code, § 11500.

3. Criminal Law ⚷304(2)

It is a matter of common knowledge that brown paper bags are customarily used by markets, grocery stores, drug stores and similar commercial enterprises for convenient carrying of merchandise by customers.

4. Arrest ⚷63(1)

When officers, having no reasonable or probable cause to believe that he was guilty of a felony, observed defendant peacefully and quietly emerge from his own room carrying a brown paper bag, officers were not confronted with a pressing emergency which would justify arrest of defendant without a warrant.

5. Searches and Seizures ⚷3(1)

A search cannot be justified by what it produces.

Levy, Russell & DeRoy and Jack Levine, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Deputy Atty. Gen., for respondent.

FOX, Justice.

[1, 2] Appellant challenges his conviction of the possession of marijuana (Health and Safety Code, sec. 11500) on the grounds that his arrest was without reasonable or probable cause; that the search was therefore unlawful; and that the evidence thus seized, on which his conviction was based, was inadmissible. We have concluded that his position is well taken.

On March 18, 1956, at approximately 9:30 p. m. Police Officers Blankenship and Ward stopped a Mr. Bruce for interrogation on the corner of 29th Street and Vermont Avenue in Los Angeles. He told them that he lived at 1201 West 30th Street and volunteered the information that a certain person occupying quarters in the same apartment building in which he lived had a pound of marijuana in his room and that this person would be home about 11:00 p. m.

Bruce was not a confidential informant. The officers had never had any previous dealings with him. They had never seen him before and knew nothing of his past record or reliability. They had not had appellant under surveillance prior to this time.

Acting on this information, the officers proceeded to 1201 West 30th Street, arriving at approximately 10:15 p. m. Bruce let them into the community kitchen, which was adjacent to a hallway leading to appellant's room in the rear of the building. The officers peeped out the door and observed appellant and one Miller enter appellant's room. Both men were empty handed. Some five minutes later the officers walked down the hallway to appellant's room and were about to knock when appellant opened the door. Officer Blankenship observed appellant was carrying a brown paper sack in his right hand in such manner that it could be disposed of rapidly. The officer testified that marijuana is usually carried in bulk in this kind of a sack but on two occasions, at least, he had observed it carried in a different fashion. The officer arrested appellant and seized the paper sack. It contained marijuana. The officers had neither a search warrant nor a warrant for appellant's arrest.

In People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535, 537, it was held that "reasonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt." In Willson v. Superior Court, 46 Cal.2d 291, 294, 294 P.2d 36, 38, the court stated that "Although information provided by an anonymous informer is relevant on the issue of reasonable cause, in the absence of some pressing emergency [citation], an arrest may not be based solely on such information [citations];" that "evidence must be presented to the court that would justify the conclusion that reliance on the information was reasonable." It was pointed out that "In some cases the identity of, or past experience with, the informer may provide such evidence [citation], and in others it may be supplied by similar information from other sources or by the personal observations of the police." 46 Cal.2d at pages 294, 295, 294 P.2d at page 38.

The question here presented is whether the information given by Bruce to the officers, coupled with their observation of appellant leaving his living quarters with a brown paper sack in his hand, was sufficient to constitute reasonable cause to believe that appellant was guilty of a felony.

[3] It appears that the officers had not previously known Bruce or had any contact with him and that they did not know his reputation or any other fact which would assist in evaluating his reliability. In the absence of any emergency, "an arrest may not be based solely on such information." People v. Willson, supra. Were the observations of the police in this instance sufficient to supply this deficiency? The answer to this question lies in the significance to be attached to the fact that appellant was observed emerging from his living accommodations with a brown paper sack in his right hand. It is, of course, a matter of common knowledge that such bags are constantly used by markets, grocery stores, drug stores, and similar commercial enterprises for convenient carrying of merchandise by their customers. Hence, practically every household has a supply of such bags at hand, and the members thereof naturally use them to carry a great variety of items, such, for example, as the childrens' lunches. This is common practice. And the usual manner of carrying such a bag is in the hand. In fact, there is no other convenient way to carry such a bag in the absence of suitable pockets, and particularly so where the package is too large for available pockets. It is, of course, obvious that marijuana may be carried in a can or other container, and the officer acknowledged that upon occasion this was done. It is therefore apparent that no incriminating significance can reasonably be attached to the fact that appellant was carrying a brown paper sack in his right hand. This incident

is no more significant than the officer's hearing footsteps that "'seemed to be going away from the door'" when he knocked, in People v. Thymiakas, 140 Cal.App.2d 940, 296 P.2d 4, 5.

The observations of the officers in the Willson case, supra, were far more revealing than in the instant matter. There Mona, the defendant, had plain scratch paper in her hand rather than a waitress' order book, and, upon being questioned, attempted to destroy the paper. Here nothing met the officer's gaze except an innocuous paper sack that any person might be carrying. Nor was any attempt made to conceal or dispose of it.

This case, factually, is very similar to Thymiakas, supra, where this court held that an unevaluated report from an anonymous informer that a particular person had heroin at his bedside, coupled with the recollection of an officer that he had heard this person mentioned as being a user and peddler of narcotics, plus hearing what appeared to be retreating footsteps when the officers knocked on the door of his apartment, did not constitute reasonable or probable cause for his arrest and the search of his apartment. See, also, to the same effect, People v. Schraier, 141 Cal. App.2d 600, 297 P.2d 81.

[4] The People suggest that the officers were confronted with a "pressing emergency", People v. Willson, supra, 46 Cal.2d at page 294, 294 P.2d 36, and were therefore justified in arresting appellant solely on the unevaluated information provided by an anonymous informer. We fail to find any "pressing emergency" in this factual setting. Here appellant was peacefully and quietly emerging from his own threshold. He was met by officers who did not have reasonable or probable cause to believe he was guilty of a felony. This does not create a "pressing emergency" justifying his arrest. See People v. Kilvington, 104 Cal. 86, 37 P. 799, cited in People v. Willson, supra.

[5] It is now settled that a search cannot be justified by what it produces. People v. Brown, 45 Cal.2d 640, 643, 290 P.2d 528.

The judgment (order granting probation, Pen.Code, § 1237) is reversed.

MOORE, P. J., and ASHBURN, J., concur.

Hearing denied; GIBSON, C. J., and SHENK and SPENCE, JJ., dissenting.

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146 Cal.App.2d 758

Fred D. HINDS, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR COUNTY OF TEHAMA, Respondent.

Civ. 9174.

District Court of Appeal, Third District, California.

Dec. 13, 1956.

Proceeding for writ of mandate commanding Superior Court of Tehama County to set aside its order dismissing appeal from judgment of Justice Court. The District Court of Appeal, Schottky, J., held that where attorney, who lived considerable distance from Justice Court, mailed notice of appeal to court for client, together with check with amount left blank, but stating it was good for not more than $15, filing fee was $10, but check was incorrectly filled in for $1, statute requiring payment of fee at time of filing of notice of appeal had been substantially complied with.

Writ issued.

1. Justices of the Peace 🔑158(1)

In order for an appeal from justice court to be effective, there must be substantial compliance with statute requiring that filing fee be paid. West's Ann.Code Civ.Proc., § 981.

2. Appeal and Error 🔑1

Right of appeal is remedial in its character and in doubtful cases should always be granted.

3. Appeal and Error ⚿370, 430(1)

If a party fails to file his notice of appeal and to pay required fees within statutory period, he has failed to perfect his appeal and court must dismiss it, notwithstanding fact he may have some meritorious excuse for his failure to file within time.

4. Action ⚿66

Where a party has done all that law requires of him in any matter which is part of proceedings in action, he should not be made to suffer by reason of neglect of officer of court to perform official duty in completion of that particular proceeding.

5. Justices of the Peace ⚿158(4)

Where attorney, who lived considerable distance from justice court, timely mailed notice of appeal to court for client, together with a check with amount left blank, but stating it was good for not more than $15, which was more than filing fee of $10, but check was incorrectly filled in for $1, statute requiring payment of fee at time of filing of notice of appeal had been substantially complied with. West's Ann.Code Civ.Proc., § 981.

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William H. Phelps, Fall River Mills, for petitioner.

Pugh & Webster, Red Bluff, for real party in interest.

SCHOTTKY, Justice.

Petitioner filed in this court a petition for a writ of mandate commanding the Superior Court of Tehama County to set aside its order dismissing the appeal of petitioner in a case in which petitioner was seeking to appeal from a judgment of the Justice Court. We issued an alternative writ.

The factual situation, which is not in substantial dispute, is as follows:

Petitioner brought an action against Arthur L. Sharp in the Justice Court of the Red Bluff Judicial District, County of Tehama. Judgment was entered against Mr. Hinds on March 21, 1956. Notice of entry of judgment was filed on March 23, 1956. On April 21, 1956, petitioner's counsel who has his offices in Fall River Mills, in Shasta County, about 100 miles from Red Bluff, sent a letter to the judge of the justice court in which counsel requested the judge to file a notice of appeal which was enclosed. The letter also stated: "Also enclosed please find my check for not over $15.00 to cover the costs on appeal." The check had not been completed. The amount had not been filled in. Someone filled in the check for $1. On June 13, 1956, petitioner's counsel learned that the appeal had not been transferred to the superior court because the total costs on appeal had not been paid. These costs were then paid and the record transmitted. On August 27, 1956, a motion was made to dismiss the appeal on the ground that section 981 of the Code of Civil Procedure was not complied with. The section reads in part as follows:

> "No appeal taken from a judgment rendered in a justice court in civil matters shall be effectual for any purpose whatever unless the appellant shall, at the time of filing the notice of appeal, pay in addition to the fee payable to the judge of the justice court on appeal, the fees provided by law to be paid to the county clerk for filing the appeal and for placing the action on the calendar in the superior court. * * * No notice of appeal shall be filed unless the fees herein provided for are paid in accordance with the provisions of this section."

The superior court made an order dismissing the appeal, stating in its memorandum opinion: "Inasmuch as the statutory provisions for the appeal were not complied with, the appeal must be dismissed. The appellant or his counsel are responsible for the mistakes made by those to whom they entrust a duty, and a failure to comply with the statutory provisions is fatal."

Petitioner contends that the trial court has placed a harsh and unreasonable interpretation upon section 981, an interpretation that is not only contrary to the facts in the matter but which is contrary to the spirit of the law, as expressed by this court in Gunn v. Superior Court, 73 Cal.App.2d 564, at page 568, 166 P.2d 906, 908, to the effect that "the right of appeal is remedial in its character, and in doubtful cases should always be granted."

Real party in interest, in reply, argues that the statutory provisions for the appeal were not complied with, that petitioner could not delegate to the judge of the Red Bluff Justice Court the task of completing the filling out of the check and perfecting his appeal for him, and that the proper filling out of the check by the judge was in no sense an official duty. He contends that under the facts of the case the superior court had no alternative except to dismiss the appeal.

[1-3] It is of course true that in order for an appeal from a justice court to be effectual there must be a substantial compliance with the provisions of section 981, but it is also true that " 'the right of appeal is remedial in its character, and in doubtful cases should always be granted.' " If a party fails to file his notice of appeal and to pay the fees provided by law within the statutory period he has failed to perfect his appeal and the court must dismiss it, notwithstanding the fact that he may have some meritorious excuse for his failure to file within the time. Autrand v. Superior Court, 104 Cal.App.2d 480, 231 P.2d 546; Johnson v. Superior Court, 28 Cal.App. 618, 153 P. 404.

[4] In the instant case the record shows that petitioner's counsel, whose office is in Fall River Mills, a considerable distance from the Justice Court at Red Bluff, mailed his notice of appeal, together with a check payable to Red Bluff Judicial District, with the amount left blank but stating that it was for not over $15, which was more than the amount of the filing fee. The letter in which the notice of appeal and check were enclosed stated: "Also enclosed please find my check for not over $15.00 to cover the costs on appeal." It is conceded that the notice of appeal and the check were received by the judge within the statutory period. All that the judge had to do was to fill in the correct amount of $10, but instead he filled in the amount of $1 which, of course, was not the correct amount. We do not believe that it is reasonable to hold that a party should be deprived of his appeal when his counsel, a member of the State Bar of California, in good standing, sends a check as was done in this case and the judge fails to fill in the correct amount, but fills it in for $1. We do not believe that either reason or authority can justify the failure of the judge to fill in the correct amount and thus perfect the appeal. What was said in Pacific States Corporation v. Superior Court, 72 Cal.App. 241, at page 244, 236 P. 938, 939, is quite applicable here:

> "* * * It is a recognized principle in court practice that, where a party has done all that the law requires of him in any matter which is a part of the proceedings in an action, he should not be made to suffer by reason of the neglect of an officer of the court to perform an official duty in the completion of that particular proceeding in the action. Therefore we hold that, when the Pacific States Corporation had paid into the hands of the justice all of the required fees in connection with its notice of appeal, and had given its sufficient undertaking on appeal, the appeal was thereby perfected so as to vest jurisdiction thereof in the Superior Court. This jurisdiction could not be lost by the mere failure of the justice to transmit the filing fees to the county clerk."

[5] We conclude that the Superior Court erred in granting the motion to dismiss the appeal and that a writ of mandate should issue commanding the court to deny the motion to dismiss the appeal.

Let the writ issue.

VAN DYKE, P. J., and PEEK, J., concur.

Johny E. McCARROLL, Willie J. McCarroll, and Thomas L. Hall, a co-partnership, d/b/a McCarroll & Hall Construction Company, a/k/a McCarroll & Hall, Plaintiffs and Respondents,

v.

LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS, an unincorporated association, et al., Defendants and Appellants.*

Civ. 21625.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1956.

Rehearing Denied Jan. 2, 1957.

Hearing Granted Feb. 6, 1957.

Carpentry contractor's suit against labor union for specific performance, injunction and damages. The Superior Court of Los Angeles County, Philbrick McCoy, J., granted a preliminary injunction, and defendants appealed. The District Court of Appeal, White, P. J., held that Taft-Hartley Act section, providing that actions for breach of collective bargaining agreements "may" be brought in federal District Court, sets up a remedy that is adequate, and held that, accordingly, federal courts have exclusive jurisdiction, even though state law provides comparable remedy.

Reversed.

1. Labor Relations 🔑777

Taft-Hartley Act section providing that actions for breach of collective bargaining agreements "may" be brought in federal District Court sets up a remedy that is adequate, and, accordingly, federal courts have exclusive jurisdiction, even though state law provides comparable remedy. Labor Management Relations Act, § 1947, §§ 1 et seq., 301 and subd. (c), 29 U.S.C.A. §§ 141 et seq., 185 and subd. (c).

2. Labor Relations 🔑510

The National Labor Relations Board has been clothed with exclusive jurisdiction to determine whether course of conduct on part of labor organization is either a prohibited activity or one protected and guaranteed by National Labor Relations Act, and, in either event, state court does not possess jurisdiction over such subject matter, and hence is without power to grant injunctive relief.

3. Labor Relations 🔑395

Union causing employees to strike and refuse to perform services with objective of forcing general contractors to withdraw or withhold their business relationships with carpentry contractor would be guilty of unfair labor practice under National Labor Relations Act. National Labor Relations Act, § 8(b)(4) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 158(b)(4).

4. Labor Relations 🔑510

A state court must decline jurisdiction in deference to Federal Labor Relations Board where facts pleaded reasonably bring controversy within National Labor Relations Act, and conduct complained of, if not prohibited by federal act, may reasonably be deemed to come within protection afforded by such act. National Labor Relations Act, § 8(b)(4) as amended by Labor Management Relations Act, 1947, 29 U.S.C.A. § 158(b)(4).

5. Monopolies 🔑12(8)

Business and Professions Code section, declaring labor not to be a commodity, was intended to except from operation of Cartwright Act combinations of laborers for purpose of furthering their interests by collective bargaining, and it is only where unions depart from their normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade that they are not exempt from provisions of Cartwright Act. West's Ann. Bus. & Prof.Code, §§ 16700–16758, 16703, 16720.

6. Monopolies 🔑12(9)

Conduct of labor union members in refusing to work under conditions believed by them to be detrimental to their general welfare was reasonably related to working conditions and right and purpose of collective bargaining, and there was no violation of Cartwright Act. West's Ann.Bus. & Prof.Code, §§ 16700–16758, 16703, 16720.

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* Opinion vacated 315 P.2d 322.

◆

Arthur Garrett, James M. Nicoson, Los Angeles, for appellants.

Hill, Farrer & Burrill, Los Angeles, for respondents.

WHITE, Presiding Justice.

This action was instituted by plaintiffs and respondents (hereinafter referred to as respondents) for specific performance, injunction and damages against defendants and appellants (hereinafter referred to as appellants). By their second amended complaint respondents alleged that appellants had engaged in a course of conduct, and by directions, instructions and orders have engaged in strikes, and have induced employees of employers to engage in the strikes or other concerted refusal to work on materials and to perform services for respondents' General Contractors, the purposes thereof being (1) to compel the General Contractors to withdraw their business relations with respondent and to cease doing business with respondent, (2) that respondent through its membership in the Building Contractors Association of California, Inc., was a party to "Master Labor Agreement" with appellants and others and that appellants had refused to perform certain obligations under that agreement, and (3) that the conduct alleged was violative of the Cartwright Act of the State of California.

In the court below numerous affidavits were filed, and oral testimony was received, resulting in the issuance of a preliminary injunction, from which order appellants prosecute this appeal.

The first cause of action alleges that respondents and appellants were and are parties to a collective bargaining agreement known as the "BCA–AF of L Master Labor Agreement." That the agreement provides that contractors shall have entire freedom of selectivity in hiring, and may discharge any employee for just cause; that contractors shall first call upon a local union having work or area jurisdiction for such men as the contractors may from time to time need and that the local union shall immediately furnish to the contractors the required number of qualified and competent workmen needed by the contractors; that the local union will furnish each such required competent workman or skilled mechanic to the contractors by use of a written referral; that if after forty-eight hours' notice, the local union shall not furnish the workmen requested by the contractor, the contractor may procure workmen from any other source; that if men are so employed the contractor will report to the local union each such workman by name.

That the collective bargaining agreement further recites that contractors may transfer workmen from the jurisdiction of one local union to the jurisdiction of another local union up to the maximum permitted by the by-laws of the craft involved, but in any event they may transfer up to 10% of their current requirements; that workmen employed by any contractor under the terms of the agreement shall not be removed nor transferred by the union without the prior approval of the contractor.

That the contract also provides that all grievances or disputes arising between the parties over the interpretation or application of the terms of the agreement shall be settled by arbitration and that during the term of the agreement the union shall not "call, or engage in, sanction, or assist in a strike against, or any slow-down or stoppage of work of the contractors." That the contract further provides that the union will require its members to perform their services for the contractors when required by the contractor so to do.

That the agreement provides that the employer shall determine the number of employees and classifications required to perform any operation and that the contractors and the unions recognize the necessity of eliminating restrictions on production and that nothing shall be permitted that restricts production or increases the time required to do the work and that no limitation shall be placed upon the amount of work which the employee shall perform, nor shall there be any restriction against labor saving devices.

That the collective bargaining agreement further provides that any provisions in the working rules of the union in conflict with the terms of the agreement between the parties shall be deemed waived.

The complaint further alleges that Section 16(f) 1 and 2 of the by-laws of the defendant Los Angeles County District Council of Carpenters provides:

> "A local union must honor a request (for a work order) from a Contractor, providing he names the individual member of our brotherhood whom he desires to have cleared to his job. The honoring of requests by local unions and their representatives shall be mandatory providing the privilege is not abused by the Contractor, and that he does not exceed at any time 50% of the carpenters needed for that particular job."

The complaint then alleges that respondents entered into a contract to do carpentry work in Palmdale, California, and that immediately thereafter, defendant Nukala (a union official) arrived on the job site and informed respondents that they would not be allowed to transfer more than 10% of their employees from the jurisdiction of any other local union. The respondents requested men from defendant Nukala and the men transferred were unqualified and incompetent. Respondents thereupon gave defendant Nukala notice to that effect and after the expiration of 48 hours respondents procured workmen from other sources. That at no time did the number of employees who were transferred from the jurisdiction of other local unions exceed 50% of the current requirements of respondents. Defendant Nukala thereupon placed respondents on the "out-of-bounds" list, and refused to honor requests from respondents for a work order for specifically named men.

The complaint further alleges that on a subsequent job in Palmdale, California, respondents requested men from defendant Nukala; that the men referred were unqualified and incompetent; that respondents were refused job requests for members of the appellant unions whom respondents desired to have "cleared" to the job by use of a written referral; that defendant Nukala at all times refused to honor these requests; the respondents sought to transfer 14 regular employees of respondents from Los Angeles to Palmdale; that respondents requested written referrals or work orders for these men; that the 14 men constituted less than 50% of the current requirements of respondents on the job; that defendant Nukala refused to issue written work orders and thereupon called a strike of respondents' employees and shut the job down for the stated reason that respondents were allegedly "labor contractors"; that approximately two weeks later the strike was called off by defendant Nukala and the dispute submitted to arbitration; that the Arbitration Board ruled that labor contracts are not illegal under the Master Labor Agreement and that respondents were not labor contractors; that respondents suffered substantial damage due to the strike and the refusal to furnish competent workmen, or honor work requests submitted by respondents.

The complaint further alleges that thereafter on other jobs being performed by respondents in other Southern California areas, the local unions furnished incompetent and unqualified workmen, thereby causing damaging delay to respondents; that the local unions refused to honor written referrals or work orders for specifically named men and refused to permit respondents to transfer more than 10% of their employees to the job; that on May 21, 1954, a strike was called of respondents' employees on the Arrow Gardens Tract for the reason that respondents were allegedly violating state safety regulations; that four days later the strike was called off and on the following day a state safety inspector inspected the tract for violations of state safety regulations and in the presence of certain defendants did state that there were no violations of state safety regulations.

The complaint further alleges that on June 9, 1954, all of respondents' jobs were shut down for the reason that respondents were allegedly labor contractors.

[1] Appellants first contend that the court did not have jurisdiction over the subject matter of this litigation and was without authority to grant a preliminary injunction because respondents through their membership in the Building Contractors Association of California came within the exclusive jurisdiction of the National Labor Relations Board under the National Labor Relations Act, as amended, Public Law 101, 80th Congress, Chap. 120, 1st Session. Respondents do not contend that the subject matter here involved is not within the jurisdiction of the national board, but that the National Labor Relations Board does not have *exclusive* jurisdiction of the controversy here in question which they argue, involves a suit for breach of a collective bargaining contract and that Section 301 of the Labor Management Relations Act of 1947, popularly referred to as the Taft-Hartley Act, 29 U.S.C.A. § 141 et seq., provides that actions for violation of contracts between employer and unions, in an industry affecting commerce, *may* be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or notwithstanding the citizenship of the parties. We are persuaded however, that the above-mentioned Section 301 has pre-empted jurisdiction in the field of controversies for breach of a collective bargaining agreement, involving commerce, for the federal tribunals. 29 U.S.C.A. § 185(c). The act provides for damages for breach of a collective bargaining agreement and having set up a remedy that is adequate, the federal courts have exclusive jurisdiction, and this is true even though the state law provides a comparable remedy. We are satisfied that in the adoption of Section 301, Congress has manifested its purpose to vest jurisdiction over breaches of collective bargaining agreements, to a certain extent, where commerce is affected, and unfair labor practices are involved, in the federal courts, Association of Westinghouse Salaried Employees v. Westinghouse Corp., 348 U.S. 437, 75 S.Ct. 488, 99 L.Ed. 510.

[2] There can be no question that the National Labor Relations Board has been clothed with exclusive jurisdiction to determine whether a course of conduct on the part of a labor organization, is either a prohibited activity or one protected and guaranteed by the National Labor Relations Act. And it is equally well settled that in either event, a state court does not possess jurisdiction over such subject matter, and hence is without power to grant injunctive relief. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 75 S.Ct. 480, 99 L.Ed. 546; Garner v. Teamsters Union, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228; Garmon v. San Diego Building Trades, 45 Cal.2d 657, 661, 291 P.2d 1; Benton, Inc., v. Painters Local Union No. 333, 45 Cal.2d 677, 681, 291 P.2d 13; California Kitchens, Inc., v. United Brotherhood of Carpenters, 139 Cal.App.2d 597, 602, 294 P.2d 468; Breidert Co. v. Sheet Metal Workers, 139 Cal.App.2d 633, 639, 294 P.2d 93.

[3] In the case now engaging our attention respondents pleaded that appellants through orders, directions and instructions, have caused employees to strike and to refuse to perform services with the objective thereof, to force or require the general contractors to withdraw or withhold their business relationships with respondents. We conclude that this alleged course of conduct, if true, constitutes an unfair labor practice as that term is defined by Section 8(b) subd. (4) of the National Labor Relations Act, 29 U.S.C.A. § 158(b)(4). There is no claim advanced herein that the activities of appellants threatened a probable breach of the state's peace. There is no suggestion that the activities complained of herein were anything but peaceful and orderly or consisted of any activities not subject to regulation by the federal board either by prohibition or by protection, and therefore fall within "the area of activities, neither

protected nor prohibited, that the State may regulate." International Union, U. A. W., A. F. of L., Local 232 v. Wisconsin Emp. Relations Board, 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651; Allen-Bradley Local No. 1111, United Electrical Radio and Machine Workers of America v. Wisconsin Emp. Relations Board, 315 U.S. 740, 62 S.Ct. 820, 86 L.Ed. 1154.

[4] We are persuaded that the instant case comes within the purview of the rule that a state court must decline jurisdiction in deference to the federal board because the facts pleaded reasonably bring the controversy within the sections of the federal act prohibiting these practices, and where the conduct here complained of, if not prohibited by the federal act, may be reasonably deemed to come within the protection afforded by that act, Benton, Inc., v. Painters Local Union, supra, 45 Cal.2d 677, 681, 291 P.2d 13.

[5, 6] By reason of the foregoing conclusion at which we have arrived it becomes unnecessary to discuss or decide the remaining issues tendered on this appeal other than respondents' contention that their third cause of action for injunctive relief comes within the purview of the California statute known as the Cartwright Act, Bus. and Prof. Code, §§ 16700–16758. It is their contention that the alleged concerted activity of appellants is designed to force them out of business and is therefore actionable under Section 16720 of the Business and Professions Code, which in general prohibits any combination in restraint of trade or commerce. There is no allegation in the amended complaint that appellants have combined with employer groups to accomplish the ends sought, as was the case in Overland Publishing Co. v. H. S. Crocker Co., 193 Cal. 109, 113, 222 P. 812, and Kold Kist, Inc., v. Amalgamated Meat Cutters, 99 Cal.App.2d 191, 193, 221 P.2d 724, relied upon by respondents.

Section 16703 of the Business and Professions Code reads as follows: "*Labor Not Commodity:* Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity". This section must be held to have been intended to except from operation of the Cartwright Act combinations of laborers for a purpose of furthering their interests by collective bargaining, Schweizer v. Local Joint Executive Board, 121 Cal.App.2d 45, 51, 262 P.2d 568. It is only where unions depart from their normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade that they are not exempted from the provisions of the Cartwright Act. The gist of respondents' third cause of action is that the acts and conduct of appellants as alleged in their first cause of action are in violation of the aforesaid Cartwright Act, "in that the purpose of defendants' conduct and acts is to carry out restrictions in the trade of plaintiffs." The allegations relied upon by respondents present a situation where the members of a labor union refused and threatened to refuse to work under conditions which they asserted were detrimental to their general welfare. Can it be said that the conduct here in question is not reasonably related to working conditions and the right and purpose of collective bargaining? We think not. In the case of In re Blaney, 30 Cal.2d 643, at page 648, 184 P.2d 892, at page 896, where a statute making secondary boycotts unlawful was involved, the court said: "'It is now settled law that workmen may lawfully combine to exert various forms of economic pressure upon an employer, provided the object sought to be accomplished thereby has a reasonable relation to the betterment of labor conditions, and they act peaceably and honestly'". And in Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S.Ct. 982, 988, 84 L.Ed. 1311, 128 A.L.R. 1044, where a restraint of trade was involved, the court said: "But the Sherman Act [15 U.S.C.A. §§ 1–7, 15 note] admittedly does not condemn all combinations and conspiracies which interrupt interstate transportation". We are inclined to the view that the same must be said of the Cartwright Act. This statute has been in force for many years, and it cannot be assumed that it was overlooked during the rendition of the many decisions of the courts of California with respect to the lawfulness of such acts as are complained of here. We conclude that no violation of the Cartwright Act appears and that the acts of appellants alleged in respondents' amended complaint, do not constitute a combination in restraint of trade within the meaning of that Act.

The order appealed from is reversed.

DORAN and FOURT, JJ., concur.

147 Cal.App.2d 164

Mildred E. HURT, Plaintiff and Respondent,
v.
Giles R. JONES, Defendant and Appellant.
Civ. 8805.

District Court of Appeal, Third District, California.
Dec. 21, 1956.

Proceeding by daughter of decedent to determine title to real property. The Superior Court, Lake County, Benjamin C. Jones, J., entered judgment quieting daughter's title and decedent's husband appealed. The District Court of Appeal, Peek, J., held that where title to property purchased with wife's separate funds was taken in names of husband and wife as joint tenants, but wife later deeded property to her daughter, in absence of evidence of any mutual understanding or agreement between the joint tenants to negate express terms of joint tenancy deed, trial court must find in accordance with presumption of joint tenancy.

Reversed.

1. Husband and Wife 🔑249

The form of instrument under which spouses hold title is not conclusive as to status of property, and property acquired under a joint tenancy deed may be shown to be actually community property or the separate property of one spouse according to intention, understanding or agreement of parties.

2. Husband and Wife 🔑14(3)

Question as to whether evidence is sufficient to rebut presumption, arising from deed to husband and wife as joint tenants, that husband and wife are joint tenants, is one of fact, but presumption cannot be rebutted solely by evidence concerning source of funds used to purchase property, nor can it be overcome by testimony of hidden intention not disclosed to other grantee at time of execution of conveyance.

3. Husband and Wife 🔑14(3), 49¾(6)

In action to quiet title to property, which had been purchased in names of husband and wife as joint tenants, with separate funds of wife who had later deeded property to her daughter, in absence of evidence of any mutual understanding or agreement between husband and wife to negate express terms of joint tenancy deed, trial court must find in accordance with presumption of joint tenancy, and finding that husband was not to receive a gift from wife was not sustained by evidence.

4. Judgment 🔑243

Inclusion in judgment of name of person not a party to quiet title action was improper and could not be given effect for any purpose.

◆

Smith & Parrish and John W. Holmdahl, Oakland, for appellant.

Marshall Rutherford, Oakland, for respondent.

PEEK, Justice.

This is an appeal from a judgment quieting plaintiff's title in certain real property "subject to the interest of Carl Wilson" and decreeing that defendant has no right, title or interest therein.

On April 26, 1948, Opal A. Jones, now deceased, the mother of plaintiff, married defendant. At the time of their marriage Mrs. Jones had certain separate property consisting of a bank account in her name and that of her brother, Carl Wilson, as joint tenants, and a $5,000 loan due her from him. Approximately two years thereafter she drew a check on that account in the sum of $8,727.33, which check was deposited in a new account she opened in her name and her brother's as joint tenants. Shortly prior to the opening of that account, decedent and her husband entered into a contract to purchase certain real property in Lake County, that being the property here in question. Pursuant to a letter of instruction to the title company, title to the property was taken in the names of "Opal A. Jones and Giles R. Jones, as joint tenants." The down payment thereon was made by checks drawn by her on the joint account of her and her brother. The balance of the purchase price which was secured by a note and deed of trust was subsequently paid out of funds received as earnings from the sale of the walnut crop raised on the Lake County property.

Approximately two and one-half years after the purchase of the property Mrs. Jones became critically ill. While in the hospital she requested Mr. Wilson (her uncle), with the assistance of plaintiff, to draft the following instrument which was executed by plaintiff, defendant and Mrs. Jones before two witnesses and a notary public:

> "To Whom It May Concern:
>
> "It is hereby agreed by all parties directly interested, and witnessed by parties whose signatures appear at the bottom of this document that property situated in Lake County on Mount Knockti consisting of sixteen acres of walnuts now in joint tenancy of Giles R. Jones or Opal A. Jones shall be under supervision and use of Giles R. Jones as long as he lives, then said property to go to Mildred E. Hurt, daughter of Opal A. Jones.
>
> "In the event that it be to the advantage of Mildred E. Hurt and Giles R. Jones to sell this property, he shall confer and come to an agreement with Mildred E. Hurt before this property can be sold.
>
> "This aforementioned property was purchased with money belonging to Opal A. Jones before her marriage to Giles R. Jones.
>
> "This document is not to be superceded by any other will or document in case of remarriage of Giles R. Jones, or children born of that marriage, or in consideration of his sons or children now living by a previous marriage.
>
> "Signed: Opal A. Jones
> "Giles R. Jones
> "Mildred E. Hurt
>
> "Witnessed by:
> "Mrs. Kathryn Williams
> "Mrs. Lucretia White
>
> "San Francisco, California
> "September 26th, 1952"
> (Notarial affidavit and seal attached.)

A short while after the execution of the above document, Mrs. Jones executed and delivered to the plaintiff a deed purporting to transfer all of the 16 acres. The trial court found that the quoted instrument conveyed no interest in the property to defendant; that neither Mrs. Jones nor Carl Wilson had made a gift thereof to him; and that the plaintiff was the owner in fee simple of the property subject to the interest therein of Carl Wilson. Judgment was entered accordingly.

Defendant's position on appeal is essentially that notwithstanding the purchase of the property with the wife's separate funds, the surrounding circumstances clearly show her intention to effectuate a valid joint tenancy with him in the property; that if any validity be given to the document signed while decedent was in the hospital, then defendant was given a life tenancy thereby, but if that document was ineffectual to convey any interest, then by virtue of the deed by decedent to plaintiff, he and plaintiff are tenants in common of the property.

[1-3] The form of the instrument under which spouses hold title is not conclusive as to status of the property, and property acquired under a joint tenancy deed may be shown to be actually community property or the separate property of one spouse according to the intention, understanding or agreement of the parties. The question as to whether the evidence is sufficient to rebut the presumption that the husband and wife are joint tenants is one of fact, but the presumption cannot be rebutted solely by evidence concerning the source of the funds used to purchase the property, nor can it be overcome by testimony of a hidden intention not disclosed to the other grantee at the time of the execution of the conveyance. Gudelj v. Gudelj, 41 Cal.2d 202, 212, 259 P.2d 656. In this case the record lacks evidence of any mutual understanding or agreement between Opal and Giles to negate the express terms in the joint tenancy deed, and hence the finding of the trial court that he was not to receive a gift from her is not sustained by the evidence. In the absence of such evidence the trial court must find in accordance with the presumption of joint tenancy. The evidence respecting the purchase of the property shows that from the beginning there was a definite intent to take title in both names as joint tenants. This was expressed not only in the actual taking of title in both names as joint tenants, but also was expressed in the written deposit receipt given to the real estate agent as well as the letters of instruction to the title company, all of which were jointly signed by Giles and Opal.

Furthermore the record establishes that the decedent, having had a number of joint tenancy accounts, was not unfamiliar with joint tenancies. Also, in the document of September 26, decedent acknowledged the defendant's right of survivorship in that the agreement specifically recited that the property was held in joint tenancy.

Defendant's final contention relates to the interpretation placed upon the document of December 26. Suffice it so say that the conclusion of the trial court that said instrument created no interest in the defendant is amply supported by the record.

[4] Any attempted adjudication in favor of or against Carl Wilson, who was not a party in this action, cannot be given effect for any purpose, and the trial court improperly included his name in the judgment as rendered.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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147 Cal.App.2d 144

R. W. AGNEW, Plaintiff and Respondent and Cross-Appellant,

v.

CITY OF CULVER CITY, a Municipal Corporation; Hurbert Turton, Electrical Inspector of the City of Culver City; W. E. Loretta, Chief of the Building Department of City of Culver City, Defendants and Appellants and Cross-Respondents.

Civ. 21679.

District Court of Appeal, Second District, Division 3, California.

Dec. 21, 1956.

Rehearing Denied Jan. 17, 1957.

Hearing Denied Feb. 13, 1957.

Electrical contractor brought suit against city and others to determine validity of city ordinances. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment, and the city and others appealed, and the electrical contractor cross-appealed. The District Court of Appeal, Vallée, J., held that provisions of city ordinance providing for the licensing and regulating of electrical contractors and fixing license fees to be charged electrical contractors as a condition precedent to engaging in electrical contracting in city, are invalid in so far as they apply to electrical contractors holding a state license.

Judgment affirmed in part and reversed in part with directions.

1. Municipal Corporations ⇨592(1)

A municipality may not impose a more stringent or additional requirement than imposed by the general law.

2. Municipal Corporations ⇨592(1)

Provisions of city ordinance providing for the licensing and regulating of electrical contractors and fixing license fees to be charged electrical contractors as a condition precedent to engaging in electrical contracting in city, are invalid in so far as they apply to electrical contractors holding a state license. West's Ann.Bus. & Prof.Code, § 7000 et seq.

3. Evidence ⇨31

The District Court of Appeal would take judicial notice of city charter.

4. Municipal Corporations ⇨742(4)

Where city charter provided that no suit should be brought on any claim for damages against the city or any officer thereof until a verified demand for the same should be presented within 90 days after the occurrence from which the damages allegedly arose, and the claim has been rejected, allegation and proof of compliance with such provisions of the city charter were prerequisites to the reception of evidence of damage in action against city by electrical contractor to recover damages for refusal of city to allow him to operate in city as an electrical contractor. St.1947, pp. 3386, 3406.

5. Electricity ⇨1

Legislation for purpose of controlling the character and quality of electrical installations and for inspection of the same is a valid exercise of the police power.

6. Municipal Corporations ⇨591

A municipal legislative body has no power to delegate to an administrative board or officer its exclusive power and function of determining what acts or omissions on the part of an individual are unlawful, and the distinction between the legislative and administrative function must be recognized and enforced.

7. Municipal Corporations ⇨591

A delegation by a municipality of a power giving an administrative officer uncontrolled discretion constitutes a delegation of legislative power.

8. Municipal Corporations ⇨111(1)

Ordinances, to be valid and effectual, must set forth with clarity some norm or standard by which all persons may know their rights and obligations thereunder.

9. Municipal Corporations ⇨591

Where an ordinance commits its application to municipal officials, it should set up a uniform standard or rule of conduct.

10. Municipal Corporations ⇨111(1), 591

Regulations prescribed by ordinance must be clear, definite, and specific in their application and operation, and their application may not be left to the caprice of enforcement officers.

11. Municipal Corporations ⇨591

An attempted delegation of power to an officer of a municipality, where no standards are established by which the officer shall be governed in his actions, is in effect an attempted delegation to such officer to enact a law.

12. Criminal Law ⇨13

A criminal statute must be so framed that those as to whom it is to be administered and those who are to administer it may know what standard of conduct is intended to be required.

13. Criminal Law ⇨13

Every man should be able to know with certainty from a criminal statute when he is committing a crime.

14. Municipal Corporations ⇨591

Provisions of city ordinance that where new problems, which are not covered by the ordinance, arise, Electrical Inspector is empowered to make his own rules as to method or manner in which electrical material shall be installed, are invalid as an unlawful delegation of power.

15. Municipal Corporations ⇨591

Provisions of city ordinance that all electrical installations in city shall be in conformity with provisions of ordinance, the Electrical Safety Orders of the State, or, if not so covered, shall be in conformity with regulations laid down in the National Electrical Code, as approved by the American Standard Association, are invalid as an unlawful delegation of power.

16. Municipal Corporations ⚿591

Provisions of city ordinance that all electrical materials and equipment installed or used in city shall be in conformity with provisions of ordinance, Electrical Safety Orders of the State, and with approved standards for safety to life and property, are invalid as an unlawful delegation of power.

17. Municipal Corporations ⚿591

Provisions of city ordinance that every electrical service shall be installed in rigid metal raceway and in accordance with rules of ordinance, and that all service equipment conduits and fittings installed on exterior of any building shall be listed and approved by a recognized testing laboratory as raintight, are invalid as an unlawful delegation of power.

18. Municipal Corporations ⚿591

Provisions of city ordinance that one and two families electrical service grounds may be armour protected grounds or open type grounds installed, as required by the National Electrical Code, and that metering equipment shall be installed as required by utility, are invalid as an unlawful delegation of power.

19. Municipal Corporations ⚿591

Provisions of city ordinance that certain listed electrical equipment shall have Underwriters' Laboratory Label or recognized testing laboratory label of ordinance were invalid as an unlawful delegation of power.

20. Municipal Corporations ⚿591

The legislative body of a municipality may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislative body for his guidance.

21. Electricity ⚿1

Sections of city ordinance providing for use of used electrical material with approval of Electrical Inspector, requiring that maker's identification symbol shall be placed on all electrical equipment, providing that no two-wire service shall be connected to a three-wire service without written approval in advance of Electrical Inspector, providing that disconnecting means shall be of a type approved for service equipment and for prevailing conditions, and providing that no deviation may be made from installation described in permit without written approval of Electrical Inspector are valid as merely administrative regulations to promote the purposes of the legislation and carry it into effect.

◆

M. Tellefson, City Atty., Culver City, for appellants and cross-respondents.

R. W. Agnew, in pro. per., for respondent and cross-appellant.

VALLÉE, Justice.

Plaintiff brought this suit for declaratory relief to determine the validity of Ordinance No. 49, as amended by Ordinance No. 250, of the City of Culver City providing for licensing and regulating electrical contractors and fixing fees to be charged electrical contractors as a condition precedent to engaging in electrical contracting in Culver City and to determine the validity of certain provisions of Ordinance No. 170 of Culver City, as amended by Ordinance No. 230, providing for examinations before the issuance of electrical permits to do wiring, and prescribing methods and material for electrical installations. Plaintiff also sought to have defendants restrained from enforcing certain provisions of the ordinances insofar as they relate to electrical contractors, for damages for refusing to permit him to engage in electrical contracting in Culver City, and for a declaration of his rights.

Plaintiff is an electrical contractor licensed by the Contractors' State License Board under section 7000 et seq. of the Business and Professions Code. Defendant City of Culver City is a municipal corporation. Defendant Turton is the Electrical Inspector of the city and defendant Loretta is the Chief of the Building Department.

Plaintiff applied to the proper official for a permit authorizing him to do electrical work within Culver City at a designated address. He was informed it would be necessary for him to pay a license fee of $100 under Ordinance 49 and to obtain from the Business License Collector a business license to do work as an electrical contractor in the city. Plaintiff refused to pay the fee and to obtain the license on the ground his state license as an electrical contractor authorized him to do work as such in Culver City without conforming to any local ordinances requiring a license or the payment of a fee.

The court found: 1. Plaintiff is authorized to work as an electrical contractor anywhere in the state, subject to the provisions of any local ordinance not in conflict with the Business and Professions Code. 2. Ordinance 49, as amended by Ordinance 250, providing for the enforcement of the provisions of the ordinance by criminal process, imposes an additional burden on plaintiff in carrying on his work as a licensed electrical contractor not contemplated by the State Contractors' License Law, and is in conflict therewith. 3. Ordinance 230, amending Ordinance 170, creating the office of Electrical Inspector and fixing his powers and duties and regulating installation of electrical equipment, etc., is an ordinance adopted by the City Council under its police power, relating to the quality, safety, and character of electrical installations, and is not in conflict with the State Contractors' License Law and does not illegally interfere with the right of plaintiff to carry on his business as an electrical contractor within Culver City.

The judgment declared: 1. Ordinance 49, as amended by Ordinance 250, is invalid and unenforceable against plaintiff insofar as it provides for the enforcement of the provisions of the ordinance by criminal process. 2. Ordinance 230 was a valid and existing ordinance at the time of trial of the action, except to the extent section 4(d) applies to plaintiff. 3. Plaintiff take nothing by way of damages.

Defendants appeal from the judgment as a whole. Plaintiff appeals from that part of the judgment declaring that Ordinance 170, as amended by 230, was a valid ordinance "except that to the extent Sec. 4(d) applies to the plaintiff" and insofar as it denies him damages.

Appeal of Defendants

While defendants appealed from the judgment in its entirety, the only point urged is that Ordinance 49, as amended by Ordinance 250, is not invalid and unenforceable against plaintiff insofar as it provides for the enforcement of its provisions by criminal process.

Ordinance 49, as amended by Ordinance 250, makes it unlawful for any person to commence or carry on any business specified in the ordinance without first having paid the required license fee and having procured a license certificate so to do from the city and without obtaining the permit, certificate of compliance, or other instrument required by the ordinance. The license fee required was $50 a year or part thereof from *local* and $100 a year or part thereof from *itinerant* electricians and electrical contractors.[1] The amount of the license fee is made a debt to Culver City. Violation of any provision of the ordinance is a misdemeanor. On payment of the required fee it is made the duty of the license collector to issue a license certificate. A permit from the City Council to carry on the occupation is required.[2]

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[1] By Ordinance No. 250, enacted January 3, 1955, the fees were reduced to $36 for local and $60 for itinerant electricians and electrical contractors.

Section 41.02 in part provides: "It is hereby made the responsibility of every general building contractor, under this Ordinance, to require subcontractors under his control or direction to obtain a business license as herein provided before permitting said sub-contractor to perform services for said general building contractor."

Defendants contend the imposition of contractors' license fees is not for regulation but for revenue purposes; that it does not add any regulatory burden on plaintiff to what is already required by state law; and that the penalty is applied for violation of the ordinance in failing to pay the license fee.

The same contention was made in Agnew v. City of Los Angeles, 110 Cal.App.2d 612, 243 P.2d 73. In that case the superior court granted an injunction against the enforcement of provisions of the electrical code of Los Angeles requiring payment of a permit service fee of $100 and the posting of a $1,000 bond by electrical contractors. In affirming the judgment we held: 1. The provision of article XI, section 11, of the Constitution declaring that "Any * * * city * * * may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws," is a limitation on the power of municipalities, from whatever source the power is derived. 2. A local ordinance is in conflict with general law if the general law occupies the entire field, leaving no room for local regulations. 3. It was the intention of the Legislature to declare that licensing and regulation of contractors by the state shall be the only licensing and regulation in the state. 4. The licensing of contractors throughout the state is a matter of general and state-wide concern, and is not a municipal affair which concerns only the inhabitants of a chartered city and which is subject to local regulation. 5. The state, by the enactment of the Contractors License Act, Bus. & Prof. Code, § 7000 et seq., has adopted a broad and comprehensive plan for licensing contractors throughout the state, and such general law has fully occupied the field to the exclusion of municipal regulation thereon other than for revenue only and for the enforcement of local regulations as to the quality and character of electrical installations. 6. A state license implies permission to the licensee to conduct his business at any place in the state, and this permission should not be circumscribed by local authorities; a city ordinance is invalid if it attempts to impose additional requirements. 7. The challenged provisions of the ordinance were invalid as an attempt to provide a means by which a contractor with a state license may be denied the right to contract or work in the city, and as being in direct conflict with the general state law, which is complete in itself; it nullified the permission given a contractor by the general law to conduct his business at any place in the state. See In re Porterfield, 28 Cal.2d 91, 116, 168 P.2d 706, 167 A.L.R. 675.

Lynch v. City of Los Angeles, 114 Cal.App.2d 115, at page 119, 249 P.2d 856, at page 858, says:

> "To finally sum up the matter in its legal aspect, appellants' argument tends to give first place to municipal regulatory powers and subjects state control to municipal limitation. This theory of operation is directly contrary to the well established rule, and should not be sanctioned either under so-called police power or otherwise. Nor should a contractor who has been duly licensed by

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[2] Section 11.01 reads: "It shall be unlawful for any person, whether as principal or agent, clerk or employee, either for himself or for any other person, or for any body corporate, or as an officer of any corporation, or otherwise, to commence or carry on in the City of Culver City any business specified in this ordinance and as herein defined, without first having paid the required license fee and having procured a license certificate from said City so to do and without complying with all other applicable regulatory ordinances now existing or hereafter adopted by the City Council, and without obtaining the permit, certificate of compliance, or other instrument required under the provisions of this ordinance, and complying with all regulations covering such business herein contained; and the carrying on of any business not specifically exempted by law without first having complied with the provisions of this ordinance, shall constitute a separate violation thereof for each and every day that such business is so carried on."

the state be placed in such a confused and burdensome position."

[1] Notwithstanding the state law which authorizes an electrical contractor holding a state license to contract anywhere in the state, Ordinance 49, as amended by Ordinance 250, limits his right to contract in Culver City unless he pays the city the prescribed fee and obtains a permit from the city. The provisions of the ordinance do not come within the category mentioned in Horwith v. City of Fresno, 74 Cal.App.2d 443, 168 P.2d 767—regulations as to the quality and character of installations. They attempt to provide the means by which an electrical contractor with a state license may be denied the right to contract or work in Culver City. The general law is complete in itself. It is not simply prohibitory. It is also permissive. It authorizes contractors licensed by the board to engage in their occupations anywhere in the state. The requirement for the payment of a fee and the obtaining of a permit nullifies the permission given a contractor by the general law to conduct his business at any place in the state. A municipality may not impose a more stringent or additional requirement than imposed by the general law. It clearly appears that the general law and the challenged provisions of Ordinance 49, as amended by Ordinance 250,—the one permitting, the other prohibiting, the same act, except on more onerous terms—are in direct conflict with each other.

[2] Ordinance 49, as amended by Ordinance 250, does what Horwith v. City of Fresno, 74 Cal.App.2d 443, 168 P.2d 767; City and County of San Francisco v. Boss, 83 Cal.App.2d 445, 189 P.2d 32; Collins v. Priest, 95 Cal.App.2d 179, 212 P.2d 269; Agnew v. City of Los Angeles, 110 Cal.App.2d 612, 243 P.2d 73, and Lynch v. City of Los Angeles, 114 Cal.App.2d 115, 249 P.2d 856, say cannot be done. The provisions of the ordinance relating to state licensed electrical contractors are invalid.

Appeal of Plaintiff

[3, 4] Plaintiff first asserts the court erred in not permitting him to introduce evidence for the purpose of establishing his damage sustained by reason of the refusal of Culver City to allow him to operate therein as an electrical contractor. The charter of Culver City, of which we take judicial notice, Thompson v. City of Los Angeles, 82 Cal.App.2d 45, 47, 185 P.2d 393, provides that no suit shall be brought on any claim for damages against the city or any officer thereof until a verified demand for the same has been presented within 90 days after the occurrence from which the damages allegedly arose and the claim has been rejected. Stat.1947, c. 24, p. 3386, 3406. The complaint is barren of any allegation that plaintiff complied with the charter provision and no offer to prove that he had done so was made. Such an allegation and proof are prerequisites to the reception of evidence of damage. Wiersma v. City of Long Beach, 41 Cal.App.2d 8, 12, 106 P.2d 45.

The court adjudged that Ordinance 170, as amended by Ordinance 230, is valid except to the extent section 4(d) applies to plaintiff.[3] Plaintiff's second assignment of error is that the trial court erred in holding that all sections, except section 4(d) of Ordinance 170, as amended by Ordinance 230, are valid.

The ordinance creates the office of electrical inspector, fixes his powers and duties, establishes some standards for electrical equipment and its installation, makes it unlawful to undertake the installation of electrical equipment without a permit, provides for the collection of an inspection fee, reinspection, the issuance of certificates, and that any person "who shall violate any of the provisions of this ordinance, or who shall fail to comply with the same, shall be guilty of a misdemeanor."

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[3] Section 4(d) reads: "Examinations: No person, as principal, agent, manager or employee shall conduct, manager [sic], or carry on the trade of a journeyman electrician or a maintenance electrician or do any electrical work or any kind of distribution with the City for which an electrical permit is required without first having submitted through practical examination before, and obtaining from, the Building Department of the City, a certificate of competency showing such person to have sufficient practical experience and sufficient knowledge to do electrical work."

Plaintiff challenges the validity of sections of the ordinance which empower the electrical inspector to make his own rules "as to motive or method or manner in which material shall be installed" (section 4(c));[4] provide that electrical installations shall be in conformity with the ordinance, the electrical safety orders of the state, and with approved standards for safety to life and property, and that where no specific type or class of material, or no specific standards are prescribed by the ordinance or by the electrical safety orders of the state of California, conformity with the regulations as laid down in the National Electrical Code, as approved by the American Standards Association, shall be prima facie evidence of conformity with approved standards for safety to life and property (section 5(a));[5] provide standards similar to those provided in section 5(a) for electrical materials and that listing or labeling in conformity to the standards of Underwriters' Laboratories, Inc., as approved by the United States Bureau of Mines, the American Standards Association, the United States Bureau of Standards, or other similar institutions of recognized standing, shall be prima facie evidence of conformity with approved standards for safety to life and property (section 5(b));[6] provide that equipment conduits and fittings installed on the exterior of any building shall be listed and approved by a recognized testing laboratory as raintight (section 9(a));[7] provide that certain grounds shall be installed as required by the National Electrical Code, and that metering equipment be installed as required by the Electrical Serving Utility (section 9(e));[8] provide that certain fixtures shall be provided with a fixed nameplate stating the manufacturer's name, and that such fixtures shall have Underwriters' Laboratory label or recognized testing laboratory label (section 21).[9]

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[4] Section 4(c) reads: "In cases where the rapid development in the application and uses of electricity or new and special or unusual methods of building construction, create problems or conditions which are not clearly contemplated in the making of this Ordinance and make literal application of the rule or rules impracticable, the Electrical Inspector is hereby empowered to make interpretations in the form of his own rules wherever there is a question as to motive or method or manner in which material shall be installed."

[5] Section 5(a) reads: "Installation: All electrical installations (industrial, commercial and residential) in the City of Culver City shal[l] be in conformity with the provisions of this ordinance, the Electrical Safety Orders of the State of California, and with approved standards for safety to life and property. In every case where no specific type or class of material, or no specific standards of installation are prescribed by the Electrical Safety Orders or by this Ordinance, conformity with the regulations as laid down in the National Electrical Code, as approved by the American Standards Association, shall be prima facie evidence of conformity with approved standards for safety to life and property."

[6] Section 5(b) reads: "Materials: All electrical materials, devices, appliances, fittings and equipment installed or used in the above described territory shall be in conformity with the provisions of this Ordinance, the Electrical Safety Orders of the State of California, and with approved standards for safety to life and property. Listing or labeling as conforming to the standards of Underwriters' Laboratories, Inc., as approved by the United States Bureau of Mines, the American Standards Association, the United States Bureau of Standards, or other similar institutions of recognized standing, shall be prima facie evidence of conformity with approved standards for safety to life and property."

[7] Section 9(a) reads: "Method of Installation of Service: Every service shall be installed in rigid metal raceway and in accordance with rules provided for herein, and all service equipment conduits and fittings installed on the exterior of any building shall be listed and approved by a recognized testing laboratory as raintight."

[8] Section 9(e) reads: "Service Grounding: Three (3) phase service grounds shall be rigid metal conduit or rigid galvanized pipe. Commercial and industrial single phase service grounds shall be protected by rigid metal conduit. Multi-Family dwelling service grounds shall be protect-

[5] Legislation for the purpose of controlling the character and quality of electrical installations and for inspection of the same is without question a valid exercise of the police power. Agnew v. City of Los Angeles, 110 Cal.App.2d 612, 616, 243 P.2d 73; Horwith v. City of Fresno, 74 Cal.App.2d 443, 448–449, 168 P.2d 767. The question on plaintiff's appeal is not one of the power of Culver City to regulate the character and quality of electrical installations, but whether the regulatory provisions are in conformity with well recognized rules and principles of law.

[6, 7] A municipal legislative body has no power to delegate to an administrative board or officer its exclusive power and function of determining what acts or omissions on the part of an individual are unlawful. The distinction between the legislative and administrative function must be recognized and enforced. In re McLain, 190 Cal. 376, 379, 381, 212 P. 620. A delegation by a municipality of a power giving an administrative officer uncontrolled discretion constitutes a delegation of legislative power. Northern Boiler Co. v. David, 157 Ohio St. 564, 106 N.E.2d 620, 623.

[8–12] Ordinances, to be valid and effectual, must set forth with clarity some norm or standard by which all persons may know their rights and obligations thereunder. Where an ordinance commits its application to municipal officials it should set up a uniform standard or rule of conduct. Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 484, 238 P. 703. Regulations prescribed by ordinance must be clear, definite, and specific in their application and operation, and their application may not be left to the caprice of enforcement officers. Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L.R.A., N.S., 896; In re Peppers, 189 Cal. 682, 685–689, 209 P. 896; In re Porterfield, 28 Cal.2d 91, 110–112, 168 P.2d 706, 167 A.L.R. 675; People v. Young, 136 Cal. App. 699, 702, 29 P.2d 440; Vaughn v. Board of Police Com'rs, 59 Cal.App.2d 771, 140 P.2d 130; Edwards & Browne Coal Co. v. City of Sioux City, 213 Iowa 1027, 240 N.W. 711; Thrift Hardware & Supply Co. v. City of Phoenix, 71 Ariz. 21, 222 P.2d 994, 995–996, 22 A.L.R.2d 810. An attempted delegation of power to an officer of a municipality, where no standards are established by which the officer shall be governed in his actions, is in effect an attempted delegation to such officer to enact a law. A criminal statute must be so framed that those to whom it is to be administered and those who are to administer it may know what standard of conduct is intended to be required.[10]

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ed by a rigid metal raceway. One (1) and two (2) family service grounds may be armour protected grounds or open type grounds installed as required by the National Electrical Code. (Note: Install metering equipment as required by the Electrical Serving Utility.)"

[9] Section 21 reads: "Gaseous Tube Lights: Each fluorescent fixture, mercury vapor fixture or high voltage gas tube light or sign shall be provided with a fixed nameplate, legible after installation, which shall state correctly the manufacturer's name or trade mark, and the voltage, amperage, total watts and power factor. No such equipment shall be installed in which the power factor is less than ninety (90) per cent. All above listed equipment shall have Underwriters' Laboratory Label or recognized testing laboratory label. * * *"

[10] Musser v. State of Utah, 333 U.S. 95, 97, 68 S.Ct. 397, 92 L.Ed. 562; Winters v. People of State of New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840; Cline v. Frink Dairy Co., 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146; Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062; Stromberg v. People of State of California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117; United States v. L. Cohen Grocery Co., 255 U.S. 81, 89, 41 S.Ct. 298, 65 L.Ed. 516; Small Co. v. Ameri-

Ordinance provisions similar to those challenged are universally condemned. The Fire Prevention Act of Kansas provided, "All electric wiring shall be in accordance with the national electrical code." Gen.St.1915, § 4863. In State v. Crawford, 104 Kan. 141, 177 P. 360, at page 361, 2 A.L.R. 880, the court said:

> "But none of the cases cited has ventured so far afield as to intimate that the Legislature might delegate to some unofficial organization of private persons like the National Fire Protective Association the power to promulgate rules for the government of the people of this state, or for the management of their property, or that the Legislature might prescribe punishment for breaches of these rules. We feel certain that no such judicial doctrine has ever been announced. If assent to such a doctrine could be given, a situation would arise where owners of property with considerable persistence might learn what these Code rules were, and incur the expense of making their property conform thereto, only to find that the National Fire Protective Association had reconvened in Chicago, New York, or New Orleans, and had revised the Code, and that the work and expense had to be undertaken anew. And there would be no end of such a state of affairs. Furthermore, there is no official way, indeed no practical way, for the average property owner to know what these Code rules are. The laws of this state to which our people owe obedience must be officially published. The people may learn what these laws are, and they are privileged to meet legislative committees and petition the Legislature for amendment, improvement, and amelioration of the laws. Shall it be intimated that if these fire prevention regulations, these 'National Electrical Code' rules are oppressive, or otherwise objectionable, the property owners of this state must be referred to some voluntary and unofficial conference of underwriters and electricians which occasionally meets here, there, or anywhere in North America for redress of grievances. But the fallacy of such legislation in a free, enlightened, and constitutionally governed state is so obvious that elaborate illustration or discussion of its infirmities is unnecessary. If the Legislature desires to adopt a rule of the National Electrical Code as a law of this state, it should copy that rule, and give it a title and an enacting clause, and pass it through the Senate and the House of Representatives by a constitutional majority, and give the Governor a chance to approve or veto it, and then hand it over to the secretary of state for publication.
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> "The clause * * * requiring that 'all electric wiring shall be in accordance with the National Electrical Code,' is void for uncertainty. * * *"

See Columbia Specialty Co. v. Breman, 90 Cal.App.2d 372, 377–378, 202 P.2d 1034.

In City of Tucson v. Stewart, 45 Ariz. 36, 40 P.2d 72, 73, 96 A.L.R. 1492, the court considered an ordinance which provided that the city electrician could refuse to give his approval of electrical installations if they did not comply with "approved methods of construction for safety to life and property" and that "[t]he regulations contained in the present National Electrical Code, and subsequent editions thereof, and in the present National Electrical Safety Code, and subsequent sections thereof, shall be prima facie evidence of such approved methods, provided that the Electrical Code of the City of Tucson shall govern in all cases where there are conflicting provisions." The court said, 40 P.2d 80:

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can Sugar Refining Co., 267 U.S. 233, 239, 45 S.Ct. 295, 69 L.Ed. 589; Smith v. Cahoon, 283 U.S. 553, 564, 51 S.Ct. 582, 75 L.Ed. 1264.

> "The contractor or supervising electrician might have one opinion as to the *approved methods*, and the city electrician, who is given final say as to whether the construction conforms with the approved methods, another and entirely different opinion. The fact that the ordinance provides that in determining the approved methods the regulations of the present National Electrical Code and the present National Electrical Safety Code and subsequent editions thereof may be taken as prima facie evidence of such methods, but that in case of conflict the electrical code of the city of Tucson shall govern, does not lend clarity, certainty, or definiteness to the regulations, but rather suggests conflicts for an administrative officer of the city to reconcile."

The court held that requiring conformity in construction to be in accordance with the regulations of some private association was delegating the legislative body's power to make the city's laws, and that the ordinance was void.

In Cawley v. Northern Waste Co., 239 Mass. 540, 132 N.E. 365, sections of a municipal ordinance provided that an owner could not connect electricity with any system of wiring for light or power without a written permit of the inspector of wires and forbade that officer to issue such permit unless "the established rules and regulations of the National Board of Fire Underwriters" should have been complied with. The sections were held void.

[13] Every man should be able to know with certainty when he is committing a crime. In re Peppers, 189 Cal. 682, 686, 209 P. 896.

[14–19] Measured by these principles, it is apparent that sections 4(c), 5(a), 5(b), 9(a), 9(e), and that part of section 21 reading "All above listed equipment shall have Underwriters' Laboratory Label or recognized testing laboratory label" of Ordinance 170, as amended by Ordinance 230, are invalid. They constitute an unlawful delegation of power. They are vague, indefinite, and uncertain. They leave it entirely to the opinion of the persons who formulate the National Electrical Code, to various private and public bodies, and to the license inspector to determine the law governing the character and quality of various electrical installations, and confer on them the power to create an offense to which criminal sanctions are attached. The regulations can be changed at any time at the will of such parties and at the whim of the license inspector, whoever he might be. They fix no ascertainable standard whereby an electrical contractor may be governed.

Plaintiff also challenges the validity of sections of the ordinance which provide for use of used material with the approval of the electrical inspector (section 5(c));[11] require that the maker's identification symbol shall be placed on all electrical equipment (section 5(d));[12] provide that no two-wire service shall be connected to a three-wire service without the written approval in advance of the electrical inspector (section 9(b));[13] provide that disconnecting means shall be of a type approved for service equipment and for prevailing conditions (section 9(g)); [14] provide that no deviation may be made from the installation described in the permit without the written approval of the electrical inspector (section 23(d)).[15]

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[11] Section 5(c) reads: "Used Materials: Previously used materials shall not be reused without the written approval obtained in advance from the Electrical Inspector."

[12] Section 5(d) reads: "Nameplate: The makers nameplate, trademark, or other identification symbol shall be placed on the outside where it is visible at time of inspection on all electrical materials, devices, appliances, fittings and equipment used or installed under the provisions of this Ordinance."

[13] Section 9(b) reads: "Two and Three Wire Services: All single phase lighting loads of not more than two (2) circuits may be served by two (2) wires. Three (3) circuits or more shall be served by three (3) wires. Where an installation has been wired and arranged for a three wire service, no two wire service shall be connected thereto without the written approval obtained in advance from the Electrical Inspector."

[20] The legislative body of a municipality may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the legislative body for his guidance. Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 642, 91 P.2d 577. "It is well settled that the Legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the Legislature for his governance." Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 484, 238 P. 703, 709; Borum v. Graham, 4 Cal.App.2d 331, 336, 40 P.2d 866.

First Industrial Loan Co. of California v. Daugherty, 26 Cal.2d 545, at page 549, 159 P.2d 921, at page 923, says:

> "The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect, and provision by the Legislature that such rules and regulations shall have the force, effect, and sanction of law does not violate the constitutional inhibition against delegating the legislative function."
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> "[26 Cal.2d at page 550, 159 P.2d at page 923.] A ministerial officer may not, however, under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute."

Gaylord v. City of Pasadena, 175 Cal. 433, 166 P. 348, held that a municipal ordinance delegating to the city electrician the power of determining whether an electrical installation in a building is dangerous to life or property, without defining what conditions he must find to exist before he determines that the installation is unsafe or dangerous, was not void as unwarrantedly conferring on that officer legislative powers or because its terms were either indefinite, arbitrary, or oppressive. The court said that from the very nature and character of an electrical apparatus, it would be impossible for any ordinance to define what conditions the city electrician must find before he determined that the electrical apparatus was unsafe or dangerous without working in many instances the very oppresssion which its language, necessarily general, was designed to prevent; that it is presumed the city electrician is competent and that he will act fairly. Also see In re Leach, 215 Cal. 536, 543–545, 12 P.2d 3.

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[14] Section 9(g) reads: "Switch and Circuit-Breaker: The disconnecting means shall be manually operable, it may consist of not more than six switches or six circuit breakers in a common enclosure, or in a group of separate enclosures, located at a readily accessible point nearest to the entrance of the conductors, either inside or outside the building wall. Two or three single pole switches or breakers capable of individual operation, may be grouped on multi-wire circuits as one multi-pole disconnect, provided they are equipped with (Handle ties). 'Handles within 1/16 inch proximity' a 'master handle' or 'other means' making it practical to disconnect all conductors of the service with no more than six operations of the hand. The disconnecting means shall be of a type approved for service equipment and for prevailing conditions."

[15] Section 23(d) reads: "Application for such permit, describing the work to be done, shall be made in writing to the Electrical Inspector by the person, firm or corporation installing the work. The application shall be accompanied by such plans, specifications and schedules as may be necessary to determine whether the installation as described will be in conformity with the requirements of this Ordinance. If it shall be found that the installation as described will conform with all legal requirements, and if the applicant has complied with the provision of this Ordinance, a permit for such installation shall be issued. No deviation may be made from the installation described in the permit without the written approval of the Electrical Inspector."

[21] We think sections 5(c), 9(b), and 9(g) come within these principles and that they are merely administrative regulations to promote the purposes of the legislation and to carry it into effect. They are valid. The purpose of section 5(d) and that part of section 21 relative to stating the manufacturer's name or trademark on certain materials may be to facilitate repair, replacement of parts, or fix responsibility for safety. It is apparent that certain standards of quality in electrical fixtures are reasonable demands in the interest of public safety. Thrift Hardware & Supply Co. v. City of Phoenix, 71 Ariz. 21, 222 P.2d 994, 996, 22 A.L.R.2d 810. We cannot say, as a matter of law, that those provisions are unreasonable. They are valid.

The judgment, insofar as it adjudges that Ordinance 49, as amended by Ordinance 250, is invalid and unenforceable against plaintiff insofar as it provides for the enforcement of the provisions of the ordinance by criminal process, and insofar as it adjudges that Ordinance 170, as amended by Ordinance 230, is invalid to the extent section 4(d) applies to plaintiff, is affirmed. Insofar as it adjudges that Ordinance 170, as amended by Ordinance 230, is valid in all other respects, it is reversed with directions to the superior court to amend its findings of fact and conclusions of law and render judgment in conformity with this opinion.

SHINN, P. J., and PARKER WOOD, J., concur.

EVELYN, Incorporated, a corporation, a/k/a Evelyn, Inc., a/k/a Evelyn Cleaners; Evelyn M. Morris and Ernest M. Govela, Plaintiffs and Appellants,

v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, and the Director of Employment, Defendants and Respondents. *

Civ. 8964.

District Court of Appeal, Third District, California.

Dec. 18, 1956.

Rehearing Denied Jan. 10, 1957.

Hearing Granted Feb. 13, 1957.

Action by a corporation and its sole stockholders to recover unemployment insurance taxes which were paid under protest. The Superior Court, Sacramento County, Grover W. Bedeau, J., entered judgment in favor of defendants and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that evidence sustained finding that two stockholders in question received compensation from their corporation for their services and that such compensation constituted wages with reference to provisions of the Unemployment Insurance Act.

Judgment affirmed.

1. Corporations 🔑**1**

A stockholder of a corporation, even though he is a large stockholder, is not the employer of those working for the corporation which is an entity distinct from its members and as such is the only employer.

2. Taxation 🔑**543(7)**

In action by a corporation and its two stockholders to recover unemployment insurance taxes which were assessed on theory that stockholders, were employees and which were paid under protest, evidence sustained finding that the two stockholders received compensation from their corporation for their services and that such compensation constituted wages with reference to provisions of the Unemployment Insurance Act. West's Ann.Unempl.Ins.Code, § 675.

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* Opinion vacated 311 P.2d 500.

3. Corporations ⚿1

Generally, the corporation and its stockholders are deemed separate entities, and this is true in respect to tax problems.

4. Corporations ⚿1

Generally, the corporate entity will be disregarded to prevent injustice or fraud, but generally cases where the corporate entity is disregarded are cases in which the person suing the corporation seeks to have the veil pierced, and the court will not approve piercing of the corporate veil to give it an advantage, rather than to present an injustice.

5. Statutes ⚿263

Generally, statutes are not construed to apply retroactively.

6. Constitutional Law ⚿107
Limitation of Actions ⚿4(2)

An amendment to a statute of limitations enlarging the period of time within which an action can be brought as to pending causes of action is not retroactive legislation and does not impair any vested right, and in accordance with such rule the legislature can alter or amend a statute of limitations as to cases which have not been barred and can remove the statute entirely or say that it will not run in certain situations.

7. Taxation ⚿318

Where an employee first became subject to the Unemployment Insurance Code in September, 1942, and an assessment for such taxes was not barred under the then statute of limitations at the time of amendment to such statute in 1945, the 1945 amendment providing that except in the case of failure without good cause to file a return every notice of assessment shall be made within three years, applied to assessments for 1942 and did not bar 1942 assessments in the absence of a showing of good cause for failure to file a return. West's Ann.Unempl.Ins.Code, § 1132.

8. Taxation ⚿543(7)

In action by corporation and its two stockholders to recover unemployment insurance taxes paid under protest, evidence on issue of tolling of statute of limitations sustained finding that there was an absence of good cause for failure of corporation to file returns showing corporate contribution liability for years in question. West's Ann. Unempl.Ins.Code, § 1132.

◆

Robert A. Waring, Homer E. Geis, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., and William L. Shaw, Deputy Atty. Gen., for respondents.

SCHOTTKY, Justice.

Plaintiffs above named commenced an action to recover unemployment insurance taxes which were paid under protest. Following a trial, judgment was rendered in favor of defendants and plaintiffs have appealed from said judgment.

There is no substantial dispute as to the facts. The record shows that in February of 1939 Evelyn Morris and Ernest Goveia formed a corporation called Evelyn, Incorporated. They were the sole stockholders. Morris and Goveia determined their positions by mutual agreement. No corporate meetings were ever held. No salaries were officially declared. The parties withdrew the profits on an agreed basis. The business conducted was a cleaning business. It was known as Evelyn Cleaners. Morris and Goveia managed the business. They hired, fired and supervised the employees. Both business and personal bills were paid from the business. Goveia advanced funds to the business whenever necessary. These advanced funds were not set up as loans. The lease of the premises where the business was conducted was in Goveia's name. A payroll account was kept but neither Goveia nor Morris were carried on the payroll. However, the corporate status was always retained. The California franchise tax was paid each year. Mr. Goveia and Mrs. Morris included themselves in the federal social security returns filed by Evelyn, Incorporated. Both federal and state corporate income tax returns were filed by the corporation. Beginning with the year 1946 state unemployment insurance tax returns were filed by the corporation in which Goveia and Morris were named as employees. In 1950 a deficiency assessment was made by respondent California Unemployment Stabilization Commission for unemployment insurance contributions for the years 1942 through 1945. During the period involved the law provided that an employer must have a minimum of four employees in order to be subject to the provisions of the state unemployment insurance law. It is conceded that unless Morris and Goveia are to be considered employees there were not four employees.

The first question presented on this appeal is whether Goveia and Morris were employers or employees. If employers, the tax was improperly assessed. If employees, the tax was due.

Appellants Goveia and Morris contend that they were not employees. They assert that the section of the law defining an employer exempts them. The provision reads in part: " 'Employer' means any employing unit, which * * * pays wages for employment." Unempl.Ins.C.A., sec. 675. It is appellants' contention that they did not receive wages nor did they perform any services under any contract of hire. It is their contention that they were employers. They ask this court to disregard the corporation Evelyn, Incorporated, and determine that Evelyn, Incorporated, was a mere name—a shadow without substance.

[1, 2] One of the distinguishing characteristics of a corporation is that it is a separate entity from its members or stockholders and from its officers or directors. Thus, in legal contemplation a stockholder of a corporation, even though he be a large stockholder, is not the employer of those working for the corporation which is an entity distinct from its members and as such the only employer. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 P. 1027, 21 L.R.A.,N.S., 550. While in the instant case Goveia and Morris acted as the proprietors of the business and managed its affairs as their own, still the corporation had to act through individuals. It could not act except through people. While the corporate status may have been maintained in a rather loose manner, and while the sums paid to Goveia and Morris may not have been entered on the books as wages, still they could only withdraw "profits" as wages or dividends, and no dividends were ever declared. They supervised the employees. They then performed functions which normally an officer does perform. The finding of the court that "each of Goveia and Morris received compensation from the corporation for their services; that such compensation received by Goveia and Morris from the corporation is wages with reference to the provisions of the Unemployment Insurance Act" is certainly supported by the record.

It is clear that the corporate status was always maintained. Whatever may have been the reasons of Goveia and Morris for adopting the corporate entity, the record shows that in filing social security tax returns with the federal government they listed themselves as employees of the corporation along with the other employees, and made payments to the government accordingly. When asked by the referee as to why he had included Mrs. Morris and himself on the federal security returns, appellant Goveia replied: "Well, I had paid social security since the beginning, since it was inaugurated, and as I am nearing the period when I will derive benefits from it, I wanted to keep it up to its highest point." It is quite apparent that in filing such social security returns appellant Goveia and Morris wished to gain benefits under the Social Security Act, 42 U.S.C.A. § 301 et seq. that they could not obtain as employers. It is not only good law but it is sound public policy that as stated in Ballantine on Corporations, page 291: "The cloak of corporate capacity adopted by a taxpayer may not be shed or donned to suit his personal convenience or caprice."

[3, 4] Appellant Goveia contends further that this is a case where to recognize the corporate status would result in an injustice. He argues that it is inequitable to

exact $2,143 from a small businessman. While this may be true, "'As a general rule a corporation and its stockholders are deemed separate entities, and this is true in respect to tax problems.'" Northwestern Pacific R. Co. v. State Board of Equalization, 21 Cal.2d 524, 530–531, 133 P.2d 400, 404. It is also a general rule that the entity is disregarded to prevent injustice or fraud. But generally cases where the entity is disregarded are cases in which the person suing the corporation seeks to have the veil pierced.

We know of no case where a court has approved the piercing of the corporate veil to give it an advantage, not to prevent an injustice.

Appellants' final contention is that the assessment or at least a part of it was barred by the statute of limitations. The tax was assessed in 1950 for taxes due for the years 1942 to 1945. If the statute of limitations had run on the assessment or any part of it the assessment would be barred in part or in whole. In 1943 the statute of limitations read that in the absence of any intent to evade the provisions of the act an assessment must be made within three years of the date on which the contribution liability included in the assessment became due. Section 45.5 of the Act as it read in 1943.[1] In September of 1945 the statute was changed to read: "Except in the case of failure without good cause to file a return, fraud or intent to evade this act or the authorized rules and regulations, every notice of assessment shall be made within three years after the last day of the month following the close of the calendar quarter during which the contribution liability included in the assessment accrued or within three years after the deficient return is filed, whichever period expires the later." (It was in effect stipulated in this case that there was no fraud or intent to evade the act because no 25% penalty was imposed in the assessment.) If the 1943 statute applies, no tax would be due since no intent to evade was in issue. Appellants argue that the 1943 statute must apply because generally statutes are not made to apply retrospectively.

[5–8] While it is true, generally, statutes are not construed to apply retroactively, it is also true that before the action is barred by the statute the legislature has absolute power to amend the statute and alter the period of limitations prescribed therein. It is well settled that an amendment to a statute of limitations enlarging the period of time within which an action can be brought as to pending causes of action is not retroactive legislation and does not impair any vested right. In accordance with this rule the legislature could alter or amend the statute as to causes which had not been barred, and the legislature could remove the statute entirely or say that it will not run in certain situations. This being so, the amendment effective September, 1945, applies to this case and the assessments then were not barred when made in 1950 since the employee first became subject to the act in September, 1942. It is conceded that no returns were filed so that unless good cause were shown the statute would be tolled. Appellant contends that he does have good cause. Whether appellants had good cause for not filing the required tax returns with the Department of Employment was a question of fact for the trial court to determine. Appellants gave as excuses that they were ignorant of the law requiring the filing of the returns to the state, but, even if true, this would hardly compel a finding that there was good cause for tolling the statute. The trial court found that there was an absence of good cause and we are satisfied that such finding is supported by the record.

No other points raised require discussion. The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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[1] Now Unemployment Insurance Code, § 1132.

The CITY OF LA MESA, a Municipal Corporation, Plaintiff and Appellant,

v.

TWEED & GAMBRELL PLANING MILL, a California Corporation; Security Title Insurance Company, a Corporation, Trustee; August D. Gambrell and Noel P. Tweed, Beneficiaries, Defendants and Respondents.

Civ. 5426.

District Court of Appeal, Fourth District, California.

Dec. 13, 1956.

Rehearing Denied Jan. 8, 1957.

Hearing Denied Feb. 6, 1957.

Eminent domain proceeding by city. The Superior Court, San Diego County, C. M. Monroe, J., entered judgment for defendants and city appealed. The District Court of Appeal, Coughlin, J. pro tem., held that instruction informing jury that defendants' planing mill was a nonconforming use and could not be changed to another use, so that if a planing mill could not be carried on on uncondemned portion of premises the premises would cease to be industrial property and would be residential property only, foreclosed jury from considering evidence that even if remainder of property would be economically unsuited for planing mill after condemnation of a portion thereof it could be used to advantage for other businesses, and therefore the instruction was prejudicially erroneous.

Judgment reversed.

1. Municipal Corporations 🔑601(5), 625

Comprehensive zoning is a legitimate subject for legislative consideration under the police power, and zoning ordinances which are reasonable in object and not arbitrary in operation constitute a valid exercise of that power.

2. Municipal Corporations 🔑601(4, 7)

Zoning legislation looks to the future, and may effect the eventual liquidation of nonconforming uses providing the method of operation is not unreasonable or arbitrary and to this end provisions which preclude the extension or enlargement of such uses forbid resumption of a use when terminated, or provide a reasonable time within which the use must cease are proper as a valid exercise of the police power.

3. Municipal Corporations 🔑601(4)

Valid zoning legislation may provide for the eventual liquidation of nonconforming uses within a prescribed period commensurate with the investment involved.

4. Eminent Domain 🔑2(1)
Municipal Corporations 🔑601(12)

The fact that the value of an individual's property may be depreciated as a result of zoning legislation enacted under the police power is not cause for invalidation if the purpose is proper and there is no arbitrary and unreasonable application in the particular cause, however, the extent of the injury caused by such zoning must be considered in determining whether the loss sustained is merely an incident to a valid exercise of the police power or constitutes a taking of property without just compensation.

5. Municipal Corporations 🔑625

Where the city of La Mesa, in order to effect a comprehensive zoning plan which would permit only a residential use of defendants' land during an interim period awaiting creation of a civic center thereon, by an ordinance, required defendants within five years to liquidate their investment in a planing mill which had an estimated remaining twenty-one years of economic life, and such property was bordered on one side by a railroad track and on three sides by industrial and commercial businesses, ordinance requiring such liquidation under such circumstances was unreasonable and arbitrary.

6. Municipal Corporations 🔑111(4)

Where the validity of an ordinance is attacked upon ground that a part thereof is unconstitutional, and a severability clause is included therein, the court may consider such a clause as a declaration of intention by the existing body that, in so far as lay within its power, a separable invalid portion of the act should not destroy the whole.

7. Municipal Corporations ⚷111(4)

Although part of an ordinance may be unconstitutional, such fact does not render the whole thereof void if the remaining provisions can be separated from the portions which are valid.

8. Statutes ⚷64(1)

The invalid part of a statute is not inseparable from the remainder, unless all of the parts are so interdependent that to eliminate the former would destroy the force of the whole statute, and conversely, the valid part of a statute will be sustained, even though other parts are invalid, if the former can establish one or all of the purposes thereof without the latter.

9. Municipal Corporations ⚷111(4)

City of La Mesa zoning ordinance which was a comprehensive plan was valid and enforceable notwithstanding that a part thereof fixing a time limit for termination of a nonconforming use was unconstitutional.

10. Eminent Domain ⚷202(1)

Provisions of a valid zoning ordinance properly may be considered by the jury in determining the value of property taken and the resulting severance damages, if any.

11. Eminent Domain ⚷222(4), 262(5)

In eminent domain proceeding by city, instruction informing jury that defendants' planing mill was a nonconforming use and could not be changed to another use so that if a planing mill could not be carried on on uncondemned portion of the premises the premises would cease to be industrial property and would be residential property only, foreclosed jury from considering evidence that even if the remainder of the property would be economically unsuited for a planing mill after condemnation of a portion thereof it could be used to advantage for other businesses, and therefore the instruction was prejudicially erroneous.

12. Eminent Domain ⚷222(4), 262(5)

In eminent domain proceeding, instruction pertaining to alteration or termination of nonconforming use buildings, based on a superseded ordinance, rather than on the provisions of a valid part of a comprehensive zoning ordinance, was prejudicially erroneous in view of fact it could have led jury to improperly believe that the taking in question would result in a termination of defendants' nonconforming use of the property.

13. Estoppel ⚷62(5)

Mere fact that application of zoning ordinance to a portion of premises condemned by city might result in a smaller loss being sustained by taking of such portion of the premises, with the consequent reduction in the amount of severance damages to be awarded, did not authorize application of doctrine of equitable estoppel to prevent a consideration of the ordinance in determining the amount of such damages.

14. Appeal and Error ⚷928(4)

Where record did not disclose that either party proposed any instructions, District Court of Appeal would presume that none were offered.

15. Eminent Domain ⚷95

The cost of removing or relocating personal property is not reasonably related to its value as a part of the premises involved, and such a cost is not a compensable item recoverable as part of an award for land taken or on account of severance damage.

16. Eminent Domain ⚷95, 203(1)

Costs of removal of machinery and equipment of the whole of certain property, required by condemnation of a portion of such property, were not damages which accrued by reason of alteration of defendants' buildings due to such condemnation within meaning of statute providing for damages accruing by reason thereof, and therefore evidence as to the costs of such removal was properly excluded in eminent domain proceeding. West's Ann.Code Civ.Proc., § 1248, subd. 6.

17. Eminent Domain ⚷196

In eminent domain proceeding, evidence respecting alleged bad faith and fraud by city concerning negotiations about acquisition of land in question before commencement of condemnation action, although not pertinent to issue of damages, was relevant to issues raised by defendants' amended answer alleging fraud and bad faith on the part of the city in adoption of its resolution of necessity and to a consideration of the unconstitutionality of a zoning ordinance requiring elimination of defendants' nonconforming use within five years, and admission of such testimony was therefore proper.

18. Evidence ⚿213(1)

Mere fact that statements are made or incidents take place during negotiations to effect a compromise does not justify exclusion of evidence relating to the same if such evidence otherwise is admissible.

19. Evidence ⚿213(4)

Although it would not be competent to admit an offer of compromise as such, the declaration therein of facts involved in a controversy which are not mere concessions made for the purpose of such offer, but are statements of independent facts, are admissible against the party making them.

20. Eminent Domain ⚿195

In eminent domain proceeding, evidence of facts tending to show fraud and bad faith on part of city were admissible as proof of allegations contained in defendants' answer even though the events related occurred during negotiations to effect a compromise seeking acquisition of land in question in view of fact that honesty and good faith of the city was not an issue in controversy at time of such negotiations.

21. Eminent Domain ⚿202(1)

In an eminent domain proceeding, on direct examination, testimony respecting appraised value of condemned property, as determined in a prior probate proceeding, is inadmissible.

22. Evidence ⚿558(8)

In an eminent domain proceeding, on cross-examination, a witness who has testified as an expert on value may be asked concerning his knowledge of a prior probate appraisal, for the purpose of testing the value of his opinion, and the scope of such cross-examination is within the discretion of the trial judge who may determine that, under the circumstances of a particular case, the time when the appraisal was made was so remote that any lack of knowledge concerning it is irrelevant.

23. Eminent Domain ⚿241

In eminent domain proceeding, where jury awarded defendants $58,000 for a portion of defendants' premises, and value of the whole of defendants' premises was $70,000, the severance damages were not substantially equal to the value of the whole property, and therefore trial court properly refused to permit city to acquire the whole parcel under statute providing for such procedure where the severance damages are equal to the fair and reasonable value of the whole. West's Ann.Code Civ.Proc., § 1266.

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Gilbert Harelson, City Atty., La Mesa, Jennings, Engstrand & Henrikson, La Mesa, for appellant.

Hillyer & Crake and Oscar F. Irwin, San Diego, for respondents.

COUGHLIN, Justice pro tem.

This is an appeal from a judgment in an eminent domain proceeding involving the taking of a 40 foot strip of land, which was part of a larger parcel belonging to the defendants. By its verdict, the jury found that the market value of the whole parcel was $70,000; the market value of the part proposed to be taken was $10,500; and the severance damage to the remaining property was $47,500. The plaintiff seeks a reversal because of error in instructing the jury; in the admission of testimony; and in refusing to permit the plaintiff to take the whole parcel.

In 1936, the Tweed brothers, predecessors in interest of the defendants, purchased the land in question, located along a railroad track in the city of La Mesa, and built a planing mill on the easterly half thereof, which was zoned for industrial use. The westerly half was zoned R-2 (Two-family residence). Four years later, after obtaining a variance permit, additional structures were erected on the westerly half, so that the planing mill covered the entire property.

In 1945, the city of La Mesa adopted Ordinance No. 265, changing the zoning laws; placing the subject property in an R–1 category (One-family residence); granting permission to continue nonconforming uses existing at the time the ordinance took effect, such as the defendants' planing mill; providing that any nonconforming building should not be "enlarged, extended, reconstructed or structurally altered" excepting alterations or replacements within any 12 month period not exceeding twenty-five per cent of the building's assessed valuation; directing that if any nonconforming building should be damaged by "fire, explosion, Act of God or Act of the Public Enemy" to the extent of more than seventy-five per cent of the assessed value, the nonconforming use should terminate.

In 1954 the city council caused a study to be made respecting the adoption of a master zoning plan and, following the recommendations made as a result of this study, in April, 1955, adopted a zoning ordinance for the entire city, known as Ordinance No. 618, which, among other things, zoned the property in question as R–3 (Multiple family residence); permitted the continuance of a nonconforming use and the changing of such use to another "of the same or more restricted classification"; provided an amortization plan for the termination of all such uses; prohibited any structural alterations to nonconforming buildings, except those provided by law, and excepting also those nonconforming buildings destroyed to the extent of not more than fifty per cent of their replacement value where such destruction was caused by "fire, explosion or other casualty or Act of God or the Public Enemy"; and expressly repealed Ordinance No. 265.

Under the amortization plan adopted by the later ordinance, a nonconforming use of wooden frame buildings, such as those on defendants' property, would terminate upon the expiration of twenty years from the date of construction of the nonconforming buildings, but, in no case, less than five years after notification by the city council.

As a further result of the master plan study it was decided to extend Nebo Drive one block between Allison Street and University Avenue, which would require the acquisition of the 40 foot strip of defendants' land.

Approximately a year prior to the adoption of Ordinance No. 618 the city acquired all of the property in the block where defendants' planing mill is located, except the defendants' property, and thereafter undertook negotiations to obtain the 40 foot right of way from them. Included in these negotiations was a proposal to reconstruct a part of defendants' planing mill on property which the city theretofore had acquired. Under this proposal it would have been necessary to zone the premises for an industrial use. However, the parties did not reach a specific understanding and, on February 23, 1955, the city terminated these negotiations; on April 26, 1955, enacted Ordinance No. 618; on June 30, 1955, filed this action; and on September 21, 1955, notified the defendants to terminate their nonconforming use within five years.

The 40 foot strip which the city seeks to acquire by this action would separate the defendants' planing mill from the railroad track and its siding privileges; would cause the removal of one building and a part of some of the other buildings on defendants' property; and would take 4,435 square feet from the 22,645 square feet of the whole parcel.

As applied to this case, Ordinance No. 618 authorized the city council to terminate the defendants' nonconforming use within five years. The buildings upon the property in question were constructed in 1936; had an estimated total economic life of 40 years; and, at the time of the adoption of the ordinance, had an estimated remaining economic life of 21 years. The planning expert who recommended the 20 year termination period provided in the ordinance was guided by the attitude of the Internal Revenue Department, Federal Housing Authority, banks and other loaning agencies respecting the estimated amount of use of an improvement, measured in units of time, necessary to effect a return on the investment therein. Based on the opinion of one of the expert witnesses, the present value of the improvements is $43,000.

The property to the north, east and south of the block in which the defendants' mill is located is zoned for either commercial or industrial uses.

The planning consultants employed by the city believed that the block in which the defendants' property is situated eventually should be used as part of a civic center, but recommended that, for the time being, it should be zoned for professional business purposes, which would act as a buffer between the adjoining commercial and residential zones.

The trial court held that the amortization provisions of Ordinance No. 618 were unconstitutional. For this and other reasons, the jury were instructed to disregard the provisions of that ordinance in determining the value of the property under consideration.

[1] Comprehensive zoning is a legitimate subject for legislative consideration under the police power, and zoning ordinances which are reasonable in object and not arbitrary in operation constitute a valid exercise of that power. Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14; Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 557, 254 P.2d 865; Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal.2d 121, 126, 272 P.2d 4.

Such ordinances ordinarily except from their operation existing lawful uses in conflict therewith, generally referred to as nonconforming uses, because of the questionable constitutionality of legislation which would terminate such uses forthwith. Jones v. City of Los Angeles, supra, 211 Cal. 304, 295 P. 14; County of San Diego v. McClurken, 37 Cal.2d 683, 686, 234 P.2d 972; Livingston Rock & Gravel Co. v. County of Los Angeles, supra, 43 Cal.2d 121, 127, 272 P.2d 4.

[2] Zoning legislation looks to the future, and may effect the eventual liquidation of nonconforming uses, Livingston Rock & Gravel Co. v. County of Los Angeles, supra, 43 Cal.2d 121, 127, 272 P.2d 4; County of San Diego v. McClurken, supra, 37 Cal.2d 683, 687, 234 P.2d 972; Jones v. City of Los Angeles, supra, 211 Cal. 304, 309, 295 P. 14; Ricciardi v. County of Los Angeles, 115 Cal.App.2d 569, 576, 252 P.2d 773, providing the method of operation is not unreasonable or arbitrary. To this end, provisions which preclude the extension or enlargement of such uses, forbid resumption of a use when terminated, or provide a reasonable time within which the use must cease have been sustained as a valid exercise of the police power. County of San Diego v. McClurken, supra, 37 Cal.2d 683, 687, 234 P.2d 972; Beverly Oil Co. v. City of Los Angeles, 40 Cal.2d 552, 254 P.2d 865; City of Los Angeles v. Gage, 127 Cal.App.2d 442, 274 P.2d 34. When the nonconforming use relates to the existence of a type of structure, provisions which look to the elimination thereof through obsolescence or destruction have been approved. Rehfeld v. City and County of San Francisco, 218 Cal. 83, 84, 21 P.2d 419. "There is a growing tendency to guard against the indefinite continuance of nonconforming uses by providing for their liquidation within a prescribed period." County of San Diego v. McClurken, supra, 37 Cal.2d 683, 686, 234 P.2d 972, 975.

The question for decision by this court is whether the provisions of Ordinance No. 618, adopting an amortization schedule for the liquidation of nonconforming uses in nonconforming buildings, are reasonable and not arbitrary as applied to the defendants' property.

[3, 4] Valid zoning legislation may provide for "the eventual liquidation of nonconforming uses within a prescribed period commensurate with the investment involved." Livingston Rock & Gravel Co. v. County of Los Angeles, supra, 43 Cal.2d 121, 127, 272 P.2d 4, 8. The fact that the value of an individual's property may be depre-

ciated as a result of legislation enacted under the police power is not cause for invalidation, if the purpose is proper and there "is no arbitrary and unreasonable application in the particular case." Livingston Rock & Gravel Co. v. County of Los Angeles, supra, 43 Cal.2d 121, 127, 272 P.2d 4, 9; Beverly Oil Co. v. City of Los Angeles, supra, 40 Cal.2d 552, 557, 254 P.2d 865; City of Los Angeles v. Gage, supra, 127 Cal. App.2d 442, 453, 274 P.2d 34. However, the extent of the injury caused by such legislation must be considered in determining whether the loss sustained is merely an incident to a valid exercise of the police power or constitutes a taking of property without just compensation. Jones v. City of Los Angeles, supra, 211 Cal. 304, 319, 295 P. 14. Each case must be determined on its own facts. Livingston Rock & Gravel Co. v. County of Los Angeles, supra, 43 Cal.2d 121, 126, 272 P.2d 4.

The plaintiff relies upon the decision in the case of City of Los Angeles v. Gage, supra, 127 Cal.App.2d 442, 274 P.2d 34, in support of its contention that the ordinance in question is a valid exercise of the police power. The defendants claim otherwise, upon the ground that the cited case involved only the application of a plan to liquidate nonconforming uses in a conforming building as distinguished from a plan to liquidate nonconforming uses in a nonconforming building. In that case, the defendant Gage operated a plumbing supply business in a residential building, in a "C" zone, under a zoning ordinance which expressly permitted such a use. By a subsequent ordinance, the building was placed in a multiple dwelling zone; a nonconforming use was granted; but such use was to be discontinued within five years. The constitutionality of this liquidating provision was sustained. The cited cases and the case at bar are clearly distinguishable. In the former, the individual's loss was limited to that involved in moving his business. He was given five years within which to accomplish this change. The building on his property was of a type approved for use in the zone where situated; it would not have to be moved or altered. In the case at bar, not only are the defendants required to move their business within five years, but also to terminate the use of their buildings, which are not capable of being converted into residences, and cannot be moved without a total loss. Moreover, in this case not only is the private loss greater than in the Gage case, but the public gain is less. City of Los Angeles v. Gage, supra, 127 Cal.App.2d 442, 460, 274 P.2d 34. It is contemplated that the block in which the defendants' property is located, the balance of which already has been acquired by the city, eventually will become part of a civic center. In the interim, it is proposed, under zoning ordinance No. 618, to restrict the use of this block to single family dwellings. However, shortly before the adoption of that ordinance negotiations were under way to transfer a part of the city's property to the defendants, in exchange for the right of way which is the subject of this action, and to zone the block in question for industrial uses.

[5] In order to effect its change of plans, which would permit only a residential use of defendants' land during the interim period awaiting the creation of a civic center, the city, by its ordinance, requires the defendants, *within five years*, to liquidate their investment which has an estimated remaining twenty-one years of economic life, although shortly before the adoption of that ordinance, the land in question was considered a proper subject for classification as an industrial site; was recommended by the planning consultants for inclusion within a professional zone; is bordered on the east by a railroad track; and surrounded on three sides by industrial and commercial businesses. This is unreasonable and arbitrary.

In ruling on defendants' objection to a consideration of Ordinance No. 618, the trial court found that the provisions thereof with respect to liquidating nonconforming uses, as applied to the defendants' property, was "unreasonable and discriminatory", "without regard to the value of the business or the resultant detriment", and "the time allowed therefor is * * * too short." These findings were proper.

However, the trial court instructed the jury to disregard entirely Ordinance No. 618, and gave further instructions based upon the provisions of Ordinance No. 265. The plaintiff contends that this constituted prejudicial error.

Ordinance No. 618 expressly repealed Ordinance No. 265. Unless the whole of the former is invalid the latter does not exist.

[6–8] Only those provisions of Ordinance No. 618 concerning the liquidation of nonconforming uses, as applied to defendants' property, are invalid. This ordinance contains the usual saving clause which provides, that in the event any part thereof be declared invalid the remaining parts shall not be affected by such invalidity. Where the validity of an ordinance is attacked upon the ground that a part thereof is unconstitutional, and a severability clause is included therein, the court may consider such a clause as a declaration of intention by the enacting body that " 'in so far as lay within its power a separable invalid portion of the act should not destroy the whole.' " Danskin v. San Diego Unified School Dist., 28 Cal.2d 536, 555, 171 P.2d 885, 897; Bacon Service Corporation v. Huss, 199 Cal. 21, 32, 248 P. 235. Although part of an ordinance may be unconstitutional, such fact does not render the whole thereof void if the remaining provisions can be separated from the portions which are valid. " 'The unconstitutional provisions will not vitiate the whole act, unless they enter so entirely into the scope and design of the law, that it would be impossible to maintain it without such obnoxious provisions.' " Danskin v. San Diego Unified School Dist., supra, 28 Cal.2d 536, 555, 171 P.2d 885, 897; National Ice & Cold Storage Co. of California v. Pacific Fruit Exp. Co., 11 Cal.2d 283, 293, 79 P.2d 380. The invalid part of a statute is not inseparable from the remainder, unless all of the parts are so interdependent that to eliminate the former would destroy the force of the whole statute. Conversely, the valid part of a statute will be sustained, even though other parts are invalid, if the former can accomplish one or all of the purposes thereof without the latter. People v. Lewis, 13 Cal.2d 280, 284, 89 P.2d 388; National Ice & Cold Storage Co. of California v. Pacific Fruit Exp. Co., supra, 11 Cal.2d 283, 293, 79 P.2d 380; Robinson v. Bidwell, 22 Cal. 379, 386.

[9] Ordinance No. 618 can be upheld and enforced without the objectionable provision fixing a time limit for the termination of a nonconforming use. Danskin v. San Diego Unified School Dist., supra, 28 Cal.2d 536, 555, 171 P.2d 885. It is a comprehensive zoning ordinance, the general scope and design of which will not be impossible to maintain without the part declared unconstitutional.

[10] All of the parties to this action agree that the provisions of a valid zoning ordinance properly may be considered by the jury in determining the value of property taken and the resulting severance damage, if any. Whether the action of the trial court, in withdrawing the whole of Ordinance No. 618 from consideration by the jury and substituting pertinent provisions of Ordinance No. 265, was prejudicial, depends upon the application of the conflicting parts of these two ordinances to the facts of this case.

Ordinance No. 618 classified defendants' property as R–3 (Multiple dwelling), whereas Ordinance No. 265 placed it in zone R–1 (Single dwelling). Over objection, evidence was introduced with respect to the severance damage sustained if the property would revert to an R–1 classification upon the taking. This was error, as under no circumstances would the property revert to such a classification, because the existing zoning law placed it in an R–3 zone upon termination of the existing use.

Ordinance No. 618 permitted a nonconforming use of a nonconforming building to be continued and to be "expanded or extended throughout such building" or "changed to another use of the same or a more restricted classification" if no structural alterations are required; whereas Ordinance

No. 265 permitted only the continuance of an existing nonconforming use. In conformity to the latter ordinance, the trial court instructed the jury that, with respect to property which had been improved for a certain use "by buildings that are of a character that they are susceptible to that particular use and that use has been carried on for which the building was constructed and planned, why that type of use must be recognized and as long as it carried on lawfully and legitimately and as the property was so planned, it may be continued. But there is this about zoning laws, that the zoning law in nonconforming use is recognized as permissible so long as that use is carried on, that is, that use cannot be increased, *nor can it be changed to another use.* * * * So *if it be the fact that for some reason a planing mill could not be carried on on this particular piece of property under this zoning law it would cease to be industrial property and would be residential property only.*" (Italics ours.)

There was testimony by defendants' witnesses from which the jury could have concluded that the defendants' property would be economically unsuited for a planing mill after the severance, but could be used to advantage as a contractor's equipment and material yard or for a cabinet making business, and, under such circumstances, the severance damage would be $25,400. The jury was foreclosed from considering this evidence under the foregoing instruction.

[11] It is argued that the verdict awarding $47,500 severance damages could have been based upon a set of facts to which the erroneous instruction was not applicable. On the other hand, it is just as likely that the jury relied upon a set of facts to which it applied this instruction. It is impossible to determine upon what theory the jury based its award. Under these circumstances the error was prejudicial. Akers v. Cowan, 26 Cal.App.2d 694, 699, 80 P.2d 143.

Ordinance No. 618 provides: "The nonconforming use of a nonconforming building may be continued and may be expanded or extended throughout such building provided no structural alterations except those required by law are made therein"; whereas, Ordinance No. 265 provided that no nonconforming building shall be structurally altered, except that work done in any 12 month period "on ordinary structural alterations or replacements of walls, fixtures or plumbing not exceeding twenty-five (25) per cent of the building's assessed valuation may be permitted." The court instructed the jury as follows: "* * * It is provided in that ordinance that if at any time alterations are made in the existing buildings upon a property so located that exceed twenty-five per cent of the assessed value of the property in any 12 months period, that the nonconforming use shall thereby be terminated. In determining the value of the property you may consider that. * * *" This instruction is an incorrect statement of the law. It does not limit the restriction to "structural" alterations. More serious, it advised the jury that a nonconforming use terminated if alterations are made in the existing buildings which exceeded twenty-five per cent of the assessed valuation of the property, contrary to the provisions of Ordinance No. 618, which excepted alterations "required by law" and, of necessity, would exclude those required by the taking in question.

[12] Evidence was introduced from which the jury could have concluded that the taking in question would require alterations in excess of twenty-five per cent of the assessed value of the buildings on defendants' property which, under the trial court's instruction, would result in a termination of the nonconforming use. If the jury so found, the prejudicial nature of the error in this instruction is apparent.

Ordinance No. 618 provides for the termination of a nonconforming use if any building subject to such a use is destroyed by "fire, explosion or other casualty or Act of God or the Public Enemy" to the extent of more than fifty per cent of its reasonable replacement value at the time of such destruction; whereas, Ordinance No. 265 provided for such a termination if the buildings were damaged by "fire, explosion, Act of God or Act of the Public Enemy" to the extent of seventy-five per cent of the assessed value thereof.

The trial court instructed the jury that "In determining the value of the property, that is the whole value before the taking * * * you will take into consideration the zoning laws as they would affect the overall value of the property * * * bearing in mind if for any reason the property would be destroyed * * * to the extent of seventy-five per cent of its assessed value, then the nonconforming use would terminate."

There was testimony from which the jury could have concluded that fifty per cent of the replacement cost far exceeded seventy-five per cent of the assessed value of the improvements in question and, under Ordinance No. 618 the defendants' nonconforming use would be assured a longer life than under Ordinance No. 265. Although such a factor might constitute an upgrading influence on the value of the whole property, to what degree, if any, that influence might be reflected in the value of the part taken or in the value of the part remaining was a question for the jury to determine.

The defendants claim that the plaintiff is estopped to take advantage of Ordinance No. 618 and, therefore, it was not admissible in evidence.

[13] The record does not sustain a conclusion that this ordinance was adopted in order to take defendants' property without paying just compensation therefor. Over two years prior to the commencement of this action, and before there was any thought of obtaining the 40 foot strip in question, the city instituted a survey preliminary to the enactment of a comprehensive zoning ordinance and master plan. The provisions in the ordinance, with respect to the nonconforming uses, are a result solely of this survey; apply to all property within the city; and are directed toward effecting compliance with the master plan. Moreover, there is no showing of injury. With the exception of those provisions terminating the defendants' nonconforming use within five years, Ordinance No. 618 does not depreciate the value of their property. The fact that an application of this ordinance, to the premises in question, might result in a smaller loss being sustained by the taking of the 40 foot strip, with a consequent reduction in the amount of severance damages to be awarded, did not authorize an application of the doctrine of equitable estoppel to prevent a consideration of that ordinance in determining the amount of such damages. Any reduction in the amount of damages awarded, resulting from an application of the present ordinance to the facts of this case, must be attributed to a finding that the property remaining after the taking is more valuable than it would have been under the prior ordinance. In addition, even though it be assumed that the city should not be permitted to take advantage of Ordinance No. 618, this fact would not authorize the defendants to take advantage of Ordinance No. 265, which had been repealed.

The defendants also contend that the plaintiff waived any error in the instructions by a stipulation and by objection to certain testimony. These contentions, however, are not sustained by the record.

The plaintiff contends that the trial judge erred in refusing to give instructions which it had offered, and also in his ruling on the admission and rejection of evidence.

[14] The record does not disclose that either party proposed any instructions, and it will be presumed that none were offered.

Objection was made to the admission of testimony that it would cost $24,982 to relocate and construct a new electrical system, $3,965 to remove and relocate the blower system, and $900 to move defendants' machinery to another location.

[15] The cost of removing personal property is not a compensable item in a condemnation proceeding. Central Pac. R. Co. v. Pearson, 35 Cal. 247, 263; County of Los Angeles v. Signal Realty Co., 86 Cal.App. 704, 710, et seq., 261 P. 536. If equipment is affixed to land which is condemned, compensation for its loss should be included in the value of the property taken. City of Los Angeles v. Klinker, 219 Cal. 198, 25

P.2d 826, 90 A.L.R. 148. The cost of removing or relocating such equipment is not reasonably related to its value as a part of the premises involved. Such a cost is not a compensable item recoverable as a part of the award for land taken or on account of severance damage. People ex rel. Department of Public Works v. Auman, 100 Cal.App.2d 262, 264, 223 P.2d 260.

Section 1248 of the Code of Civil Procedure provides in part as follows:

> "The court, jury, or referee * * * must ascertain and assess: * * * 6. If the removal, alteration or relocation of structures or improvements is sought, the cost of such removal, alteration or relocation and the damages, if any, which will accrue by reason thereof."

[16] The evidence to which objection is made involves the cost of removal of equipment and machinery from the whole of defendants' property. It is not limited to the cost of altering or removing that part of the structures and improvements required by the taking of the 40 foot strip. Nevertheless, the defendants contend that, under the provisions of said section 1248, they are entitled to compensation for the removal of machinery and equipment from the whole of their property as damages accruing by reason of alterations caused by the taking. However, if, as defendants contend, the taking of a part of their property destroys its use as a planing mill, because of the zoning laws or inadequacy of the remaining space, and requires the removal of their business to another location, the cause of such removal is the taking of a part of the property and not the alteration of the buildings upon the remainder. The costs of such removal are not "damages * * * which will accrue by reason" of the alteration within the meaning of the code section. The evidence objected to was not admissible.

[17] The plaintiff also objected to the admission of evidence respecting alleged bad faith and fraud on its part concerning negotiations about the acquisition of the 40 foot strip before the commencement of any action in condemnation; proving ownership by the city of land adjoining that of defendants; and relating offers to sell an industrial site to the defendants for 10¢ a square foot. Although this evidence was not pertinent to the issue of damages, it was relevant to the issues raised by the defendants' amended answer alleging fraud, bad faith and abuse of discretion on the part of plaintiff in the adoption of its resolution of necessity; also to a consideration of the unconstitutionality of zoning Ordinance No. 618. People ex rel. Department of Public Works v. Schultz Co., 123 Cal.App.2d 925, 941, 268 P.2d 117. Admission of this testimony was proper.

[18–20] It is argued that the negotiations to acquire the 40 foot strip, before commencement of these proceedings, constituted an offer to compromise the controversy in question and, for this reason, evidence with respect thereto is inadmissible. Code Civ.Proc. § 2078. Evidence of facts tending to show fraud and bad faith on the part of the city were admissible in this action as proof of the allegations contained in the defendants' amended answer, even though the events related occurred during negotiations to effect a compromise seeking acquisition of the 40 foot strip in question. The honesty and good faith of the city was not an issue in controversy at the time of these negotiations, and it made no admissions with respect thereto in order to effect a compromise. The fact that statements are made or incidents take place during negotiations to effect a compromise, does not justify exclusion of evidence relating to the same if such evidence otherwise is admissible. California Home Extension Ass'n v. Hilborn, 37 Cal.2d 459, 465, 235 P.2d 369; Zelayeta v. Pacific Greyhound Lines, 104 Cal.App.2d 716, 729, 232 P.2d 572. It would not be competent to admit an offer of compromise as such; however, "the declaration therein of facts involved in the controversy which are not mere concessions made for the purpose of such offer, but are statements of independent facts, is admissible against the party making them." Rose v. Rose, 112

Cal. 341, 344, 44 P. 658. Plaintiff's objection properly was overruled.

[21, 22] The plaintiff also contends that the trial court committed error in refusing to admit testimony respecting the appraised value of defendants' property, as determined in a prior probate proceeding. On direct examination such evidence is inadmissible. City of Los Angeles v. Deacon, 119 Cal.App. 491, 493, 7 P.2d 378. On cross-examination, a witness who has testified as an expert on values may be asked concerning his knowledge of a prior probate appraisal, for the purpose of testing the value of his opinion. Central Pacific R. Co. v. Feldman, 152 Cal. 303, 310, 92 P. 849. However, the scope of such cross-examination is within the discretion of the trial judge, People v. McReynolds, 31 Cal.App.2d 219, 225, 87 P.2d 734, who may determine that, under the circumstances of the particular case, the time when the appraisal was made is so remote that any lack of knowledge concerning it is irrelevant. The ruling objected to was not error.

[23] Finally, the plaintiff contends that it should have been permitted to purchase the whole parcel of defendants' property.

After the jury rendered its verdict, the city council, pursuant to the authority which it assumed was conferred by section 1266 of the Code of Civil Procedure, adopted a resolution declaring it was necessary for the public use that the city acquire the whole of defendants' property. The code section in question provides:

> "Whenever land is to be condemned by a * * * city for * * * any street * * * and the taking of a part of a parcel * * * would leave the remainder * * * in such * * * condition as to require such condemnor to pay * * * an amount equal to the fair and reasonable value of the whole * * * the resolution * * * may provide for the taking of the whole * * * and upon the adoption of any such resolution it shall be deemed necessary for the public use * * * that such condemning authority acquire the whole of such parcel."

Following the adoption of the resolution referred to, the plaintiff asked and was granted permission to file an amended complaint seeking acquisition of the whole property for $70,000; the value established by the verdict. The court found that the portion of the property not taken had a "substantial value over and above the amount of severance damages" and denied plaintiff's request to acquire the whole.

Plaintiff argues that it should be permitted to take the whole parcel under the provisions of said section 1266 because, under the verdict, the city would be required to pay $58,000 for the 40 foot strip; whereas the value of the whole parcel was $70,000. The code section under consideration permits the taking of the whole property only where the taking of a part would require the condemning authority to pay an amount "equal" to the value of the whole. It is obvious that $58,000 is not equal to $70,000. The city contends that the requirements of the law are satisfied if these sums are "substantially equal." Even if this interpretation is accepted, it would be unreasonable to hold that a seventeen per cent difference in the two amounts brought them so close together as to constitute substantial equality. Furthermore, the plaintiff contends on this appeal that, under erroneous instructions, the jury awarded defendants severance damages in excess of their actual loss. If this is true, the variance between the amounts which must be equal, in order to permit a taking of the whole property, is even greater than now appears.

The court's refusal to permit plaintiff to acquire the whole parcel was proper. However, because of prejudicial errors in the giving of instructions and the admission of evidence, the judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

146 Cal.App.2d 810

Theodore C. ROBINSON et al., Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES, a Municipal Corporation, et al., Defendants and Respondents.

Civ. 21757.

District Court of Appeal, Second District, Division 2, California.

Dec. 14, 1956.

Hearing Denied Feb. 6, 1957.

Homeowners brought action against the City of Los Angeles, a municipal corporation, and others attacking as arbitrary and unreasonable a city ordinance which rezoned 785 acres of vacant land, which had formerly been zoned for agricultural uses, for light industrial uses. The Superior Court of Los Angeles County, William P. Haughton, J., entered judgment adverse to the homeowners, and they appealed. The District Court of Appeal, Ashburn, J., held that zoning ordinance was not invalid because homes situated from one fifth to one fourth of a mile from the rezoned area would depreciate in value.

Judgment affirmed.

1. Municipal Corporations ⚷601(10), 625, 626

Zoning ordinance, or its application to particular property, must have a reasonable tendency to promote the public morals, health, safety, or general welfare and prosperity of a community, and be free from arbitrary and discriminatory conception and application.

2. Municipal Corporations ⚷122(2)

Every intendment is in favor of the validity of the action of the legislative authority of a city in enacting a zoning ordinance, and the ordinance will not be overthrown unless plaintiff produces evidence establishing physical facts justifying, or rather requiring, the conclusion that the ordinance is, as a matter of law, unreasonable and invalid.

3. Municipal Corporations ⚷625

Fact that plaintiffs' property may depreciate in value as a result of rezoning does not establish unreasonableness or invalidity of zoning ordinance, since damage caused by proper exercise of the police power is merely one of the prices an individual must pay as a member of society.

4. Municipal Corporations ⚷63(1)

If matter is debatable, and if reasonable minds may differ on question whether zoning is required by or consistent with the public welfare, courts may not interfere with a zoning ordinance.

5. Municipal Corporations ⚷601(15)

Zoning ordinance rezoning land, which had previously been zoned for agricultural uses, for light industrial uses was not invalid because homes situated from one fifth to one fourth of a mile from the rezoned area would depreciate in value.

6. Constitutional Law ⚷93(1)

Owners of homes had no vested right to continuity of zoning of general area in which they resided.

7. Municipal Corporations ⚷63(1)

The effect of zoning on surrounding properties is a matter for consideration and determination by legislative authority of city.

8. Municipal Corporations ⚷601(15)

City ordinance rezoning 785 acres of vacant land, which had previously been zoned for agricultural uses, to light industrial uses, was not invalid, on ground that development of 785 acres for industrial uses would create intolerable congestion of traffic and inadequacy of sewer service, where contention that such situation would result presupposed that roads and sewers would remain in their present limited capacity, rather than that they would be improved in proportion to increasing public demands.

Herschel E. Champlin, Los Angeles, for appellants.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Claude E. Hilker, Deputy City Atty., Los Angeles, for respondent City of Los Angeles.

ASHBURN, Justice.

Plaintiffs-appellants attack as arbitrary and unreasonable ordinance No. 102641, which amended the comprehensive zoning ordinance (No. 90500) of the city of Los Angeles so as to rezone approximately 785 acres of vacant land in the northwesterly portion of San Fernando Valley from RA, A1 and A2 (agricultural uses) to M2 and M2-O (light industrial uses). Properties owned by the plaintiffs, some twelve in number, are not within the rezoned area and are located at distances beyond its confines varying from 980 to 1320 feet. Appellants assert that the rezoning was initiated by the city Planning Commission, and say in their opening brief: "All procedural steps required by the City Charter were observed and no attack was made or issue raised at the trial regarding procedure followed." The record shows that elaborate hearings were held before the Planning Commission, and further hearings by the City Council, at which the various objections now urged were advanced and considered and held to be not valid reasons for withholding the rezoning.

Appellants' major contentions are that the rezoning has and will depreciate the value of their homes situated in the general neighborhood, and that permitting light industry in that portion of the valley is not consistent with the general welfare because *inter alia* existing roads and sewers are inadequate to accommodate the traffic which will be developed by the improvement of this vacant land in conformity with the new ordinance.

The trial court made a finding 16, as follows: "It is true that the Council of the City of Los Angeles considered each and every of the following factors, each of which is true, or may have had them in mind, at the time of passing Ordinance No. 102,641: (a) Industry within the San Fernando Valley was inadequate to supply the necessary industrial employment for the inhabitants thereof. (b) The amount of industrially zoned land as compared to otherwise zoned land was much less proportionately within the San Fernando Valley portion of the City of Los Angeles than in the remainder of the City. (c) The amount of industrially zoned land as compared to population was much less proportionately within the San Fernando Valley portion of the City of Los Angeles than within the remainder of the City. (d) A far greater number of persons were commuting from the San Fernando Valley for their employment than were entering for such purpose. (e) Plots of land available for industrial development within the San Fernando Valley portion of the City of Los Angeles were scattered in location, small in size and diverse in ownership and thus greatly hindered industrial development thereof. (f) The rezoned land here in question is located in one of the least populated portions of the San Fernando Valley, and the possible annoyance as a result of the rezoning thereof will thus be inflicted on the least possible number of persons. (g) The terrain of the rezoned area here in question is essentially flat, and thus lends itself most easily to industrial development. (h) The rezoned area here in question is, in the main, undeveloped other than the agricultural use of portions thereof, and thus when eventually developed would have among the least non-conforming uses of any like size area within the San Fernando Valley. (i) The extension of the existing population numerical trend within the San Fernando Valley indicated a population therein of approximately one million persons by the year 1965. (j) The population directional trend within the San Fernando Valley was toward the west end of the Valley. (k) Most, if not all, of the owners of the land within the rezoned area favored such rezoning, and none expressed any opposition or objection to such rezoning. (l) The Southern Pacific Railroad Line runs through the heart of the rezoned area and thus provides shipping facilities essential to industrial development, but detrimental to residential development. (m) The rezoned area was one of the best located in the San Fernando Valley from the standpoint of availability of industrial power. (n) The rezoned area was one of the best located in the San Fernando Valley from the standpoint of availability of industrial quantities and pressures of water. (o) The master plan of the City of Los Angeles indicated ample highway and roadway access to the rezoned area. (p) Large amounts of industrial land within the City of Los Angeles portion of the San Fernando Valley have been used for other than industrial purposes or have been rezoned for residential use, thus magnifying the shortage of industrially zoned land. (q) Light industrial development would not necessarily retard or restrict and could well enhance nearby residential growth. (r) Light industrial development would not necessarily impair and could well increase nearby residential land values. (s) Large buffer areas were provided between the rezoned area and the nearest residential development." Appellants' counsel does not undertake to show, except by way of general arguments, that the evidence fails to support these findings.

The principles upholding zoning ordinances as valid exercise of the police power in furtherance of the general welfare are well established in this state. See Miller v. Board of Public Works, 195 Cal. 477, 487, 234 P. 381, 38 A.L.R. 1479; Jones v. City of Los Angeles, 211 Cal. 304, 307, 295 P. 14. "As our civic life has developed so has the definition of 'public welfare' until it has been held to embrace regulations 'to promote the economic welfare, public convenience, and general prosperity of the community.' Chicago, B & Q. R. Co. v. [State of] Illinois, supra [200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596]. Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life, and thereby keep pace with the social economic, moral, and intellectual evolution of the human race." Miller v. Board of Public Works, supra, 195 Cal. 477, 485, 234 P. 381, 383. It also has been noted in the following decisions that the police power develops and expands with, and advances to meet, changing conditions: Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 43, 207 P.2d 1, 11 A.L.R.2d 503; Miller v. Board of Public Works, supra, 195 Cal. 477, 484, 234 P. 381.

[1-4] While a zoning ordinance, or its application to particular property, must have a "reasonable tendency to promote the public morals, health, safety, or general welfare and prosperity of a community," Miller v. Board of Public Works, supra, 195 Cal. at page 488, 234 P. at page 385, and be free from arbitrary and discriminatory conception and application, every intendment is in favor of validity of the action of the legislative authority, which will not be overthrown unless plaintiff produces evidence establishing physical facts justifying, or rather requiring, the conclusion that the ordinance is as a matter of law unreasonable and invalid. Wilkins v. City of San Bernardino, 29 Cal.2d 332, 338, 175 P.2d 542; In re Angelus, 65 Cal. App.2d 441, 454, 150 P.2d 908; Lockard v. City of Los Angeles, 33 Cal.2d 453, 460-461, 202 P.2d 38, 7 A.L.R.2d 990; Clemons v. City of Los Angeles, 36 Cal.2d 95, 98, 222 P.2d 439; Skalko v. City of Sunnyvale, 14 Cal.2d 213, 215, 93 P.2d 93; Otis v. City of Los Angeles, 52 Cal.App.2d 605, 614, 126 P.2d 954. The fact that plaintiffs' property may depreciate in value as a result of rezoning does not establish unreasonableness or invalidity, for "[d]amage caused by the proper exercise of the police power is merely one of the prices an individual must pay as a member of society." Reynolds v. Barrett, 12 Cal.2d 244, 250, 83 P.2d 29, 32; see also authorities last hereinbefore cited. If the matter is debatable, if reasonable minds may differ upon the question of whether the zoning is required by or consistent with the public welfare, the courts may not interfere. Wilkins v. City of San

Bernardino, supra, 29 Cal.2d 332, 339, 175 P.2d 542; Lockard v. City of Los Angeles, supra, 33 Cal.2d 453, 462, 202 P.2d 38; Clemons v. City of Los Angeles, supra, 36 Cal.2d 95, 98, 222 P.2d 439; Reynolds v. Barrett, supra, 12 Cal.2d 244, 249, 83 P.2d 29; Miller v. Board of Public Works, supra, 195 Cal. 477, 490, 234 P. 381. The boundary between different zones inevitably must be drawn and that is the function of the municipality, not the courts. Wilkins v. City of San Bernardino, supra, 29 Cal.2d at page 341, 175 P.2d at page 548; Lockard v. City of Los Angeles, supra, 33 Cal.2d at page 468, 202 P.2d at page 46; Reynolds v. Barrett, supra, 12 Cal.2d at page 249, 83 P.2d at page 32. The wisdom of the decision is not subject to judicial review. Wheeler v. Gregg, 90 Cal.App.2d 348, 361, 203 P.2d 37; Lockard v. City of Los Angeles, supra, 33 Cal.2d at page 461, 202 P.2d at pages 42, 52.

[5–7] It is apparent from the foregoing authorities that appellants' complaint that their properties, situated from one-fifth to one-fourth of a mile from the rezoned area, have depreciated or will depreciate in value is not well taken in point of law. They have no vested right to continuity of zoning of the general area in which they reside. "They have no vested right in the maintenance of restrictions on the property of defendants. It may be true that to continue the zoning restrictions upon defendants' property would confer benefits on neighboring owners, including plaintiffs, and enhance the value of their properties, but the existence of such benefits does not generate interests protected by the Constitution against diminution by governmental authorities in the proper exercise of the police power. The city in the exercise of its police power has the right to modify its zoning regulations from time to time." Case v. City of Los Angeles, 142 Cal.App.2d 66, 298 P.2d 50, 52; see, also, Wheeler v. Gregg, supra, 90 Cal.App.2d 348, 365, 203 P.2d 37. The effect of the zoning upon surrounding properties is a matter for consideration and determination by the legislative authority. Lockard v. City of Los Angeles, supra, 33 Cal.2d 453, 464, 202 P.2d 38.

[8] The argument that development of the 785 acres (1.226 square miles) for industrial uses would create intolerable congestion of traffic and inadequacy of sewer service presupposes that roads and sewers will remain in their present limited capacity, rather than growing in proportion to increasing public demands. This is a faulty notion of the basis for testing validity of a zoning, which necessarily looks to the future and proceeds upon the assumption that development of properties and facilities within and without the zoned area will proceed harmoniously with its requirements. Jones v. City of Los Angeles, supra, 211 Cal. 304, 309, 295 P. 14, 17: "Moreover, the argument of plaintiffs, carried to its logical conclusion, would destroy the usefulness of zoning ordinances as an effective means of city planning, for it would require an examination of the regulation solely on the basis of present conditions. But zoning legislation looks to the future. It is a constructive movement in municipal legislation and, as such, it has received the approval of our courts." Lockard v. City of Los Angeles, supra, 33 Cal.2d 453, 466, 202 P.2d 38, 45: "A commercial district of this type is necessarily limited as to expansion by the development of the surrounding area, and the fact that the district has developed slowly is not determinative of the reasonableness of the restrictions, since one of the bases for zoning regulations is the guidance of future development for the protection of residential areas. See Sunny Slope Water Co. v. City of Pasadena, 1 Cal.2d 87, 93, 33 P.2d 672. To be effective, zoning regulations must necessarily look to the future * * *." To the same effect, see Acker v. Baldwin, 18 Cal.2d 341, 346, 115 P.2d 455; Ayres v. City of Los Angeles, supra, 34 Cal.2d 31, 41, 207 P.2d 1, 11 A.L.R.2d 503; In re Jones, 56 Cal.App.2d 658, 665, 133 P.2d 418. The fact that the city's plans for future handling of problems growing out of the development of this 785 acres are today in the formative stage is not determinative of plaintiffs' rights, nor

is it prophetic of municipal ills which appellants predict. Ayres v. City of Los Angeles, supra, 34 Cal.2d at page 42, 207 P.2d at page 7; Miller v. Board of Public Works, supra, 195 Cal. at pages 495–496, 234 P. at pages 387, 388.

Appellants contend also that industrial use of the 785 acres would create smog conditions now practically nonexistent in the west end of the San Fernando Valley; that a great increase in dust, noise and traffic would occur in a predominantly residential community; that the growth trend in the valley demonstrates a need for more homesites, rather than industrial locations; that during rainy seasons streets and bridges are flooded and impassable, and this condition would be greatly exaggerated by an industrial development in the subject area; that the incidence of crime is substantially greater in industrial areas than in residential neighborhoods, and that would be bad for the valley as a whole. Manifestly, these are but considerations which pertain to the public welfare in its larger aspects, questions presented for determination by the City Council. It is presumed to have taken cognizance of all these matters, as well as those mentioned in the court's finding 16 quoted above. "The courts may differ with the Legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which could have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation." Miller v. Board of Public Works, supra, 195 Cal. 477, 490, 234 P. 381, 385.

The Wilkins case, supra, 29 Cal.2d 332, at page 338, 175 P.2d at page 547, states that, "it is incumbent on plaintiff to produce sufficient evidence from which the court can make such findings as to the physical facts involved as will justify it in concluding, as a matter of law, that the ordinance is unreasonable and invalid. It is not sufficient for him to show that it will be more profitable to him to make other use of his property, or that such other use will not cause injury to the public, but he must show an abuse of discretion on the part of the zoning authorities and that there has been an unreasonable and unwarranted exercise of the police power." This the appellants have not done at bar. In fact, their arguments go only to the weight of the evidence adduced in the court below.

Judgment affirmed.

MOORE, P. J., and FOX, J., concur.

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147 Cal.App.2d 33

PEOPLE of the State of California ex rel. Ernest D. BREUNING, County Surveyor of the County of Shasta, State of California, Plaintiffs and Respondents,

v.

Raymond H. BERRY and Scott Lumber Company, a corporation, Defendants,

Scott Lumber Company, a corporation, Appellant.

Civ. 8863.

District Court of Appeal, Third District, California.

Dec. 18, 1956.

Hearing Denied Feb. 13, 1957.

Action by county surveyor to compel defendants to secure building permit for planing mill constructed by defendant lumber company in unincorporated area in certain county. The Superior Court, Shasta County, Richard B. Eaton, J., entered order requiring that the company apply for building permit and pay required fees. The company appealed. The District Court of Appeal, Schottky, J., held that planing mill, housing two planers served by seven men each on 40 hour per week shift, was building intended primarily for occupancy by human beings, and accordingly was not exempt from building permit requirement by statute exempting any building not intended primarily for occupancy by human beings and located entirely outside the limits of a city or city and county.

Judgment affirmed.

1. Counties ⚷21½

Though repair of fire damage may not constitute construction of building, structure complete from foundation to roof within its own exterior bounds does not cease to be a "building" because it is on one side contiguous with and connected to an earlier structure, within statute exempting from building permit requirement a building not intended primarily for occupancy by human beings and located entirely outside limits of city or city and county. West's Ann.Health & Safety Code, §§ 19100–19170, 19100(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Building".

2. Courts ⚷89

Though opinions of Attorney General are not of controlling authority, yet in view of their relation to general government and nature of their duties, they are to be regarded as having a quasi-judicial character and are entitled to great respect.

3. Statutes ⚷219

Although not necessarily controlling, as where made without authority of or repugnant to statute, contemporaneous administrative construction of statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous and unauthorized.

4. Statutes ⚷219

Rule relating to contemporaneous administrative construction of statute as source of statutory interpretation by courts applies to administrative construction by officials of local governmental units.

5. Statutes ⚷188

Purpose of statute prevails over abstract dictionary definitions in determining meaning of term used in statute.

6. Counties ⚷21½

The word "primarily" means chiefly or principally, within statute exempting from building permit requirement any building not intended primarily for occupancy by human beings and located entirely outside the limits of a city or city and county. West's Ann.Health & Safety Code, §§ 19100–19170, 19100(a).

See publication Words and Phrases, for other judicial constructions and definitions of "Primarily".

7. Counties ⚷21½

Statute exempting from building permit requirement any building not intended primarily for occupancy by human beings and located entirely outside the limits of a city or city and county, contemplates buildings intended to be used chiefly or principally for occupancy or use by human beings as distinguished from buildings intended to be used chiefly for some other purpose but where humans will enter and be in the buildings but only incidental to the main purpose for which the buildings are erected. West's Ann.Health & Safety Code, §§ 19100–19170, 19100(a).

8. Counties ⚷21½

Planing mills, canneries, stores, and manufacturing plants are subject to provisions of so-called Riley Act, and are not within provision exempting from building permit requirement any building not intended primarily for occupancy by human beings and located entirely outside the limits of a city or city and county. West's Ann.Health & Safety Code, §§ 19100–19170, 19100(a).

9. Counties ⚷21½

Under statute exempting from building permit requirement any building not intended primarily for occupancy by human beings and located entirely outside the limits of a city or city and county, if the carrying out of the purpose for which the building is constructed requires the presence of workers or customers in the building, it is not the type of building that legislature intended to be exempt from requirement of building permit. West's Ann.Health & Safety Code, §§ 19100–19170, 19100(a).

10. Counties ⚷21½

Planing mill, housing two planers served by seven men each on 40 hour week shift, was building intended primarily for occupancy by human beings and accordingly was not exempt from building permit requirements by statute exempting any building not intended primarily for occupancy by human beings and located entirely outside the limits of a city or city and county. West's Ann.Health & Safety Code, §§ 19100–19170, 19100(a, b), 19121, 19123, 19130–19132, 19132.3, 19132.9, 19150, 19151.

Glenn D. Newton, Redding, for appellant.

Randall J. Presleigh, Dist. Atty., Redding, for respondents.

SCHOTTKY, Justice.

Ernest D. Breuning, County Surveyor of Shasta County, and as such having exclusive jurisdiction within the unincorporated area of said county to issue building permits and enforce the provisions of Division 13, Part 3, Chapter 2, of the Health and Safety Code of the State of California, commonly known as the Riley Act, commenced an action to compel defendants above named to secure a building permit for a planing mill constructed by defendant Scott Lumber Company in unincorporated area in Shasta County.

Defendants filed an answer setting forth that said corporation was not required by said Riley Act to obtain a permit for said building. At the trial the issue was whether or not the planing mill of defendant corporation was a building exempted from the operation of the Riley Act by the provisions of subsection (a) of Section 19100 of the Health and Safety Code which reads:

> "(a) Any building not intended primarily for occupancy by human beings and located entirely outside the limits of a city or city and county."

The trial court decided that the said planing mill was not exempted from the requirements of said Act and ordered that defendant corporation apply for a building permit for its planing mill and pay therefor the required fees. The action was dismissed as to defendant Berry. Defendant Scott Lumber Company has appealed from the decree and/or writ of injunction.

The sole question involved upon this appeal is whether the planing mill of appellant is a "building not intended primarily for occupancy by human beings." The trial court filed a memorandum opinion which we believe correctly states the facts as shown by the record and the law applicable thereto, and we therefore adopt the following portion thereof as part of the opinion of this court:

"* * * [T]he following facts, substantially uncontested, have been made to appear from the pleadings and the evidence. Defendant corporation owns and operates a lumber mill at Burney, California, in unincorporated territory of Shasta County. Defendant Berry is vice-president and general manager of the corporation, and is in direct charge of the Burney mill. Among the mill buildings was a planing mill. A portion of this structure, housing the planing machinery, burned down in November, 1953. In accordance with plans previously prepared with a view to a renovated mill, the remaining portion, housing lumber sheds and a lumber chain, was shifted on its base; and the burned portion was replaced with a new structure connected to the old. This new structure is 120 feet by 130 feet in size; and consists of a corrugated metal roof and gables over a steel frame, with the sides open. It houses two planers, served by 7 men each on a 40 hour per week shift. Another 10 or 12 lumber handlers work back and forth along the chain from the planers to the lumber sheds, and other employees enter the premises briefly to unload lumber for the planers. No one sleeps, cooks, eats, smokes or rests in the planing mill. The new structure was erected by defendant corporation, under the immediate direction of defendant Berry; and no building permit was applied for, defendants having the belief, reinforced by advice of counsel, that none was legally required.

"The statutory provisions under which this case *arise* are to be found in Chapter 2, Part 3, Division XIII (Sections 19100 to 19170) of the Health and Safety Code. This chapter derives in the first instance from Chapter 601, Statutes of 1933, commonly known as the Riley Act, a statute passed as an urgency measure shortly following the notorious Long Beach earthquake. Although many amendments have since been made, the present statutory provisions may be referred to for convenience as the Riley Act.

"The Act provides that all buildings subject thereto shall be designed and cnstructed to resist horizontal forces as specified in Sections 19150 and 19151, Health and Safety Code; and that, to ensure such result, application shall be made for a building permit, in accordance with Sections 19130, 19131 and 19132 of the Health and Safety Code. Relator as County Surveyor is charged with the issuance of permits, pursuant to Sections 19121 and 19123, Health and Safety Code.

"Certain buildings, including 'any building not intended primarily for *occupancy* by human beings, and located entirely outside the limits of a city or city and county' are by Section 19100 of the Health and Safety Code excepted from the operation of the Act.

[1] "The essential point at issue in this case is whether the quoted term *occupancy* means *habitation* in the sence of residence or whether it means *use* in the sense of habitual physical presence; as in these senses this planing mill clearly is not inhabited by anybody, and equally clearly is used by human beings. There is, it is true, a suggestion that repair of fire damage does not constitute construction of a *building*; but in the Court's opinion a structure complete from foundation to roof within its own exterior bounds does not cease to be a building because it is on one side contiguous with and connected to an earlier structure.

"This case therefore raises in principle a substantial and important question of public law—namely, whether all industrial and commercial buildings outside cities are or are not required to be made earthquake resistant and to have building permits.

"The term *occupancy* has been defined in various connections under the law of California. Its original and best established interpretation has been to indicate the actual possession of land, and effective dominion over it, in connection with controversies arising from possessory rights, such as government land entries, adverse possessions, etc. (Lawrence v. Fulton, 19 C[al]. 683; McKenzie v. Brandon, 71 C[al]. 209 [12 P. 428]; Crocker v. Dougherty, 139 C[al]. 521 [73 P. 429]; Hart v. All Persons, 26 C[al]. A[pp]. 664 [148 P. 236].) This use of the term obviously does not in principle require habitation on the premises, nor has it been required in fact. (McKenzie v. Brandon, supra.) The term *occupancy* has likewise been held to mean habitation, or residential use. (Mauck v. Northwestern Nat. Ins. Co., 102 C[al]. A[pp]. 510 [283 P. 338]; Wall Estate Company v. Standard Box Co., 20 C[al]. A[pp]. 311 [128 P. 1020].) Each of these cases, however, bases its interpretation upon a context, of a contract and of a statute respectively, referring expressly to dwellings.

"These different interpretations suggest that the quoted word, like other words in statutes, is colored by its context, and the general purpose of the enactment. 'As words do not always mean the same thing, they should not be considered separately or abstractly, but the context should be consulted for the purpose of ascertaining the precise meaning intended or the particular purpose for which a doubtful word or phrase was employed.' (23 Cal.Jur. 748.)

"Counsel argue and the Court agrees that the word *occupancy* as used in the Riley Act has never been construed by any Court of appellate jurisdiction at any time. This ordinary and preferred source of authoritative legal interpretation is therefore not here available.

"Opinion No. 3 NS–3637 of the Attorney General of California, dated July 10, 1941, expressly holds that *occupancy* as used in the Riley Act means use and not habitation.

[2] "'Although the opinions of the Attorneys General are not of controlling authority, yet in view of their relation to the general government and the nature of their duties, they are to be regarded as having a quasi-judicial character and entitled to great respect.' (People v. Shearer, 30 C[al]. 645, at [page] 652.)

* * * * * *

[3] "A further approved source of legal interpretation is contemporary administrative construction. 'Although not necessarily controlling, as where made without the authority of or repugnant to statute, the contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous and unauthorized.' (Coca-Cola Co. v. State Board of Equalization, 25 C[al].2d 918, at [page] 921 [156 P.2d 1, at page 2].)

[4] "The foregoing rule applies fully to administrative construction by officials of local governmental units. (City of Los Angeles v. Rancho Homes Inc., 40 C[al].2d 764, at [page] 770 [256 P.2d 305, at page 308].)

"In the endeavor to ascertain contemporary administrative construction of the Riley Act, this court directed that inquiry be made of various counties other than Shasta, as to their practice in enforcing the Act. Relator submits replies from 36 counties and defendants submit replies from 10. These replies were admitted into evidence by stipulation. Unfortunately, relator's inquiry was very easily susceptible of misinterpretation, and was obviously misinterpreted in Calaveras and Placer Counties, and probably in various other counties. Defendants' inquiry, though diffuse, seems to have elicited clearer answers. Moreover, many counties operate under local ordinances displacing the Riley Act from effective operation, and were therefore not equipped to be helpful.

"Cross-checking critically all data received, the Court is convinced that, under the Riley Act, *occupancy* has meant *use* in Butte, Calaveras, Modoc, Monterey, Placer, Sacramento, San Benito, San Diego, Santa Barbara, Santa Cruz and Yolo Counties; and habitation in Mendocino, Sierra, Siskiyou and Tehama Counties. Other counties remain in doubt. * * *

"The language of other portions of the present Act is susceptible of differing opinions reasonably arguable. In the Court's opinion, Section 19100(b) of the Health and Safety Code (prescribing a residential exception outside city limits), Section 19132.3 (prescribing fees on a graduated scale) and Section 19132.9 (dispensing with fees for public buildings including schools) suggest that Section 19100(a) was not intended to exclude from regulation everything outside city limits except multiple dwelling units. It would have been easy for the legislators to have used 'dwelling' in subdivision (a) if that is what they meant; it is impossible to conceive of constructing a multiple dwelling for less than $50.00; it is unlikely that a public school would be building a multiple dwelling,

[5] "The Riley Act was intended to preserve human life against earthquake damage. (Sec. 8, Chapter 601, Statutes of 1933.) It was therefore enacted for the public safety. The recent Tehachapi, Bakersfield and Eureka earthquakes (which are matters of public notoriety, and a proper subject of judicial notice) suggest that all parts of the state are exposed to the hazard of earthquakes. Common sense suggests that commercial and industrial buildings are, in the general case, more likely to require earthquake protection than even multiple dwellings, in that they can bring together larger groups of persons in

one place, and are likely to be less divided up by interior partitions. The statutory purpose of protection against earthquakes is therefore better served by an interpretation of *occupancy* as meaning use rather than habitation. This purpose prevails over abstract dictionary definitions. (Levitt v. Faber, 20 C[al].A[pp]. (Supp.)2d 758 [64 P.2d 498].)

"It is not in the public interest that workmen at their labors, tradesmen at their counters, or members of the general public going about to do business should be exposed to the hazard of collapsing buildings in any part of the state for want of compliance with the very elemental requirements of the Riley Act.

"No particular difficulty or injustice arises from applying the Riley Act even to small commercial buildings, inasmuch as the stress resistances vary with the size of the building, and the permit fees with its cost, as set forth in Sections 19150 and 19132.3 of the Health and Safety Code.

"We therefore hold and decree that the planing mill of defendant corporation is a building intended for human occupancy."

Appellant relies strongly on the contention that the word "primarily" as used in Section 19100(a) is most significant and that by its use it clearly exempts from the requirements of the Riley Act a planing mill which is constructed primarily for the manufacturing and surfacing of lumber and the sheltering of machinery and not primarily for occupancy by human beings. Appellant's argument as to this contention is persuasive but unconvincing. The word "primarily" has been defined to mean "chiefly" or "principally."

[6–9] We believe that it is in this sense that the word is used in subdivision (a). It is our view that the section applies to buildings intended to be used chiefly or principally for occupancy or use by humans as distinguished from buildings intended to be used chiefly for some other purpose but where humans will enter and be in the buildings but only incidental to the main purpose for which the buildings are erected. We believe that planing mills, canneries, stores, and manufacturing plants are subject to the provisions of the Act. If the carrying out of the purpose for which the building is constructed requires the presence of workers or customers in the building then we believe that it is not the type of building that the legislature intended to exempt from the requirement of the Riley Act.

[10] It is of course true that the purpose for which appellant's planing will was constructed requires the presence of workers within the structure, and bearing in mind that the chief object of the Riley Act was to have buildings "so constructed that the lives and property of the people will be safeguarded," we are convinced that the planing mill of appellant cannot be held to be a "building not intended primarily for occupancy by human beings."

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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147 Cal.App.2d 67

Bernadette DUGGAN, Plaintiff and Appellant,

v.

Thorne HOPKINS, as Executor of the Last Will and Testament of Jeanette Thorne, Deceased, Defendant and Respondent.

Civ. 16981.

District Court of Appeal, First District, Division 2, California.

Dec. 19, 1956.

Quiet title action involving ownership of balance of joint savings account standing in name of deceased and claimant. The Superior Court, City and County of San Francisco, Milton D. Sapiro, J., entered decree adverse to claimant and she appealed. The District Court of Appeal, Kaufman, J., held that where deceased who had a joint savings account delivered a passbook for individual account in another bank together with a withdrawal slip and instructions to close out individual account and transfer balance to joint account, and before her death individual account was closed out and matter was in process of collection, survivor of joint account was entitled to balance from individual account although it was not credited to joint account until after deceased's death.

Reversed with directions.

1. Banks and Banking ⚷156

From the moment of collection of an item by a bank, relationship of debtor and creditor arises, if no instructions have been given which show an intent on the part of the customer to keep the proceeds of collection separate from the general funds of the bank.

2. Banks and Banking ⚷119

Where a bank receives money for deposit to a customer's account, relationship of debtor and creditor immediately arises, and is not delayed until the time that the actual entry of the sum is made upon the ledger.

3. Banks and Banking ⚷133

Where deceased who had a joint savings account delivered a passbook covering individual account in another bank together with a withdrawal slip and instructions to close out individual account and transfer balance to joint account and in accordance with forwarding bank's instruction, other bank had paid balance of account to collecting bank and mailed advice of completed transaction, relationship of debtor and creditor between deceased and other bank had ceased.

4. Principal and Agent ⚷43(1)

The agent's authority is terminated by death of the principal.

5. Banks and Banking ⚷126

Under sections of Financial Code providing that credit allowed by bank for an item drawn on, through or payable at any other bank, shall be provisional and subject to final payment, although credit may be provisional, for the time being the relationship is that of debtor and creditor subject only to revocation if a reason for protest arises. West's Ann.Financial Code, §§ 1011, 1013–1019, 1017.

6. Joint Tenancy ⚷3

Where deceased who had a joint savings account delivered a passbook covering an individual account in another bank together with a withdrawal slip and instructions to close out individual account and transfer balance to joint account and before her death individual account was closed out and balance paid to collecting bank in accordance with forwarding bank's instructions, survivor of joint account was entitled to balance of individual account although it was not credited to joint account until after death of deceased.

7. Gifts ⚷30(3)

Delivery of a bank book with donative intent constitutes a gift of a savings account whether or not accompanied by a written order.

8. Gifts ⚷30(3)

Delivery of a bank passbook may be made to a third person for benefit of the donee.

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Otto A. Hoecker, San Francisco, for appellant.

MacInnis, Alaga & Glassman, San Francisco, for respondent.

KAUFMAN, Justice.

This is an appeal by plaintiff Bernadette Duggan from that part of a decree quieting title which awarded the sum of $5,394.96 to Thorne Hopkins, as executor of the estate of Jeanette Thorne, deceased. Said sum had been claimed by appellant as part of a joint account standing in the names of deceased and appellant.

Jeanette Thorne died on January 23, 1954, in the residence of Bernadette Duggan, appellant, with whom she had made her home since March, 1953. Shortly after Mrs.

Thorne came to live with appellant, she made appellant a joint tenant on a bank account which she had in the Ocean-Faxon Branch of the Bank of America, San Francisco, and informed appellant that she wished her to have whatever money was in the account at the time of her death. She told her nephew William Hopkins, a beneficiary under her will, that the residue in said account at the time of her death was to go to appellant, as long as she could have a home with her.

In June, 1953, Jeanette Thorne opened two accounts in the Ocean-Faxon Branch of the Bank of America, one a commercial account, which was still in existence at the time of her death; the other, a savings account, No. 5259. These accounts were created by transfers of funds from savings accounts in the Turlock Branch of the Bank of America.

On June 22, 1953, Jeanette Thorne closed savings account No. 5259 and caused the balance on deposit to be transferred to a savings account No. 5211 in the names of appellant and herself as joint tenants with right of survivorship.

At the time Mrs. Thorne also had a savings account No. 2503 in Anglo California National Bank, San Jose Branch.

On January 19, 1954, Mrs. Thorne executed a withdrawal order for the balance of savings account No. 2503 in Anglo, San Jose. The withdrawal order together with her passbook for said account were deposited at her direction with the Ocean-Faxon Branch, Bank of America, for collection and for deposit in joint savings account No. 5211. The Ocean-Faxon Branch issued collection receipt No. 1252 signed by Jeanette Thorne, which directed Bank of America to credit the amount of the Anglo account to joint savings account No. 5211.

On January 21, 1954, the Ocean-Faxon Branch sent the withdrawal order and passbook to Anglo, San Jose, with instructions to credit the Bank of America general account with the proceeds of the account.

On January 22, 1954, Anglo, San Jose, completed the withdrawal order, closed account No. 2503, and credited the balance of $5,394.96 to the Bank of America general account at the Head Office of Anglo and sent the advice of fate direct to the Ocean-Faxon Branch.

This method of transmitting money between the banks was a known recognized and reasonable custom and usage of banks, and Bank of America and Anglo California National Bank maintained reciprocal accounts with each other.

On Saturday, January 23, 1954, Jeanette Thorne died. The bank was closed on Saturday and Sunday, hence the advice of fate was not received by the Ocean-Faxon Branch until after Jeanette Thorne's death. The entry of the credit of $5,394.96 was not made in the ledger for joint savings account No. 5211 until January 27, 1954. Ocean-Faxon Branch up till this time had had no notice of Mrs. Thorne's death.

The trial court found that it was the intention of both appellant and Mrs. Thorne that the balance remaining in joint savings account No. 5211 at the death of Mrs. Thorne was to be the property of appellant but that *at the time of opening the account* Mrs. Thorne did not intend to make a gift of the funds in said account to appellant. The court further found that Anglo, San Jose had closed account No. 2503 on January 22, 1954, and credited the Bank of America general account in San Francisco with the balance; that this method of forwarding proceeds of collections was a recognized and reasonable custom of banks; that the written advice from Anglo, San Jose, was not received by the Ocean-Faxon Branch of the Bank of America until after the death of Jeanette Thorne. The trial court concluded therefrom that the sum credited to account No. 5211, before the death of Jeanette Thorne, namely $8,085.99, belonged to appellant, but that the sum of $5,394.96, which was entered in said account on January 27, 1954, was the property of the estate of Jeanette Thorne.

[1] Appellant contends that the sum of $5,394.96 was collected before the death of Jeanette Thorne, therefore the collecting

bank, Ocean-Faxon Branch, was from that time indebted to the holders of the joint account, and the fact that the advice of fate had not been received prior to the death of Mrs. Thorne is of no consequence. It is appellant's position that the collecting bank became a debtor to Jeanette Thorne's joint savings No. 5211 at the moment when the item was paid by Anglo, San Jose to the Bank of America, when the reciprocal account of said bank was credited with the amount of account No. 2503 according to the instructions from the Ocean-Faxon Branch. It is well settled that from the moment of collection of an item by a bank, the relationship of debtor and creditor arises, if no instructions have been given which show an intent on the part of the customer to keep the proceeds of the collection separate from the general funds of the bank. In Powell v. Bank of America, 53 Cal.App.2d 458, 464, 128 P.2d 123, this distinction is noted and the court there quotes from a discussion of the subject in 8 Zollman on Banks and Banking, pages 401–409, where it is pointed out that banks usually adopt one of two methods of collecting against another bank, reciprocal accounts or remittance, and that under the first system, the relationship of debtor and creditor arises as soon as the collection is made. It is said in Mitchie on Banks and Banking, Vol. 6, section 9, page 18, that it is sufficient if the collection is made according to custom by a settlement between the two banks on balancing accounts, that "this is a money settlement and the receipt of the money is *payment* in the actual business sense that the law requires, under the reasonable custom adopted by banks as a necessity and recognized as such throughout the world." (And, see, 8 Cal.Jur.2d 128.) (Emphasis ours.)

[2] When a bank receives money for deposit to a customer's account the relationship of debtor and creditor immediately arises, and the relationship is not delayed until the time that the actual entry of the sum is made upon the ledger. See, Midway Five Oil Co. v. Citizens' Nat. Bank, 25 Cal.App. 366, 368, 143 P. 800; Luckehe v. First National Bank, 193 Cal. 184, 187, 223 P. 547.

[3] There can be no question but that the relationship of debtor and creditor between Jeanette Thorne and Anglo, San Jose, had ceased on January 22, 1954, the day before her death, when Anglo had paid the balance of the account to Bank of America in accordance with the instructions of the Ocean-Faxon Branch by crediting the Bank of America account, and had mailed an advice of the completed transaction. On the collection request in the space headed "How Paid to Depositor", Anglo had entered, "Due from Cr."

[4] Respondent argues that the relationship of principal and agent existed between Jeanette Thorne and the Ocean-Faxon Branch, and that since she died before January 27, 1954, the day on which the item was credited on the joint account, the item was not collected until then. Therefore the agency being revoked by death, the bank could not carry out her instructions to credit the joint account upon the collection of the item from Anglo, San Jose. It is of course a well-recognized principle that the agent's authority is terminated by death of the principal. Kunz v. Anglo & London Paris, Nat. Bank, 214 Cal. 341, 5 P.2d 417. According to the above cited authorities, it appears, however, that the collection and payment of the item had been made on January 22, 1954, the purpose of the agency fulfilled, and that the relationship of debtor and creditor had already been established.

[5] Respondent to avoid this result, relies upon sections 1013 to 1019 of the Financial Code. Section 1011 provides that when any credit is allowed by a bank for an item drawn on, through or payable at any other bank, it shall be provisional and subject to final payment. In the instant case we have no evidence but that the payment was final. Section 1013 provides that when credit had been given the bank may have until midnight of the next business day to *revoke* such credit, and if revoked such bank is entitled to a refund of, or credit for, the amount of the item. Respondent claims,

that in view of these sections, and section 1017 allowing a bank to charge back the item within such provisional period, there was no payment and no debtor-creditor relationship until midnight of the next business day, which would have been Monday, January 25, 1954. Since Jeanette Thorne had died on January 23, the agency relationship terminated, the money was not owed to the joint account, but became the property of decedent's estate.

The sections relied upon by respondent do no appear to be in any way applicable to the present situation. The very wording of the sections show that they contemplate the coming into existence of a debtor-creditor relationship upon the crediting of an item, but that this relationship may be revoked, the credit reversed, or the money refunded during the protest period. The credit may be provisional under the section, but nevertheless, for the time being the relationship is that of debtor and creditor subject only to revocation if a reason for protest arises.

We conclude that since Bank of America had been paid the proceeds of the account in Anglo, San Jose, before the death of Jeanette Thorne, the debt was owed from that moment to the joint account in accordance with her instructions, the nature of the debt was then fixed and her death later would not change its character. This being true, the amount collected would be owed to the owners of the joint savings account, and the collected sum of $5,394.96 should be paid to appellant, as survivor of that account.

[6] Appellant also contends that the opening of the joint account and the contract for collection of the Anglo, San Jose, account with instructions to deposit the proceeds to the joint account constitutes a gift to appellant. The trial court had made a finding which is supported by substantial evidence that at the time of *opening* the joint account, it was Jeanette Thorne's intention that the funds therein should be used for the benefit of Jeanette Thorne during her lifetime and in accordance with her instructions, and that she intended that the balance remaining in the account at her death should be the property of appellant. No finding has been made in regard to decedent's intent regarding the funds which were transferred from the San Jose account, but since she had ordered their transfer into joint savings account No. 5211, her intention has been clearly indicated that the conditions applying to account No. 5211 were to attach to this fund. She had done everything that she could do to effect that purpose. In the case of White v. Bank of America, 53 Cal.App.2d 831, 128 P.2d 600, it was held that there had been a complete gift of a savings account to persons with whom deceased had a joint account, when she had delivered the passbook of another savings account to a bank teller together with a signed withdrawal slip, during the weekend, but her death intervened before the passbook and withdrawal order had been taken to the bank by the teller. In the instant case, the signed withdrawal slip and passbook had been delivered to the bank with instructions to collect the sum and credit the joint account before the death of decedent.

[7, 8] It has been held that delivery of a bank book with donative intent constitutes a gift of a savings account whether or not accompanied by a written order. Here, also we have the written order signed by decedent. See Wilson v. Crocker First National Bank, 12 Cal.App.2d 627, 630, 55 P.2d 1208; Cahill v. Goecke, 10 Cal.App.2d 279, 51 P.2d 905. Delivery of the passbook may be made to a third person for the benefit of the donee. In re Estate of Escolle, 134 Cal.App. 473, 480, 25 P.2d 860.

It is clear, therefore, that the account formerly on deposit in the San Jose bank partakes of the nature of joint savings account No. 5211 under either of the theories discussed above.

In view of the foregoing, the decree is reversed with directions to the trial court to enter a decree in favor of appellant in accordance with the views expressed in this opinion.

DOOLING, Acting P. J., and DRAPER, Justice pro tem., concur.

147 Cal.App.2d 137

Leona K. MARTIN et al., Petitioners,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Cunningham Company, a corporation, and Fireman's Fund Insurance Company, a corporation, Respondents.

Civ. 21921.

District Court of Appeal, Second District, Division 1, California.

Dec. 21, 1956.

Hearing Denied Feb. 13, 1957.

Workmen's compensation case. The Commission denied benefits, and the claimants petitioned for writ of review. The District Court of Appeal, Nourse, J. pro tem., held that Commission could find deceased workman's refusal to accept blood transfusion (necessary to save his life) to have been unreasonable, even though acceptance of such aid was contrary to his religious beliefs.

Award affirmed.

1. Workmen's Compensation ⟹1725

Question as to whether deceased workman's refusal to accept blood transfusion had been unreasonable, in light of all circumstances, including his religious beliefs, was question of fact to be determined by Commission in compensation case. West's Ann.Labor Code, § 4056.

2. Workmen's Compensation ⟹1939

If Commission's findings on issues of fact, in workmen's compensation case, are supported by substantial evidence, they are not subject to review by court. West's Ann.Labor Code, § 5953.

3. Workmen's Compensation ⟹948

Commission could find deceased workman's refusal to accept blood transfusion (necessary to save his life) to have been unreasonable, even though acceptance of such aid was contrary to his religious beliefs. West's Ann.Labor Code, § 4056.

4. Constitutional Law ⟹84, 245

Workmen's Compensation ⟹34

Even though Workmen's Compensation Act permitted Commission to hold workman's refusal to accept medical aid to be unreasonable notwithstanding his religious scruples against acceptance of such aid, such statute would not deny him constitutional right to religious freedom or right to equal protection of law. West's Ann. Labor Code, § 4056.

5. Constitutional Law ⟹84

Freedom of conscience and freedom to believe are absolute, but freedom to act is not.

Abe Mutchnik and Leslie C. Burg, Los Angeles, for petitioners.

Everett A. Corten, Los Angeles, Edward A. Sarkisian, San Francisco, for respondent Industrial Accident Commission.

Herlihy & Herlihy, E. Herbert Herlihy, E. H. Kendig, Jr., K. A. Stoll, Los Angeles, for respondent Fireman's Fund Ins. Co.

NOURSE, Justice pro tem.

This is a proceeding brought by petitioners pursuant to section 5950 of the Labor Code to annul an award made by the respondent commission denying petitioners compensation for the death of Charles C. Martin.

The following relevant facts are either admitted, proved by uncontradicted evidence or, in case of conflict in the evidence, sustained by substantial evidence:

Petitioners are respectively the widow and children of Charles C. Martin (hereinafter called Martin). Martin and his wife, the petitioner Leona K. Martin, were, at all times hereinafter mentioned, members of a religious sect known as Jehovah's Witnesses. One of the tenets of their religion forbade them eating the blood of another, and the transfusion of the blood of another into their veins was forbidden as a consumption or eating of that blood.

On February 23, 1955, Martin, while in the scope and course of his employment by respondent Cunningham Company, sustained serious injuries including a rupture of the spleen when the scaffold upon which he was working suddenly collapsed. Immediately after the accident Martin was taken to a hospital where his injuries were diagnosed as a probable rupture of the spleen and he was advised that an operation would be necessary and that a transfusion of whole blood was necessary and should be administered. His wife was likewise so advised. Martin and his wife advised the hospital authorities and the attending physician that a transfusion of blood was against their religious beliefs and that if it was a question of permitting a blood transfusion or dying, Martin would choose death. Before Martin was taken to surgery he and his wife signed a document, which the parties here have denominated a release, in which the following is stated: "I, Charles Martin, refuse to have a transfusion of blood, even tho it may mean the loss of my life, because of my religious beliefs." An operation was then performed, the physicians using blood plasma and other substitutes for whole blood. Upon the opening of the abdomen the cavity was found to be full of blood, and there was a laceration of the spleen pulp with active bleeding. The spleen was surgically removed and, about two hours after the operation, Martin went into acute shock. The attending physician ordered a blood transfusion in the hope of saving his life, but the hospital authorities declined to consent to its being given because of the refusal of Martin and his wife to permit such transfusion, and shortly thereafter he died.

It was established by medical evidence that transfusion of substitutes for whole blood would not suffice to prevent shock, that transfusion of whole blood is the usual procedure in spleen operations and that the risks of such blood transfusions are minimal compared with the benefits thereof, and that the transfusion of whole blood in adequate amounts during and after surgery would probably have saved Martin's life.

Upon reconsideration of the findings and award made by the referee, the commission made the following finding: "The death of the employee on February 24, 1955, was proximately caused by said employee's unreasonable refusal to accept proper medical treatment, and his death was not the proximate result of the injury of February 23, 1955."

On the basis of this finding the commission entered its order denying compensation to petitioners.

The statutory basis for the commission's denial of compensation pursuant to its finding above quoted is found in section 4056 of the Labor Code.[1]

[1, 2] The question as to whether Martin's refusal to accept a blood transfusion was an unreasonable refusal to submit to medical treatment was a question of fact to be determined by the commission from all of the evidence before it, and if its findings and conclusions upon that issue of fact are supported by substantial evidence they are not subject to review by this court. Lab.Code, sec. 5953; Danziger v. Industrial Acc. Comm., 109 Cal.App. 71, 292 P. 525; Southern Cal. Edison Co. v. Industrial Acc. Comm., 75 Cal.App. 709, 243 P. 455; Bethlehem Steel Corp. v. Industrial Acc. Comm., 70 Cal.App.2d 369, 161 P.2d 18.

[3] Petitioners do not contend that there was not substantial evidence that the dangers inherent in a blood transfusion were minimal and that transfusion of whole blood would probably have saved Martin's life, but contend that despite these facts the commission could not find Martin's refusal to be unreasonable without finding that his religious beliefs and the tenets of

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[1] Wording of section 4056: "No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the commission, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury."

his religion were unreasonable, and that it was beyond the province of the commission to so find. In other words, it is petitioners' contention that the commission was limited to finding whether Martin acted as a reasonable member of Jehovah's Witnesses Church and that, it being admitted that he entertained the belief which he asserted, and to which we have adverted, in good faith, the commission could not take any other fact into consideration in determining the reasonableness of his refusal.

We think that petitioners' contention misconceives the real question presented. No question is presented as to the reasonableness of Martin's belief or of his religion, but the question presented to the commission and found upon by them was whether, in the light of all of the evidence including his religious beliefs, it was unreasonable for him to refuse to accept a treatment necessary to save his life.

Section 4056 of the Labor Code is a part of the statutory plan or scheme for workmen's compensation which imposes liability upon the employer for an industrial injury without regard to fault, and the Legislature clearly had the right to make it a condition of the right to receive compensation and of the imposition of liability on the employer that the employee should not unreasonably refuse to accept medical care.

Petitioners entirely overlook the fact that not only are Martin's rights to compensation involved but the employer's liability for the payment of compensation is also involved. Certainly it was not unreasonable for the Legislature to fix as a condition to the employer's liability that the death of an employee must arise out of his employment and that it should not exist where death is the result of the voluntary act of the employee in refusing medical attention. Here the commission not only found that Martin's refusal of medical care was unreasonable but that his death was due not to the injury received in the scope and course of his employment but by his refusal of transfusions of whole blood. Martin was not obligated to work in an employment that rendered him subject to the Workmen's Compensation Act, and if he accepted such employment he accepted it, insofar as his right to compensation is concerned, subject to the conditions imposed by the Legislature upon the right to such compensation.

It is petitioners' contention, however, that if the statute is construed as permitting the commission to hold that an employee's refusal to accept medical aid is unreasonable where the acceptance of such aid is contrary to his religious beliefs, the statute denies him his constitutional right of religious freedom and to the equal protection of the laws.

[4, 5] There is no merit in this contention, for "[a]lthough freedom of conscience and the freedom to believe are absolute, the freedom to act is not." Pencovic v. Pencovic, 45 Cal.2d 97, 103, 287 P.2d 501, 504; Prince v. Massachusetts, 321 U.S. 158, 169–170, 64 S.Ct. 438, 88 L.Ed. 654; Jacobson v. Massachusetts, 197 U.S. 11, 29, 25 S.Ct. 358, 49 L.Ed. 643; Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517. Under the statute here Martin was free to believe and worship as he chose, and he was further free, if he so chose, to practice his belief; but if he exercised that choice and his death resulted from his choice, petitioners were not entitled, as a matter of right, to the benefits of the workmen's compensation laws.

Petitioners cite, in support of their proposition that the statute is unconstitutional, West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, and Hardwick v. Board of School Trustees, 54 Cal.App. 696, 205 P. 49. These cases, however, are clearly distinguishable. In each of them the statute made the performance of an act contrary to the religious belief of the petitioner compulsory, and the refusal to conform subjected the one so refusing to penal action. There is nothing in the present statute that compels an employee to accept medical treatment of any kind, and he is free to make his choice between the practice of his religion and the acceptance of treatment that may be contrary thereto; but if he refuses, the commission is bound, as a court or jury would be in a tort action, to look at all of the facts and to determine therefrom whether his refusal was reasonable. As to rules in tort actions, see Christiansen v. Hollings, 44 Cal.App.2d 332, 345–346, 112 P.2d 723.

Section 4056 of the Labor Code no more transgressed upon Martin's constitutional rights than did the statute involved in the case of Hamilton v. University of California, 293 U.S. 245, 55 S.Ct. 197, 79 L.Ed. 343, transgress Hamilton's, or the statute under the provisions of which Adler was expelled from the faculty of an educational institution in the case of Adler v. Board of Education, supra, transgress Adler's.

In the Hamilton case the United States Supreme Court held that the denial of the right to education in a state university because of a refusal by a conscientious objector to take a prescribed course in military training and tactics did not violate Hamilton's right to religious freedom as guaranteed by the federal and state Constitutions. In the Adler case that court held that the denial of employment in the state school system to one who was a member of a surversive organization did not violate the right of free speech and assemblage as guaranteed by the federal Constitution, saying in substance that the state had a right to fix reasonable conditions which must be met by those who sought employment or to retain employment in its educational institutions, and that a condition which forbade the employment of one who was a member of an organization which had been found to be subversive did not deny that person his constitutional rights of free speech and assemblage, as he remained free to choose employment where he might exercise them as he saw fit.

So in the case at bar Martin was free to accept the tenets of his church and believe in them, and he was free to exercise his right to practice those beliefs, but that did not give him a right to impose, contrary to the statute, a liability upon his employer for his death resulting from his voluntary practice of his religion.

Petitioners seek to apply here the cases which hold that an employer "takes an employee as he finds him" and that the employee may recover compensation for an injury received during the course of his employment although the inducing proximate cause of his injury is some disease or physical disability not connected with his employment. See Edson v. Industrial Acc. Comm., 206 Cal. 134, 273 P. 572; Employers Mutual Liability Ins. Co. v. Industrial Acc. Comm., 41 Cal.2d 676, 263 P.2d 4.

The cited cases hold that where an employee sustains an injury while acting in the scope and course of his employment due to a fall caused by some disease or physical disability, the injury is compensable as arising out of his employment inasmuch as the statute contains no exception to injuries arising in the scope and course of employment which are contributed to by a non-industrial disease or physical disability of the employee. In the present case, however, the Legislature has seen fit to deny the right to compensation where the death or disability is contributed to by an unreasonable refusal to accept medical care. We could not, therefore, apply the decisions upon which petitioners rely to the facts here without in effect setting at naught the express provisions of the statute.

By their petition here petitioners have also sought to have us review the findings of the commission wherein it found that the original injury sustained by Martin was not caused by the willful misconduct of his employer. In view, however, of the conclusion which we have heretofore reached, it is unnecessary for us to discuss and decide this question.

The award of the Industrial Accident Commission is affirmed.

WHITE, P. J., and FOURT, J., concur.

Hearing denied; CARTER, J., dissenting.

146 Cal.App.2d 831

J. H. TRISDALE, Inc., a corporation, Plaintiff and Appellant,

v.

SHASTA COUNTY TITLE COMPANY, a corporation, Title Insurance and Guaranty Company, a corporation, Defendants and Respondents.

Civ. 8905.

District Court of Appeal, Third District, California.

Dec. 14, 1956.

Insured brought action against insurer and title company to recover damages allegedly suffered by insured as result of a misdescription of an easement of record made in a preliminary title report and in a policy of title insurance. The Superior Court, of Shasta County, Albert F. Ross, J., entered judgment sustaining demurrers, and the insured appealed. The District Court of Appeal, Schottky, J., held that first cause of action alleging that insurer breached terms of title insurance policy because policy referred to an easement belonging to a telephone and telegraph company, when in fact the easement belonged to a gas and electric company, and that title company was liable along with insurer because policy stated that it was issued directly from the office of the title company, and second cause of action alleging that title company was negligent in searching the record and in preparing preliminary title report stating that easement belonged to telephone and telegraph company, when easement in fact belonged to gas and electric company, were not demurrable, on ground that insured was barred as a matter of law by its own contributory negligence.

Judgment reversed with directions to overrule demurrers.

1. Insurance ⚷426½

Reference in policy of title insurance to an encumbrance belonging to "A" is not a reference to an encumbrance belonging to "B".

2. Insurance ⚷146(3)

Title insurance policies should be interpreted in the same fashion as are other insurance policies, that is, liberally in favor of the insured, and against the insurer.

3. Abstracts of Title ⚷3

Insurance ⚷635

First cause of action alleging that insurer breached terms of title insurance policy because policy referred to an easement belonging to a telephone and telegraph company, when in fact the easement belonged to a gas and electric company, and that title company was liable along with insurer because policy stated that it was issued directly from the office of the title company, and second cause of action alleging that title company was negligent in searching the record and in preparing preliminary title report stating that easement belonged to telephone and telegraph company, when easement in fact belonged to gas and electric company, were not demurrable, on ground that insured was barred as a matter of law by its own contributory negligence. West's Ann.Civ. Code, § 19.

4. Insurance ⚷124

"Title insurance" is a contract to indemnify against loss through defects in the title or against liens or encumbrances that may affect the title at the time when the policy is issued.

See publication Words and Phrases, for other judicial constructions and definitions of "Title Insurance".

5. Abstracts of Title ⚷3

Generally, an abstracter's obligation in preparing an abstract of title, such as preliminary title report, is contractual, and liability will result on theory of breach of contract, for damages resulting from negligence in preparation of the title report.

6. Abstracts of Title ⚷3

So far as an abstracter assumes to describe instruments of record, due care and skill require that his description be accurate.

7. Records ⚿**19**

In an action on a policy of title insurance, the doctrine of constructive notice of matters of record cannot be applied.

8. Limitation of Actions ⚿**95(1)**

Where action to recover damages alleged to have been suffered by plaintiff as result of misdescription of easement of record made by defendants in preliminary title report and in policy of title insurance was commenced April 23, 1954, and plaintiff allegedly did not discover nature or extent of damage suffered by it as result of breach of terms of policy until January 7, 1954, and did not learn of existence of negligence until on or about October 20, 1953, the action was not barred by two year statute of limitations on theory of constructive notice. West's Ann.Code Civ. Proc., § 339, subd. 1.

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Carlton & Shadwell, Redding, for appellant.

Chenoweth & Leininger, Redding, for Shasta County Title Co.

Royal E. Handlos, San Francisco, for Title Ins. & Guaranty Co

SCHOTTKY, Justice.

Appellant commenced an action to recover damages alleged to have been suffered by it as the result of a misdescription of an easement of record made by respondents in a preliminary title report and in a policy of title insurance.

At the time that appellant purchased the property, the easement in question was of record in the Shasta County Recorder's Office, in Book 217 of Official Records, at page 105. It was an easement belonging to Pacific Gas and Electric Company, a corporation, for the construction of an electric transmission line. Neither the preliminary title report nor the policy of title insurance made reference to such an easement. Instead, both documents, in identical language, referred to an easement recorded in Book 217 of Official Records, at page 105, belonging to Pacific Telephone and Telegraph Company, a corporation.

The first cause of action is based upon the theory of breach of the terms of the title insurance policy in that the policy failed to show or refer to an easement of record belonging to Pacific Gas and Electric Company for the construction of an electric transmission line. The insurer named in the policy is Title Insurance and Guaranty Company. In addition to the insurer, respondent Shasta County Title Company was also named as a defendant to the first cause of action based upon the following statement appearing on the title page of the policy: "This policy issued direct from the office of Shasta County Title Company, Redding, California, affiliated with Title Insurance and Guaranty Company." Respondents maintain that the policy was only issued by the insurance company and not by the title company.

The second cause of action is based upon the theory that respondent title company was negligent in searching the record and in preparing the preliminary title report for the benefit and use of appellant. It alleges in detail that appellant purchased its property, and suffered the resulting damage, in reliance upon the report that had been ordered by its agent for its benefit and use, and that appellant was reasonably entitled to rely upon the state of the title revealed by the report. It alleges further that plaintiff knew of the existence and location of lines and poles of the Pacific Telephone and Telegraph Company and reasonably believed that the deed of easement mentioned concerned such poles and lines and that plaintiff had no duty to examine, and in particular, Book 217 of Official Records, at page 105, in order to ascertain whether the deed of easement was correctly described.

The court sustained the demurrers of both respondents without leave to amend, upon the ground that the first amended complaint did not state a cause of action against either respondent, stating in its ruling that it would consider a motion for leave to amend if made within ten days. No such motion was made and judgment was entered in favor of respondents. In ruling upon the demurrer the court stated that the sole basis for its ruling was that appellant was contributorily negligent in failing to examine the record itself, after being given notice of the existence of an easement upon its property. The court said: "The typographical error was carelessness but the refusal or neglect of the plaintiff to avail himself of the knowledge to be obtained from the public records was even more careless." This appeal is from the judgment.

Appellant contends first that it was error to sustain the demurrers because the allegations of the complaint, if denied, would have raised an issue of fact for determination by the trier of fact as to whether appellant under such circumstances had a right to rely upon the statement in the preliminary title report that the easement recorded in Book 217 of Official Records, at page 105, belonged to Pacific Telephone and Telegraph Company.

Appellant next contends that the first cause of action states a good and sufficient cause of action for damages resulting from a breach of the title insurance policy issued to appellant by respondents in that the policy did not "show" or "refer" to an easement belonging to the Pacific Gas and Electric Company for the construction of an electric transmission line. Appellant maintains that at the very least, this issue is one of fact and not of law, and it was error for the court to impliedly find as a matter of law that there was no breach of the terms of the policy. The policy only "shows" and "refers" to a non-existent deed of easement belonging to the Pacific Telephone and Telegraph Company.

[1, 2] Appellant concedes that if the policy had merely referred to a deed of easement recorded at Book 217 of Official Records, at page 105, without undertaking to name the owner of the easement, there would have been no breach of the policy. However, appellant argues, when respondents went further and voluntarily undertook to name the owner of the easement, they took upon themselves the risk and the obligation of naming the owner accurately. The terms of the policy are clear and unambiguous. They insure plaintiff against any encumbrance not shown or referred to in the policy. A reference to an encumbrance belonging to "A" is not a reference to an encumbrance belonging to "B". As was stated in the case of Overholtzer v. Northern Counties Title Insurance Co., 116 Cal.App.2d 113, at page 122, 253 P.2d 116, at page 120:

> "Title insurance policies should be interpreted in the same fashion as are other insurance policies, that is, liberally in favor of the insured, and against the insurer. Title insurance is practically an unregulated business. No state control is exercised over the terms of the policies or over rates. The companies frame the policies. When the very contingency happens that was insured against, only clear and compelling reasons should permit a court to deny to the insured full reimbursement for all losses, up to the face amount of the policy, sustained because of the happening of such contingency. [Citations.]"

The Overholtzer case, supra, was also an action for damages for breach of a title insurance policy resulting from the failure of the policy to disclose the existence of a recorded easement for a pipeline. The owners discovered the existence of the easement some time after they had purchased the property and the policy had been issued. As a result, they had to engage in litigation with the holder of the easement. They brought suit on the policy and recovered damages. Both sides appealed, plaintiffs appealing because of inadequate damages. The judgment was affirmed as to defendant's liability on the policy, and was reversed as to the damages, with directions to retry that issue. On the sufficiency of pleading damages, the court stated, 116 Cal.App.2d at page 124, 253 P.2d at page 122:

> "* * * The damage results from the cloud on the title. If that cloud impairs the market value of the land, the Overholtzers are entitled to what-

> ever damages resulted from that cloud. * * * So far as pleading and proof are concerned, an allegation and proof of the existence of the easement and of diminution in the market value are all that is required."

[3] It would appear that the court sustained the demurrers to both causes of action upon the stated ground that the plaintiff was itself negligent in failing to inspect the record after being given notice of a certain easement being recorded in Book 217 of Official Records, at page 105. This ground was apparently intended to be equally applicable to the cause of action based upon the title insurance policy. The court's ruling appears to be, not that there has not been a breach of the policy, but that the insured is barred as a matter of law by its own contributory negligence. We think that the court erred in so ruling.

[4] For as stated in King v. Stanley, 32 Cal.2d 584, at page 590, 197 P.2d 321, at page 325:

> "* * * Title insurance is a contract to indemnify against loss through defects in the title or against liens or encumbrances that may affect the title at the time when the policy is issued. [Citations.]"

The principal question in the cause of action based upon the policy is whether there was a breach of the policy, or, in other words, a breach of the contract of indemnity against loss. No California decision can be found that suggests that the negligence of the insured could be set forth as a bar to such an action, particularly as a matter of law as has been done by the trial court in this action. The New York decision of Maggio v. Abstract Title & Mortgage Corporation, 277 App.Div. 940, 98 N.Y.S.2d 1011, indicates that the doctrine of negligence has no application to a contract of title insurance. At page 1013 of 98 N.Y.S.2d, the court stated:

> "* * * In the case of a title insurance policy, the insurer undertakes to indemnify the insured if the title turns out to be defective. That is the purpose of procuring the insurance and knowledge of defects in the title by the insured in no way lessens the liability of the insurer. The doctrine of skill or negligence has no application to a contract of title insurance."

The appellant next contends that the allegation in the second cause of action was sufficient to raise an issue of fact as to whether, under such circumstances, a reasonable person was entitled to rely upon such a statement of ownership of an easement of record in a preliminary title report without the necessity of having to examine the record for himself in order to ascertain its accuracy.

Appellant concedes that this contention assumes that appellant was willing to assume the risk as to the extent of an easement belonging to Pacific Telephone and Telegraph Company, but that it was not willing to, and did not mean to, assume the risk as to the extent of an easement belonging to an entirely different corporation for an entirely different purpose. As was stated by the trial court itself, in its memorandum opinion: "As I have stated before it is a matter of common knowledge that there is considerable difference in the rights and extent of those rights pertaining to an easement for a telephone line of low voltage and a power line of high voltage, and one might very well be perfectly willing to accept the easement of a telephone company and not to accept an easement of a power company."

[5, 6] It is generally accepted that an abstracter's obligation in preparing an abstract of title, such as the preliminary title report here in question, is contractual, and that liability will result, on the theory of breach of contract, for damages resulting from negligence in the preparation of the title report. A statement that is particularly applicable is found in 1 American Jurisprudence, Abstracts of Title, section 15, that: "So far as he

[abstracter] assumes to describe instruments of record, due care and skill require that such description shall be accurate."

In 1 American Jurisprudence, Abstracts of Title, section 26, at page 170, it is stated:

> "* * * The person employing the abstracter has the right to rely upon the truth and accuracy of the abstract as regards essential facts of record, unless it is plainly apparent from the certificate that there was a mistake. He does not, by so relying upon the work of the abstracter, defeat recovery for negligence."

Also, in 1 C.J.S., Abstracts of Title, § 11, p. 391, it is stated:

> "One who employs an abstracter to abstract or report upon a title is justified in relying upon the truth and accuracy of the abstract or report, as regards essential facts of record, without himself making an investigation thereof, unless the abstract itself or the terms of the certificate make it plainly apparent that there has been an omission or mistake. So, while it may be the duty of one relying on an abstract which recites that a deed is subject to certain restrictions, without setting them out, to examine the record and see what restrictions were contained in the deed, where the abstract purports to recite the restrictions of a deed, but gives only a part of them, with nothing to show that any are omitted, the customer may rely on the abstract as setting forth all and the only restrictions contained in the deed, and if there are others which are material, the abstracter is liable for his failure to show them."

Respondents argue that the date, book and page being correct, and no terms of the easement being set forth either in the title report, or title policy, the appellant had no other recourse than to look at the public record referred to, or inquire from the Telephone Company as to its rights, and in either case the true facts would have been disclosed.

However, as appellant points out, there is nothing in the report to indicate that such a statement as to ownership of the easement was inaccurate. The language in the exception, "for poles, towers and incidental purposes," would not of itself indicate to a layman that the statement of ownership was inaccurate. At most, it would be a question of fact as to whether such was the case.

Respondents cite section 19 of the Civil Code, which states:

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

However, the rule stated in this section tends to support appellant's contention that it was a question of fact as to whether the preliminary title report gave appellant "actual notice" of circumstances sufficient to put a "prudent man" upon inquiry as to whether the easement referred to in the report belonged to Pacific Telephone and Telegraph Company or to someone else.

[7] Respondents' argument as to the doctrine of constructive notice of matters of record cannot be applied to an action against a title company for negligence in reporting the state of the title to real property. If the doctrine of constructive notice applied to such cases, then title companies would never be held liable for their negligence, no matter how flagrant it might be, and there would be little use for prospective property owners to obtain title reports, for they would be relying upon any statements contained therein at their own risk.

[8] Respondents' final contention that the instant action is barred by the two year statute of limitations, Code Civ.Proc. § 339(1), by reason of the doctrine of constructive notice is without merit. This action was commenced by the filing of the original complaint on April 23, 1954. The first cause of action alleges that plaintiff did not discover the nature or extent of the damage suffered by it as the result of the breach of the terms of the policy until January 7, 1954. The second cause of action alleges that plaintiff did not learn of the existence of the right-of-way for an electric transmission, and of the negligence of defendant title company, until on or about October 20, 1953. It would therefore appear that both causes of action show affirmatively on the face thereof that they were commenced within the allowable statutory period.

As we view the matter it would be strange, indeed, if prospective purchasers of real property could not rely upon title reports for which they are required to pay, but must search the records themselves. If such be the law a large part of the value of title companies would disappear. For as aptly stated in Bridgeport Airport, Inc., v. Title Guaranty & Trust Co., 111 Conn. 537, 150 A. 509, at page 510, 71 A.L.R. 345, at page 348:

> "The defendant, having assumed to search and report upon the title, the very purpose of obtaining its services would be undone if the plaintiff could not rely upon the truth and accuracy of its report as regards essential facts of record, unless perhaps the terms of the certificate made it plainly apparent that there was a mistake."

In view of the foregoing we conclude that the court erred in sustaining the demurrers. The judgment is reversed with directions to the trial court to overrule the demurrers.

VAN DYKE, P. J., and PEEK, J., concur.

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147 Cal.App.2d 79

SAN VICENTE NURSERY SCHOOL, a corporation, Dr. Maurice Walsh, Libby Freedman, William A. Gould, individually and as guardian ad litem for Nancy Robin Gould, a minor, Plaintiffs and Appellants,

v.

The COUNTY OF LOS ANGELES, The Board of Supervisors of the County of Los Angeles et al., Defendants and Respondents.

Civ. 21619.

District Court of Appeal, Second District, Division 3, California.

Dec. 19, 1956.

Rehearing Denied Jan. 17, 1957.

Hearing Denied Feb. 13, 1957.

Action by private, non-profit nursery school and others against county and others to obtain declaration that county had a legal right to permit school to use a public park of the county and a building and facilities thereon for school purposes. The Superior Court, Los Angeles County, Thomas J. Cunningham, J., entered judgment adverse to plaintiffs, and plaintiffs appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to sustain trial court's findings that the school had had the exclusive use of a park building for seven years to the unreasonable exclusion of other members of the public, that the primary purpose of such exclusive use was the benefit to the limited number of children attending the school and their parents, and that such exclusive use by the private group was not a public use or public purpose.

Judgment affirmed, and purported appeal from order denying motion for new trial dismissed.

1. Counties ⚿21½, 106

County has only those powers which are specifically conferred by charter or the general law, or necessarily implied from the expressed powers, and there is no express authority which permits use of a public park for a private nursery school.

2. Counties ⚿106

In absence of express authority to do so, county cannot permit use of public park in a manner which will unreasonably impair or interfere with right of the public to use the park.

3. Declaratory Judgment ⚷345

In action by private, non-profit nursery school and others against county and others to obtain declaration that county had legal right to permit schools to use public park and building and facilities thereon for school purposes, evidence was sufficient to sustain trial court's findings that the school had had the exclusive use of a park building for seven years to be unreasonable exclusion of other members of the public, that the primary purpose of such exclusive use was the benefit to the limited number of children attending the school and their parents, and that such exclusive use by the private group was not a public use or purpose. West's Ann.Const. art. 4, § 31.

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Brock, Easton, Fleishman & Rykoff, and Stanley Fleishman, Hollywood, for appellants.

Kenny & Morris, and Robert W. Kenny, Los Angeles, as amici curiae on behalf of appellants.

Harold W. Kennedy, County Counsel, and Richard L. Riemer, Deputy County Counsel, Los Angeles, for respondents.

PARKER WOOD, Justice.

Action for declaratory relief and injunction. Plaintiffs sought a declaration that the county of Los Angles had a legal right to permit plaintiff nursery school, which is a private school, to use a public park of the county and a building and adjacent facilities in the park for school purposes. In another cause of action, plaintiffs sought an injunction restraining the county from evicting the school from the park. At the trial, plaintiffs abandoned the cause of action for an injunction. The judgment, in favor of defendants, declared that the use of the building and facilities for school purposes, or the use of other space in the park for such purposes, was an illegal diversion of the park. The judgment also provided that no injunction should issue against the eviction of the school. Plaintiffs appeal from the judgment.

The allegations in the cause of action for declaratory relief were, in part: Plaintiff San Vicente Nursery School is a nonprofit corporation existing under the laws of California. Plaintiffs Walsh and Freedman are taxpayers of said county, are members of the school, and are parents of children who attend the school. Plaintiff William Gould is a member of the school, is the father of a child who attends the school, and is guardian ad litem of plaintiff Nancy Gould, a minor, 4½ years of age. The individual plaintiffs bring the action on behalf of all members and children of the school. Since December 3, 1947, the school has been on the West Hollywood Park, a county park. The school operates 5 days a week from 9 a. m. to 12 noon and employs a teacher. The mothers of the school children work in rotation as teaching assistants, and as drivers who take the children to school "in car pools." The fathers of the children assist in making and repairing play equipment. Parents pay $17.50 a month as tuition for each child, which amount is used to pay the teacher's salary and purchase play equipment. The use of the park by the school has not interfered with the customary use of the park by the general public. On March 4, 1954, the school was given a 30-day eviction notice which was signed by defendant Gruendyke, the superintendent of parks and recreation. A controversy exists between plaintiffs and defendants as to whether, as a matter of law, the park may be used to store play equipment of the nursery school.

In a supplemental complaint, plaintiffs allege that after the filing of the complaint they requested the Board of Supervisors of Los Angeles County to permit the school to construct its own storage facilities in the park, and the board declined to entertain the request, stating that it was a legal issue.

Defendants allege in effect, in their answer, that plaintiff school has continuously occupied the building in the park, and the horseshoe area adjoining the building, at all times for the past 6 years to the exclusion of all other members of the general public, who are not members of plaintiffs' private school.

The parties made a written stipulation of the following facts: The park was acquired by the county by purchase. The school is a nonprofit, nonsectarian corporation existing under the laws of California. The school has a license from the State Department of Social Welfare permitting the attendance of 20 children, and the school must comply with the standard set by that department. Children are admitted "on a first come, first serve basis." The school operates five days a week from 9 a. m. until 12 noon in a corner of the park. The dimensions of the building occupied by the school, where the play equipment is stored at all times even when the children are not present, is about 13 feet by 21 feet. The school also occupies a closet therein, which is about 4 feet by 5 feet, and uses the adjoining rest room. During the sessions the school occupies the horseshoe area, adjoining the building, which is 35 feet by 40 feet. The building is opened about 9 a. m. each day by the park attendant and is locked by him about 12:30 p. m. The school has so occupied the building, closet, and horseshoe area uninterruptedly about seven years—since December 3, 1947. At that time the school was given permission by the director of the park to meet in the building and store its equipment there. During the first two months the school paid $25 a month as rent, but thereafter no rent was required to be paid. The play equipment is stored in such a manner that it is impracticable for other groups to use the building. The space used by the school is about ½ of 1 per cent of the park area. The school is a cooperative one, wherein the parents are responsible for the business administration and financing. The school is also a child study center for the parents. A teacher is employed by the school. The mothers work in rotation as teaching assistants and as drivers who take the children to school "in car pools." The fathers assist in making and repairing play equipment. Each Sunday some of the fathers wash the building and rest room. At times they have put new linoleum on the floor of the building. They built a locker in the park for storage of play equipment, with permission of the park director. The school has a key to the locker. The parents pay $20 a month as tuition for each child, which amount is used to pay the teacher and to purchase play equipment. No one makes any pecuniary profit from the school. The school has graduated about 150 children and parents, and it contributes to their physical, mental and moral development, and it "constitutes" recreation for the children and education for the parents. The school includes activity in the fields of music, drama, art, handicraft, science, literature, nature study, athletics, and informal play. The building was originally intended to be used as a card playing shelter, and defendants intend to use the building for that purpose. On December 20, 1953, the County Counsel of Los Angeles County rendered an opinion, which is attached to the stipulation. (The opinion was to the effect that such use of the park for school purposes was illegal.) On January 26, 1954, defendant Gruendyke, who is the superintendent of parks and recreation, told some of the parents that he had received an opinion of the County Counsel of Los Angeles County that the use of the park by the school was prohibited by law. On March 4, 1954, defendant Gruendyke, as such superintendent, gave the school a 30-day eviction notice. Plaintiffs Walsh and Freedman are residents and taxpayers of Los Angeles County. Mrs. Freedman is a member of the school and has a child in attendance there. Plaintiffs Walsh and Gould are former members of the school, who had children in attendance there when the action was commenced. Plaintiff Nancy Gould, a child, was in attendance at the school when the action was commenced. Defendants contend that, as a matter of law, the school may not store its equipment in the building or in any other building or facility in the park. Plaintiffs contend that the storage of the equipment is legal.

At the trial it was stipulated orally that the school was of value to the children and the parents.

Two parents, who were members of the school, testified that the school was of value to the community.

Mrs. Harmon, the teacher at the school, testified that on one occasion she stored the school equipment at one side of the room so that there would be room in the building for a meeting of cub scouts.

Mr. Wyckoff, senior maintenance man at the park, testified he has been an employee at the park since 1946; the building involved here is known as the senior citizens building or card shelter building; he has not seen the school children interfering with the use of the park by other persons; the county repairs and maintains the building; the county has its own program for small children, which is known as the Tiny Tots program; about six children are in attendance.

Mr. Swab, director of the park, testified that the leader of the Tiny Tots program is a university student who works part time for the county; the children of the plaintiff school do not interfere with the use of the park by other persons; there is not ample space in the park to meet all the requests for use of the park; if the school did not tie up the facilities of the park, the presence of the school would be good for the park; no other group stores equipment in the park; when other groups use a building in the park they pay $1.00 an hour rent before 6 p. m., and $2.00 an hour thereafter.

Mrs. McKellar, who was director of the park from 1941 to 1955, testified that she was director when the school started; the school was given permission to use the building on a temporary basis; the building was intended for use by senior citizens; there were complaints by parents in the community that, by reason of the school, the play equipment in the park could not always be used by other children; the school program is a good program; the school has had exclusive use of the building and horseshoe area about 7 years; the school equipment stored in the building interferes with the use of the building by other groups.

The court made findings in accordance with said written stipulation. Further findings were as follows: The school has had the exclusive use of the building and horseshoe area for 7 years to the unreasonable exclusion of other members of the public. To allow the school to continuously store its equipment in any park building or to build its own storage facility in the park would be an exclusive use of public park property and an unreasonable exclusion of the general public from that portion of the park so occupied by the school. The benefit to the members of the school and their children is the primary purpose of the use of the park property by the school. The use of the park by the school does not contribute to the enjoyment of the park by other members of the public, but detracts from such enjoyment. The exclusive use of the park property by the school, a limited private group, is not a public use or public purpose. A recreation program for pre-school children conducted by a public authority for the public is a proper park purpose. A privately conducted nursery school for the benefit of a limited private group upon a public park is not a proper park purpose but is a diversion of the park property. It is equally a diversion of such property whether the school has the exclusive use of a park building or any park facility for storage of equipment, or builds its own storage facility in the park. During the occupancy of the building by the school the county has performed the usual maintenance and upkeep of the building.

The court found further that: It is not true that the removal of the school from the park would involve an illegal expenditure of county funds or waste of county property. It is not true that the county has not been put to expense by reason of the occupancy of the building by the school. It is not true that there is sufficient space in the park to meet all requests for use of the park. It is not true that any other groups have been given exclusive use of any park facility for storage or other purpose. It is not true that the only reason the county requested the school to vacate the building was the advice of the county counsel, but it is true that the county officials determined, as a matter of fact, that the exclusive use by the school unreasonably excluded the public from the use of the facility occupied by the school, and the superintendent of parks determined, as a matter of policy, that the building should be opened to the public generally for the purposes for which it was originally designed and for all other public uses. It is not true that the school will necessarily lose its license, issued by the social welfare department, because it is not permitted to store its play equipment on the park property. It is not true that the county has barred the school or its members from using the park in the same way as other members of the public.

The judgment was that the existing use of the building and adjacent facilities constituted an illegal diversion of the park; and the proposed allocation of other space in the park buildings, or the building of storage facilities in the park by the school at its own expense, would constitute an illegal diversion of the park.

[1, 2] A county has only those powers which are specifically conferred by charter or the general law; or those powers necessarily implied from the powers expressed. There is no express authority which permits the use of a public park for a private nursery school. In the absence of such authority a county cannot permit the use of a public park in a manner which will unreasonably impair or interfere with the right of the public to use the park. See 64 C.J.S., Municipal Corporations, § 1822, p. 307; and Hall v. Fairchild-Gilmore-Wilton Co., 66 Cal.App. 615, 625, 227 P. 649. In Williams v. Gallatin, 229 N.Y. 248, at page 253, 128 N.E. 121, at page 122, 18 A.L.R. 1238, it was said: "A park is a pleasure ground set apart for recreation of the public, to promote its health and enjoyment. [Citation.] It need not, and should not, be a mere field or open space, but no objects, however worthy, such as courthouses and schoolhouses, which have no connection with park purposes, should be permitted to encroach upon it without legislative authority plainly conferred, even when the dedication to park purposes is made by the public itself * * *." In Derr v. City of Fairview, 121 Okl. 23, 247 P. 45, it was held that a lease to plaintiff by defendant city of a portion of a park for 25 years, in which lease plaintiff was given the exclusive right and control of the land leased, amounted to an ouster of the public from the park, and therefore the lease was invalid. In a note in 116 A.L.R. 889, under the title "Subsidizing Recreational Enterprises," it was said at page 891: "The question of the power of a county * * * to lend its aid to a private enterprise conducted for recreational or entertainment purposes depends upon a number of different considerations, including (1) whether such an enterprise can be deemed a 'public purpose' within the general rule restricting the expenditure of public funds to public purposes, (2) whether the legislature has authorized the county or municipality to lend its aid to the enterprise in question, and (3) whether the state Constitution contains a provision, as is the case in many states, forbidding local authorities to lend their aid to private enterprises."

Section 31 of Article IV of the Constitution of California prohibits a county from using public funds for private purposes. Goodall v. Brite, 11 Cal.App.2d 540, 544-545, 54 P.2d 510.

[3] As above stated, the trial court found to the effect that the school, which is conducted by a private group of persons, has had the exclusive use of the building for 7 years to the unreasonable exclusion of other members of the public, and that the primary purpose of such exclusive use was the benefit to the limited number of children attending the school and their parents, and that such exclusive use by the private group was not a public use or public purpose. The findings are supported by

the evidence. The evidence shows that the school is in session five mornings each week (Monday through Friday inclusive), that the equipment of the school remains stored in the building all the time, and the building is locked all the time when school is not in session. It was stipulated that the equipment was stored in the building in such a manner that it was impracticable for other groups to use the building. Photographs (received in evidence) of the interior of the building show that barrels, boxes, tables, chairs, boards and many miscellaneous things were so stacked therein that it would be impossible for any group of persons (even plaintiffs) to use the major portion of the room as a meeting place. The photographs and the evidence indicate that the members of the private school contemplated the continued exclusive daily use of the public property for an unlimited period of time. Plaintiffs did allege in their complaint that children are admitted to the school "on a first come, first serve basis." There was evidence, however, that when a parent was interested in becoming a member of the school the matter was referred to the "membership chairman" of the school, who had the duty of advising the prospective member as to the responsibilities of a parent in a cooperative nursery school; and there was evidence that the chairman considered whether or not the prospective member was in sympathy with the aims of the school group. It was stipulated (orally) that there had been occasions when parents, who had applied for membership, declined to join after the responsibilities had been explained to them. It thus appears that to some extent the matter of selection was involved in admitting new members. The school was privately conducted and was limited to a few children and their parents, who paid the required tuition fee to the school. The building was not open to the public generally. The general public was excluded from the use of the park to the extent that the school had the exclusive use or occupancy of the building and facilities. The use of the building by the school was not a temporary use but was a continuous exclusive use or occupancy for 7 years. The use of the park by the school did not contribute to the enjoyment of the park by the general public but contributed only to the enjoyment of the park by the few children and their parents. The existing use of the building and facilities by the school was not a public use or public purpose; and the proposed exclusive use of other space in the park by the school would not be a public use or public purpose.

The judgment is affirmed. The purported appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

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147 Cal.App.2d 160

Dennis Dale PATTERSON, a minor, by Bonnie Patterson Quick, his guardian, Plaintiff and Appellant,

v.

DELTA LINES, Inc., a corporation, and Boettler Francis Seibert, Defendants and Respondents.

Civ. 8650.

District Court of Appeal, Third District, California.

Dec. 21, 1956.

Action for wrongful death of decedent who was killed when, while squatting near his pickup truck and trailer parked on the shoulder of a highway, he was struck by a truck trailer driven by defendant in the course and scope of his employment by codefendant. The Superior Court, Sacramento County, James H. Oakley, J., entered judgment in favor of defendants and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that evidence presented questions for the jury as to whether defendant-driver was negligent in driving with his truck lights on low beam, swerving to his left after observing decedent and his parked truck and trailer on the shoulder of the highway instead of proceeding in a straight path, failing to keep a vigilant lookout, failing to see decedent's parked vehicles until he was within 60 feet thereof, and as to whether such alleged negligence was the proximate cause of the accident.

Judgment affirmed.

1. Automobiles ⚷245(17, 39, 62)

In action for wrongful death of decedent who was killed when, while squatting near his pickup truck and trailer parked on the shoulder of a highway, he was struck by a truck trailer, evidence presented questions for the jury as to defendant-driver's negligence in driving with his lights on low beam, swerving to his left after observing decedent and his parked vehicles on the shoulder of the highway instead of proceeding in straight path, failing to keep a vigilant lookout, failing to see decedent's parked vehicles until he was within 60 feet thereof, and as to whether such alleged negligence was a proximate cause of the accident.

2. Automobiles ⚷246(21)

Where defendant truck driver was not guilty of negligence as a matter of law in the operation of his truck, there was no error in instructing jury in a wrongful death action arising out of such operation of the truck that if defendant was unexpectedly confronted with peril, arising from either the actual presence or the appearance of imminent danger to himself or to others, he was not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments.

3. Appeal and Error ⚷1064(1)

There is no prejudicial error in instructing a jury that if they find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, they should view with distrust any weaker and less satisfactory evidence actually offered on that point, even though there is no occasion for giving such instruction.

4. Trial ⚷240

An instruction that when there is evidence that one looked but did not see an object clearly visible there is either an irreconcilable conflict in such evidence or the person was negligently inattentive, is argumentative and need not be given.

5. Automobiles ⚷173(5)

Statute providing that outside of a business or residence district during certain times a rear light meeting statutory requirements must be displayed upon any vehicle parked or standing upon a highway, applies to vehicles parked on the shoulder of a highway. West's Ann.Vehicle Code, §§ 81, 83, 582, 627.

6. Trial ⚷241

In action for wrongful death of decedent who was killed when, while squatting near his pickup truck and trailer parked on the shoulder of a road, he was struck by a truck trailer, trial court did not err in reading to jury statutory requirements as to lights on parked vehicles, in view of evidence as to lack of such lights on deceased's vehicles. West's Ann.Vehicle Code, § 627.

7. Trial ⚷255(11)

In action for wrongful death of decedent who was killed when, while squatting near his pickup truck and trailer parked on the shoulder of a road, he was struck by a truck trailer, trial court did not err in failing to instruct jury that presumption of negligence arising from a violation of a statute may be rebutted by evidence of excuse or justification for such violation, in absence of a request by plaintiff for such instruction.

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William W. Speer, Crescent City, Richard J. Lawrence, Horace E. Cecchettini, Sacramento, for appellant.

Fitzwilliam & Memering, Sacramento, for respondents.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered upon the jury's verdict in favor of the defendants in a wrongful death action.

The father of the minor, upon whose behalf this action was brought, was instantly killed when struck by a trailer attached to a truck being driven by the respondent Seibert in the course and scope of his employment by the corporate respondent. Respondent Seibert will hereinafter be refered to as the respondent.

The material facts stated in accordance with the rules on appeal follow: The accident occurred near Vacaville at a place on U. S. Highway No. 40 where the highway is divided into two lanes for southbound, and two lanes for northbound, traffic. The time was just before the break of dawn on September 4, 1952.

Shortly before the accident, the witness Roy Sterner passed the site and observed the deceased's pickup and trailer parked on the shoulder approximately two feet to the right of the right edge of the main traveled portion of the highway used by southbound traffic. Deceased was "squatting down" on the left side of the parked vehicles in such a position that his body extended over the highway proper for a distance of about one foot. No lights were then burning on the pickup or trailer but there was a glass reflector a few feet to the rear thereof. In the absence of evidence to the contrary, it may be inferred that the lack of burning lights on decedent's vehicles continued until the time of the accident. Jackson v. Butler, 88 Cal. App.2d 608, 612, 199 P.2d 63.

Respondent was driving a truck to which was attached two unloaded trailers. He was proceeding south in the right hand lane at a speed of forty miles per hour. Respondent did not see the decedent's parked pickup and trailer until he was within approximately sixty feet of the rear thereof. He immediately swerved to the left and thereby, apparently, caused his rear trailer to "whip" to the right and strike decedent and his pickup. The force of the impact was such that respondent's truck and trailers laid down skid marks for approximately 91 feet before going across a drainage ditch and into an adjacent field where they came to rest about 200 feet to the right of the highway. Hair and blood on the axle of the rear trailer indicated that decedent had been dragged by it to a point sixty feet south of his pickup where his body was found. After the accident two reflectors were found to the rear of decedent's trailer, one of which was severely damaged and the other of which was then in such a position that it would have afforded no warning to vehicles approaching from the north. Respondent's testimony was corroborated by the witness George Lyle who was following respondent's truck and trailer at a distance of about 300 feet. He saw deceased's pickup and trailer approximately at the same time as respondent did, although he was then 300 feet further distant therefrom. However, this does not necessarily mean that respondent was negligent in not observing the decedent's pickup and trailer at the same distance. The witness George Lyle had the benefit of the illumination from the lights on respondent's equipment and he may also have had his attention attracted to the parked vehicles by respondent's sudden swerve to the left. The witness testified that there were no lights burning on the decedent's pickup or trailer and that prior to the accident he did not see decedent nor any reflectors.

[1] Appellant contends that the presumption of due care upon the part of the decedent was not rebutted and that, as a matter of law, respondent was guilty of negligence in driving with his lights on low beam, in swerving to the left instead of proceeding in a straight path, in failing to keep a vigilant lookout, and in not seeing decedent's parked vehicles until he was within 60 feet thereof. Such contentions are not supported by the record. It is not

within the province of this court to weigh the evidence. The factual questions as to the negligence of the parties and the proximate cause of the accident were properly submitted to the jury.

[2] Since respondent was not guilty of negligence as a matter of law, there was no error in instructing the jury that if he were "unexpectedly confronted with peril, arising from either the actual presence or the appearance of imminent danger to himself or to others," he was "not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." Koon v. Sher, 98 Cal.App.2d 530, 533, 220 P.2d 784.

[3] Likewise, there was no error in instructing the jury that if they found that "it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him on that point." It has often been held that no prejudicial error is involved, even where there is no occasion for giving this instruction. Koon v. Sher, supra, 98 Cal. App.2d at pages 533–534, 220 P.2d at pages 786, 787.

[4] The trial court refused to instruct the jury that when there is evidence that one looked but did not see an object clearly visible there is either an irreconcilable conflict in such evidence or the person was negligently inattentive. Such an instruction is argumentative and need not be given. Cooper v. Smith, 209 Cal. 562, 566, 289 P. 614; Schwenger v. Gaither, 87 Cal. App.2d 913, 914–915, 198 P.2d 108.

[5–7] Appellant complains because the trial court read the following portion of Section 627 of the Vehicle Code to the jury:

> "Outside of a business or residence district and during the times mentioned in Section 618 hereof a rear light meeting the requirements of Section 621 hereof must be displayed upon any vehicle parked or standing upon a highway."

Appellant argues that the provisions of the quoted section are inapplicable since the shoulder upon which decedent's pickup and trailer were parked did not constitute a part of the "highway". Section 81 of the Vehicle Code defines a "highway" as "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." It may include the shoulder as well as the "roadway" which is "that portion of a highway improved, designed or ordinarily used for vehicular travel." Veh.Code, sec. 83. When the legislature has wished to limit the application of certain statutory provisions to the "main traveled portion of the highway", it has done so. Veh.Code, sec. 582. It did not so limit the provisions of Section 627. We conclude that Section 627 applies to vehicles parked on the shoulder. The trial court did not err in reading to the jury the statutory requirements as to lights on parked vehicles. Neither did the trial court err by failing to instruct the jury, on its motion, that the presumption of negligence arising from a violation of a statute may be rebutted by evidence of excuse or justification for such violation. If appellant desired such an instruction, it was his duty to propose it.

The judgment is affirmed.

SCHOTTKY and PEEK, JJ., concur.

147 Cal.App.2d 88

George W. HARTUNG and Margaret E. Hartung, Plaintiffs, Cross-Defendants and Respondents,

v.

Dino POLLASTRINI, Alex Maul, Maul and Pollastrini, a partnership, and Harrison Wiggins, Defendants, Cross-Complainants and Appellants.

Civ. 8883.

District Court of Appeal, Third District, California.

Dec. 19, 1956.

Hearing Denied Feb. 13, 1957.

Action for damages arising from breach of an oral agreement to level and seed land. The Superior Court, Merced County, R. R. Sischo, J., rendered judgment for plaintiff and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that where defendant had agreed to complete leveling and seeding of plaintiffs' land by December 1, 1952, and subsequently defendant fraudulently induced plaintiffs to forgo planting by telling plaintiffs the seed would freeze if planted before December 1, the contract was not modified nor was failure to plant by December 1st excused.

Judgment affirmed.

1. Contracts ⚷350(2)

In action by landowners for damages arising from breach of oral agreement to level and seed land, evidence sustained finding that defendant agreed to have work completed and ground seeded by December 1, 1952.

2. Contracts ⚷247, 322(3)

In action by landowners for damages arising from breach of oral agreement to level and seed land by December 1, 1952, where defendant told landowners in November that seed would freeze if planted before December 1st, evidence sustained implied finding that contract was not modified nor was failure to plant by December 1, 1952, excused.

3. Contracts ⚷303(1)

Where landowners had agreement with defendant to have land leveled and seeded by December 1, 1952, and defendant falsely told landowners in November that seed would freeze if planted before December 1st, and induced landowners to agree not to plant seed in December, defendant could not rely upon conduct of landowners fraudulently induced by defendant as excuse for nonperformance.

4. Contracts ⚷316(1)

Where landowners and defendant entered into oral agreement on September 1, 1952, that defendant would level and seed land by December 1, 1952, and defendant did not have work done by that date, and the landowners protested to defendant and defendant falsely promised to complete work in short time in order to induce landowners to refrain from terminating agreement, and as a result of original breach and subsequent broken promises landowners terminated agreement, defendant was precluded from claiming waiver of breach since he had fraudulently induced landowners to keep contract alive.

5. Damages ⚷175

In action by landowners for damages arising from breach of oral agreement to level and seed land by December 1, 1952, for any reasonable amount that contractor might charge, when contract was not completed by that date but work was done which was beneficial to the land, it was not error for court to receive evidence of reasonable value of work which had been performed.

6. Contracts ⚷230

Where landowners orally agreed to pay contractor any reasonable sum that contractor might charge for leveling and seeding land, although contractor was given broad power he could not charge what he pleased for work but was only entitled to be paid reasonable value of services performed.

C. Ray Robinson by W. E. Craven, Merced, for appellants.

Byers, Burd & Fraser by Fred K. Howell, Jr., Berkeley, and Landram & Silveira, Merced, for respondents.

VAN DYKE, Presiding Justice.

Dino Pollastrini, Alex Maul, Maul and Pollastrini, a partnership, and Harrison Wiggins appeal from the judgment against them upon the plaintiffs' complaint and upon their cross-complaints.

The Hartungs, the respondents, own a ranch in Merced County, comprising 220 acres of land. They entered into an oral agreement with the partnership, Maul and Pollastrini. The trial court made findings concerning the contract which include the following: Maul, Pollastrini, and the partnership, all referred to hereafter as Pollastrini, agreed to prepare the Hartungs' land so that it could be irrigated; to sow the land with grasses suitable for permanent pasturage; and to complete the work by December 1, 1952. The Hartungs agreed to pay Pollastrini in cash any reasonable amounts he might charge. Payments were to be made when called for. It was further agreed that Pollastrini should investigate and determine what type or mixture of seed would be most successful in that locality to produce permanent pasturage for raising and feeding white-faced Hereford cattle for sale. Pollastrini was to designate and employ any person he wished as surveyor, but the Hartungs were to pay the surveyor any reasonable amounts he might charge. The court found that Pollastrini began work on September 1, 1952, but did not complete it by December 1, 1952, as agreed; that frequently after December 1, 1952 and until about March 5, 1953 the Hartungs protested that the work was not completed and demanded that Pollastrini complete it as soon as possible; that on all such occasions Pollastrini promised to increase his efforts to finish the work in a short time, promised to use more men and equipment but did not do so; that these promises made after December 1st were made without any intention of performing them in order to induce the Hartungs to refrain from terminating the contract for breach; that as a result the Hartungs were induced to and did refrain from terminating the agreement until March 5, 1953, when the Hartungs terminated the contract for breach and employed others who completed the job. The court found that the Hartungs had performed their part of the obligation in all particulars, and that, as a result of the breach by Pollastrini, the Hartungs had been delayed in growing permanent pasture for a period of about five months to their damage in the amount of $3,000. The court also found that Pollastrini had received $20,140 for the work that he had done; that the reasonable value of the work was $11,755, and that the Hartungs had been damaged in the amount of $8,500 by the overpayment. As to appellant Wiggins, who was the surveyor selected by Pollastrini, the court found that he had been paid $1,215 for his services, which exceeded the reasonable value thereof by $515, and judgment was rendered against him for that amount.

[1–3] Appellant Pollastrini attacks that part of the findings which finds that Pollastrini agreed to have the work completed and the ground seeded by December 1, 1952. There was ample evidence to support the finding. Hartung testified that the deadline for the completion of the work was December 1st, and Pollastrini admitted that December 1st was the date the work was to be completed. However, appellants assert that the agreement that the work be completed by December 1st was modified by the parties. They refer to testimony of Hartung to the effect that, in the latter part of November, Pollastrini, when urged to sow the ground that was then ready, asserted to Hartung that it should not be done because the seed would freeze, and that sowing should be delayed until the following spring. Hartung testified: "Well, I was disappointed, and told him so, but I also appreciated that, well, if we would lose the seed, we had better not plant it then. I agreed when he told me that we could lose the seed." From the findings it is apparent that the court found that there was no modification of the agreement to complete the work by December 1st. The question then is whether the implied finding is supported. In addition to the testimony of Hartung already referred to in which Hartung agreed to permit the seeding to be deferred on Pollastrini's representation that the seed would freeze if planted before December 1st, there was testimony that this statement of Pollastrini's was false. There was also the agreement that the work be completed by December 1st. At the time of the original agreement, Pollastrini made no mention of any risk if seed were planted before December 1st. When the conversation concerning seeding took place in late November, Pollastrini was far behind with the work, and the court could infer that he had a motive for making the false statement that the seed would freeze if planted before spring. There was testimony by experts that it was both customary and the best practice to plant permanent pasture in the fall of the year. The foregoing supports the court's implied finding that the contract was not modified nor the failure to plant by December 1st excused, for Pollastrini cannot rely upon conduct of Hartung fraudulently induced by him. 92 C.J.S., Waiver, pp. 1058, 1059.

[4] Appellants contend that the court should have found as a matter of law that Hartung waived the breach of Pollastrini in not completing the work by December 1st. This contention cannot be sustained. The court found that on or about December 1st and every weekend thereafter, until on or about March 5, 1953, Hartung protested to Pollastrini that the work was not completed and demanded that he complete it as soon as possible; that on all such occasions Pollastrini falsely promised to increase his efforts to finish the work in a short time; and that the false promises were made in order to induce Hartung to refrain from terminating the agreement for breach. The court found that as a result Hartung was induced to and did refrain from terminating the contract. The court further found that as a result of the original breach, and as a result of the broken promises made thereafter Hartung terminated the agreement. Appellants assert that, once Hartung elected to keep the contract alive, he could not thereafter elect to treat the contract as breached. In view of the findings of fraud, this rule is inapplicable. Pollastrini is precluded from claiming waiver of breach where he fraudulently induced Hartung to permit him to continue and thereafter violated the promises he made to induce Hartung to permit him to continue. Wilkinson & Co. v. McKinley, 84 Cal.App.2d 100, 190 P.2d 35. Under the circumstances shown by the record in this case, the question of waiver was at most a matter of fact which the court resolved against Pollastrini.

[5, 6] By the terms of the oral agreement, Hartung agreed to pay Pollastrini any reasonable amount that Pollastrini might charge him. Pollastrini received an amount of $21,400 before the contract was terminated. Pollastrini claims that it was error for the court to receive any evidence of the reasonable value of the work which had been performed because the issue was solely whether Pollastrini used good faith in making his charges. Appellants assert that by the agreement the work was turned over to Pollastrini to complete as he might judge best, and that in the face of his testimony that he did exercise his best judgment the only issue before the court was whether he had done so, and not whether the work was well done or whether it was done for a reasonable charge, or what amount Hartung was reasonably benefited by the work Pollastrini did. We think that appellants misconstrue the contract. While it is true that Hartung was to pay Pollastrini any reasonable amount for his work and services that might be charged, the court found that the contract contained other undertakings on the part of Pollastrini. These included undertakings to level the land by discing, sub-soiling, scraping and planing,

to put up permanent borders with sufficient ditches to separately irrigate the checks, to provide efficient irrigation facilities, and not to harm the fertility of the soil. The contract also contained a provision that the work was to be done in a first-class manner and to the best benefit of the Hartungs. There was evidence that Pollastrini failed to keep his bargain. He did not use a land plane at all, which, according to testimony, left the land poorly leveled for irrigation. He failed to erect proper permanent borders, and, according to testimony, the basic plan for leveling was defective in that it required great quantities of dirt to be moved long distances unnecessarily and to the damage of the land itself. Yet, his work had value. This the trial court recognized by allowing a figure which the court found to represent the true value of the services performed. We think it clear from the testimony and from the findings as well that by the agreement Pollastrini agreed to complete a finished job of land leveling and seeding by December 1, 1952; that it should be a good job, properly and efficiently done; and that for such a job he was to be paid a reasonable sum in compensation. To be sure, he was expressly given wide latitude, but this was shown to be because Hartung was known by him to be, and was in fact, grossly ignorant of how land should be leveled for the purpose of permanent pasturage under irrigation, and of how much such work would ordinarily cost. In giving Pollastrini broad power, Hartung relied upon Pollastrini's statements and upon the statements of others as to his long experience in such work and his good reputation as a land leveler. There was nothing in the negotiations or in the terms of the contract to indicate that Pollastrini was to do what he pleased and charge what he pleased for it.

While we have not specifically discussed each and every contention advanced in the briefs by the appellants, we think that what we have said disposes of all the issues.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

146 Cal.App.2d 740

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Avery FURRH, Defendant and Appellant.

Cr. 2681.

District Court of Appeal, Third District, California.

Dec. 12, 1956.

Prosecution resulting in a conviction of the crime of assault with intent to commit rape. The Superior Court, Calaveras County, J. A. Smith, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Peek, J., held that fact that the act of intercourse admittedly was consummated did not take from the case the element of assault, and question whether crime committed was rape or assault with intent to commit rape was for jury, not solely the question of whether act was accomplished with consent of prosecutrix.

Judgment affirmed.

1. Rape ⚷16(1)

Essential element of the offense of assault with intent to commit rape is intent to commit the act against will of complainant, and offense is complete if at any moment during the assault the accused intends to use whatever force may be required.

2. Rape ⚷57(5)

In prosecution resulting in conviction for the offense of an assault with intent to commit rape, question whether the crime committed was rape or assault with intent to commit rape was for jury.

3. Rape ⚷16(4)

While the consent of a prosecutrix or degree of her resistance at a time prior to the actual consummation of an act of intercourse might preclude a conviction for rape, alleged acquiescence of prosecutrix to an act of intercourse did not relate back so as to preclude a conviction of a defendant for the crime of assault with intent to commit rape.

4. Criminal Law 🔑1186(4)

Where neither the state nor the defendant in a prosecution resulting in a conviction for the crime of assault with intent to commit rape requests instructions on included offenses, and the record discloses support for elements of offense for which defendant was convicted, a miscarriage of justice does not result because of the failure of the trial court to instruct on its own motion regarding included lesser offenses. West's Ann.Const. art. 6, § 4½.

5. Criminal Law 🔑824(3)

Where defendant in a prosecution resulting in a conviction for the offense of assault with intent to commit rape did not specifically request trial court to instruct jury on the included offense of attempted rape, but trial court had instructed the jury on the included offenses of assault with intent to commit rape and simple assault, trial court did not commit prejudicial error in failing to instruct on the offense of attempted rape on its own motion.

6. Criminal Law 🔑795(3)

Failure of the trial court to designate in instructions as felonies or misdemeanors the included offenses of assault with intent to commit rape and simple assault, in a prosecution resulting in a conviction for an assault with intent to commit rape, was not error.

7. Criminal Law 🔑1186(4)

Exclusion by trial court of specific lewd acts committed by the prosecutrix in a prosecution resulting in a conviction for assault with intent to commit rape was not such error as resulted in a miscarriage of justice under the constitution in view of the additional evidence introduced by defendant concerning prosecutrix' general reputation for unchastity. West's Ann.Const. art. 6, § 4½.

8. Rape 🔑40(1)

Where defendant introduced evidence concerning prosecutrix' reputation for unchastity in a prosecution resulting in a conviction for an assault with intent to commit rape, trial court did not err in excluding evidence relative to the reputation of the prosecutrix for morality alone.

Orrin K. Airola, San Andreas, for appellant.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant appeals from a judgment of conviction of the crime of assault with intent to commit rape and from the order denying his motion for a new trial. His various contentions may be stated generally to be (1) that the evidence is insufficient to support the conviction of the crime of assault with intent to commit rape; (2) that the trial court erred in [a] refusing to permit testimony concerning previous conduct of the prosecutrix and [b] in refusing testimony concerning her morality; and (3) that the trial court erred in the giving of certain instructions and in the failure to give others.

The record discloses testimony by the prosecutrix that the defendant, instead of driving her home from a bar where they met, and as she had expected, turned his car off the highway onto a side road in an uninhabited area, and against her will and continuing protests physically held her in the car and ultimately accomplished an act of intercourse. The defendant, testifying in his own behalf, admitted that an act of intercourse occurred but contended that it was with the consent of the prosecutrix. When the sheriff appeared at the home of defendant with a warrant to arrest him, he fled, was not apprehended until the following day and when interrogated by the officers gave different and conflicting accounts of the circumstances surrounding the crime charged.

Defendant first argues that since admittedly an act of intercourse was consummated, the sole question remaining was whether it was accomplished with or without the consent of the prosecutrix; and since assault to commit rape is an incomplete rape, therefore there was no evidence to support the charge, and it was error for the court to instruct the jury on that crime.

[1–3] The essential element of the offense of assault with intent to commit rape is "* * * the intent to commit the act against the will of the complainant. The offense is complete if at any moment during the assault the accused intends to use whatever force may be required." People v. Meichtry, 37 Cal.2d 385, 388, 231 P.2d 847, 849. But whether the crime committed was rape or assault with intent to commit rape was a question of fact for the jury to resolve. Under the facts and circumstances of the present case it could have been either. The fact that admittedly the act was consummated did not take from the case the element of assault. While the consent of the prosecutrix or the degree of her resistance at a time prior to the actual consummation of the act might preclude a conviction for rape, it could not relate back so as to preclude a conviction of assault with the intent to commit rape. In other words, her subsequent acquiescence could not undo that which had been done.

[4–6] Necessarily, therefore, it was not error as defendant contends for the trial court to instruct the jury on the included offenses of assault with intent to commit rape, and simple assault, nor was it error for the trial court not to instruct, on its own motion, on the further included offense of attempted rape. But, says the defendant, the court could not pick and choose between the included offenses; that is, if an instruction was given on one included offense, then instructions on all should have been given. However, it is the rule that where neither the people nor the defendant requested the instructions on included offenses, and where "* * * the record discloses support for the elements of the offense for which he was convicted, the defendant is not in a position to complain that a miscarriage of justice resulted because of the failure to instruct the jury regarding the inclusion of the lesser offense [s]." People v. Meichtry, supra, 37 Cal.2d at page 390, 231 P.2d at page 850. Necessarily, therefore, in the absence of a specific request by the defendant in the present case to so instruct the jury, it cannot be said that the court committed prejudicial error in failing so to do on its own motion. Nor was it of any concern to the jury, as the defendant further contends, whether the included offenses were felonies or misdemeanors.

[7] It is defendant's further contention that the court erred in excluding evidence of specific lewd acts committed by the prosecutrix that evening towards a defense witness, and in limiting such testimony to her conduct with the defendant. The exclusion of the particular evidence so offered may well have been error since it would have tended to disprove the charge of force and show that the act was more likely to have occurred with the consent of the prosecutrix. People v. Pantages, 212 Cal. 237, 297 P. 890; People v. Battilana, 52 Cal.App.2d 685, 126 P.2d 923. However, in view of the additional evidence introduced by defendant concerning her general reputation for unchastity, this court cannot say it was such error as resulted in a miscarriage of justice under the provisions of Article VI, § 4½, of the Constitution.

[8] Defendant's further argument, that the court erred in excluding evidence relative to the reputation of the prosecutrix for morality alone, is likewise without merit. It was not her moral character generally which could be questioned; rather it was her reputation for unchastity. Hence evidence relative to that moral trait was admissible as tending to disprove her testimony relative to the use of force by the defendant and to show more likelihood of her consent.

It is also contended by defendant that the court erred in excluding evidence offered to impeach certain contradictory statements made by the prosecutrix. We find no merit in such contention, in that from our examination of the record we find no such contradictory statements made by her.

The judgment and order are affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

147 Cal.App.2d 63

Cecil O'DONNELL, Plaintiff and Appellant,
and
Pacific Employers Insurance Company, Plaintiff in Intervention and Appellant,
v.
CITY and COUNTY OF SAN FRANCISCO, Defendant and Respondent.
Civ. 16923.

District Court of Appeal, First District, Division 2, California.
Dec. 19, 1956.

Hearing Denied Feb. 13, 1957.

Personal injury action against bus owner. Workmen's compensation carrier of plaintiff's employer intervened for cost of treatment and temporary compensation benefits paid and to be paid to plaintiff. The Superior Court, City and County of San Francisco, Frank T. Deasy, J., dismissed the action and the intervention, and plaintiff and intervenor appealed. The District Court of Appeal held that, where, at time when bus owner demanded jury trial, there were still more than seven months available of the five year period within which case was required to be brought to trial, and neither plaintiff nor carrier took any steps to have case specially set within the available period or made any showing that it was impossible to reach such result, plaintiff did not bring himself within the impossibility exception to rule requiring case to be brought within the five year period, and, therefore, case was properly dismissed as to plaintiff when set for trial after expiration of the five year period, and that carrier's appeal was not timely filed.

Judgment affirmed, and appeal of intervenor dismissed.

1. Dismissal and Nonsuit 🔑60(1, 3)

Dismissal under the five year Code of Civil Procedure provision is mandatory where applicable, but time during which going to trial was impossible or impracticable and futile is to be disregarded. West's Ann.Code Civ.Proc., § 583.

2. Dismissal and Nonsuit 🔑60(3)

Rule that time during which going to trial was impossible or impracticable and futile is to be disregarded in determining five year period within which action must be brought to trial does not contemplate that time consumed by delay caused by ordinary instance of proceedings, like disposition of a demurrer, amendment of pleadings, and normal time of waiting for a place on court's calendar or of securing a jury trial are to be excluded from a computation of the five year period. West's Ann.Rules on Appeal, rules 2(a), 45(a); West's Ann.Code Civ.Proc., § 12.

3. Dismissal and Nonsuit 🔑60(3)

Where, at time when bus owner demanded jury trial in personal injury action against owner, more than seven months remained of the five year period within which to bring the case to trial, and neither plaintiff nor intervenor had case specially set within the available period or made any showing that it was impossible to reach such result, plaintiff did not bring himself within the impossibility exception to rule requiring case to be brought within the five year period. West's Ann.Code Civ. Proc., § 583.

4. Dismissal and Nonsuit 🔑60(3)

Facts that compensation carrier of plaintiff's employer had intervened in plaintiff's personal injury action and that there was a possibility of a claim under the Workmen's Compensation Law for further disability arising from the accident would not permit extension of the five year statutory time limit on bringing the civil action to trial, in view of facts that plaintiff had been ready to go to trial for nearly a year within such five year period and that failure to obtain a trial date within such period was due to lack of diligence. West's Ann. Code Civ.Proc., § 583.

5. Time 🔑9(8)

In computing time for filing of an appeal, the day on which the judgment is entered must be excluded. West's Ann.Rules on Appeal, rules 2(a), 45(a); West's Ann. Code Civ.Proc., § 12.

6. Time ⚷10(9)

Even if sixty day period within which to file appeal should be calculated from date of judgment of dismissal entered April 6, not from prior minute order granting motion to dismiss, June 5 would be the sixtieth day, but such day would be excluded since it was a Sunday, and June 6, a Monday, which was not a holiday, would be the last day on which the appeal could be filed, and, therefore, appeal filed one day later was not timely. West's Ann.Rules on Appeal, rules 2(a), 45(a), West's Ann.Code Civ.Proc., § 12.

◆

O'Gara & O'Gara, James A. O'Gara, San Francisco, for appellant O'Donnell.

Mullen & Filippi, Duncan P. Davidson, San Francisco, for appellant Pacific Employers Ins. Co.

Dion R. Holm, City Atty., Richard Saveri, Deputy City Atty., San Francisco, for respondent.

PER CURIAM.

These are two appeals, one by O'Donnell, plaintiff in a negligence action for injury suffered when he was hit by a bus of defendant, from the judgment of dismissal of his action, because of failure to bring it to trial within five years after he filed it, and one by Pacific Employers Insurance Company, workman's compensation carrier of O'Donnell's employer and intervener in O'Donnell's action, claiming costs of treatment and temporary compensation benefits paid and to be paid to O'Donnell, from the judgment of dismissal of its action in intervention because of failure to bring it to trial within two years after said action was filed. The facts are undisputed.

O'Donnell's complaint was filed February 20, 1950, and the answer March 21, 1950. On March 24, 1950, plaintiff filed memorandum to set cause for trial demanding jury trial, but the case was dropped off calendar because a police witness was not available. The complaint in intervention was filed June 4, 1952, and answer to it filed by the City and County July 2, 1952. Only on April 30, 1954, did the attorney of intervener, after consultation and in accord with the attorney of plaintiff, file a memorandum to set cause for nonjury trial. Calendar to set such cases was announced for May 11, 1954, but appellants were not represented at that time and the case went off calendar. A new memorandum to set was filed by intervener on August 2, 1954. Defendant on August 5, 1954, demanded jury trial. On March 8, 1955, the case was called for setting and the trial set for April 7, 1955, but on March 9, 1955, defendant moved to dismiss both the complaint and the complaint in intervention, an affidavit stating as prejudice to defendant by the delay, that since the accident on November 21, 1949, on which both actions were based, one of three defense witnesses had died, one could not be located anymore and that the motorman involved in the accident had resigned. The motion was heard on April 1, 1955 and granted by minute order of the same date. Judgment of dismissal was entered April 6, 1955. The notice of appeal of plaintiff was filed on May 24, 1955, that of intervener on June 7, 1955.

1. Appeal of Plaintiff.

[1–4] It is not disputed that the dismissal under the five year statute of Code of Civil Procedure Section 583 is mandatory where applicable. Appellant, however, relies on the settled rule of our cases, that the time during which going to trial was impossible or impracticable and futile is to be disregarded, Pacific Greyhound Lines v. Superior Court, 28 Cal.2d 61, 64, 168 P.2d 665; Continental Pacific Lines v. Superior Court, 142 Cal.App.2d 744, 299 P.2d 417, and urges that such impossibility existed from the time that defendant demanded jury trial on August 5, 1954, until the date set for trial, April 7, 1955. The contention is without merit. The rule on which plaintiff relies does not contemplate that time consumed by the delay caused by ordinary incidents of proceedings like disposition of demurrer, amendment of pleadings and the normal time of waiting for a place on the court's calendar or securing a jury trial are to be excluded from a computation of the five year period. Continental Pacific Lines v. Superior Court, supra, 142 Cal.App.2d at page 750, 299 P.2d at page 421. Moreover, on August 5, 1954, when defendant demanded jury trial, to which his right cannot be disputed, there were still more than seven months available of the five year period within which the case should have been brought to trial. There is no showing or contention that the attorney of appellant or the attorney of intervener, who acted for him, took any steps, by motion to advance or otherwise, to have the case specially set within the available period, or that it was impossible to reach said result. Hence appellant did not bring himself within the impossibility exception on which he relies. Sanford v. Superior Court, 111 Cal. App.2d 311, 244 P.2d 463. Appellant's plea that the connection of this case with workman's compensation law (possibility of a claim for further disability arising from the same accident) justified delaying of the trial is immaterial because such would not permit the exceeding of the statutory time limit in the civil action, and because at any rate appellant was ready to go to trial on April 30, 1954, nearly a year within said limit, the failure to obtain a trial date within said period being due to the lack of diligence of the attorneys involved. The judgment of dismissal as to plaintiff must be affirmed.

2. The Appeal of Intervener.

[5, 6] Respondent correctly asserts that this appeal, filed on June 7, 1955, was too late, even if the 60 day period of Rule 2(a) of the Rules on Appeal should be calculated from the judgment of dismissal entered on April 6, 1955 and not from the minute order granting the motion to dismiss entered on April 1, 1955. Rule 2(a) requires that the notice of appeal be filed within 60 days from the date of entry of judgment. Rule 45(a) provides that such time shall be computed in the manner provided by the Code of Civil Procedure and section 12 of said code provides that in such computation the first day is excluded and the last included, unless the last day is a holiday, and then it is also excluded. Accordingly, in computing the time for the filing of an appeal the day on which the judgment is entered must be excluded. Hoover v. Sweitzer, 34 Cal. App.2d 441, 93 P.2d 831. Starting to count on April 7, June 5th would be the sixtieth day, but as June 5, 1955, was a Sunday, this day is excluded and Monday, June 6, 1955, would be the last day on which the appeal could validly be filed, said Monday not being a holiday. The appeal of intervener filed one day later must be dismissed, irrespective of whether the minute order or the judgment of dismissal was the appealable final decision.

The judgment is affirmed, the appeal of intervener is dismissed.

* * *

146 Cal.App.2d 819

Blanca M. DE HERMOSILLO, Plaintiff and Respondent,

v.

Augustin F. MORALES, Administrator of the Estate of Maria M. Acosta, Deceased, Augustin F. Morales, Sole Beneficiary of the Estate of Maria M. Acosta, Deceased, Defendants and Appellants.

Civ. 21648.

District Court of Appeal, Second District, Division 3, California.

Dec. 14, 1956.

Action against administrator, in his official capacity and as sole beneficiary of decedent's estate, for quasi-specific performance of oral agreements to make a will devising property to plaintiff as compensation for services rendered decedent and for establishment of a trust in the property. The Superior Court, Los Angeles County, Roger Alton Pfaff, J., entered judgment for plaintiff, and defendant appealed. The District Court of Appeal, Parker Wood, J., held that evidence was sufficient to sustain the judgment.

Judgment affirmed.

1. Frauds, Statute of ⚷142

Under some circumstances, principles of equity will remove a contract from the operation of the statute of frauds. West's Ann.Code Civ.Proc., § 1973, subd. 6; West's Ann.Civ.Code, § 1624, subd. 6.

2. Specific Performance ⚷45

Usually, rendition of services is not such part performance of a verbal contract as will relieve the contract from operation of the statute of frauds, but, if the services are of such a peculiar nature that it is impossible to estimate their value by any pecuniary standard, and parties did not intend to measure by such standard, and, if person who has performed the services cannot be restored to situation in which he was before rendition of the services, there exists such part performance, and specific performance will be decreed in absence of other objections. West's Ann.Code Civ.Proc., § 1973, subd. 6; West's Ann.Civ.Code, § 1624, subd. 6.

3. Appeal and Error ⚷931(3)

Where, in action for quasi-specific performance of oral agreements to make a will devising property to plaintiff as compensation for services rendered and for establishment of a trust in the property, findings were waived, all intendments would be in favor of the judgment.

4. Specific Performance ⚷121(7)

In action against administrator, in his official capacity and as sole beneficiary of deceased's estate, to obtain quasi-specific performance of oral agreements to make will devising property to plaintiff as compensation for services rendered deceased and to establish a trust in the property, evidence was sufficient to sustain judgment for plaintiff.

5. Executors and Administrators ⚷224

Action for quasi-specific performance of oral agreements to make a will devising property to plaintiff as compensation for services rendered and for establishment of a trust in the property was not an action upon a creditor's claim but was one for equitable relief, and, therefore, Probate Code provision stating time within which action upon a creditor's claim must be commenced was not applicable. West's Ann. Prob.Code, § 714.

6. Witnesses ⚷133

Action for quasi-specific performance of oral agreements to make a will devising property to plaintiff as compensation for services rendered decedent and for establishment of trust in the property was not an action upon a claim or demand against the estate, and, therefore, Code of Civil Procedure provision forbidding persons to an action against an executor or administrator upon a claim or demand against decedent's estate from being witnesses as to any matter or fact occurring before deceased's death was not applicable to such action. West's Ann.Code Civ.Proc., § 1880, subd. 3.

7. Specific Performance ⚷116½

Where, in original complaint in action for quasi-specific performance of oral agreements to make will devising property to plaintiff as compensation for services rendered decedent and for establishment of trust in the property, plaintiff alleged that $4,200 constituted the reasonable value of her services and that a claim against the estate in such amount for such services had been disallowed, plaintiff was not precluded from thereafter alleging in amended complaint that the services were of exceptional character and could not be estimated in money, but such inconsistency of the allegations could be considered in determining whether the services were of exceptional character.

8. Specific Performance ⚷123
Trusts ⚷373

In action for quasi-specific performance of oral agreements to make will devising property to plaintiff as compensation for services rendered decedent and for establishment of a trust in the property, question whether plaintiff's services were of exceptional character and could not be estimated in money was for trial judge.

◆

Leonard DiMiceli, San Pedro, for appellants.

David A. Fall and Kenneth W. Gale, San Pedro, for respondent.

PARKER WOOD, Justice.

Action for "quasi-specific performance" of oral agreements to make a will devising property as compensation for services rendered, and to establish a trust in the property. Augustin Morales, as administrator of the estate of decedent, is a defendant. Also he is a defendant, as sole beneficiary of the estate. Judgment was for plaintiff. Defendants appeal from the judgment, and from the order denying their motion for a new trial.

Appellants contend, among other things, that the first amended complaint does not state a cause of action; the two alleged agreements are invalid under the statute of frauds; plaintiff had an adequate remedy at law; and no oral agreement was proved.

The amended complaint alleges that Maria M. Acosta, a resident of Los Angeles County, died intestate about May 8, 1953; defendant Morales is administrator of her estate; about October 1, 1949, decedent Mrs. Acosta was ill and unable to care for herself; she requested help from plaintiff, "who was the much loved niece and cherished friend of decedent"; about October 6, 1949, plaintiff and decedent entered into an oral contract to the effect that if plaintiff would act as decedent's housekeeper and practical nurse, take care of decedent during her illness, and look after decedent's comfort and general welfare, decedent would, upon her death, leave a will devising to plaintiff all property owned by decedent at the time of her death; plaintiff accepted and performed all of the terms of said contract; about April 29, 1950, decedent and her husband Crispin Acosta purchased two houses located on a lot in San Pedro, California; the houses were at 207 South Centre Street and 311 West Second Street; subsequent to such purchase, about May 1, 1950, decedent entered into an oral contract with plaintiff (referred to as supplementary contract) whereby decedent agreed that if plaintiff would continue to "carry out" the contract of October 6, decedent would leave a will devising to plaintiff the house located at 207 South Centre Street and the portion of the lot upon which said house was situated; plaintiff accepted and performed all of the terms of the supplementary contract; Mr. Acosta died about March 7, 1952, at which time Mrs. Acosta became owner of the property; Mrs. Acosta did not will or convey any of the property to plaintiff or to any other person; plaintiff put aside many of her personal pleasures, comforts, and affairs, and forsook many of her friends while she cared for decedent; in accepting and carrying out the terms of the agreement, the plaintiff changed her position and altered her life, "all in detrimental reliance upon the aforesaid promises and agreements made by the decedent" that she would make a will providing for the plaintiff as aforesaid; pursuant to the contract of October 6, plaintiff made a home for decedent and performed the contract until December 13, 1952; from October 6, 1949, until about December 13, 1952, plaintiff "kept house for said deceased, acted as maid, laundress, cook, practical nurse and looked after the comfort and general welfare, and gave her love, companionship, affection and solace during the decedent's remaining days."; decedent moved to the home of Augustin Morales (defendant) about December 13, 1952; decedent died at the home of Morales on May 8, 1953; plaintiff remained ready, able and willing, between December 13, 1952, and May 8, 1953, to carry out the contracts between plaintiff and decedent but was prevented from doing so by the moving of decedent to the home of Morales; about December 13, 1952, decedent's financial difficulties prevented her from maintaining a home, and by reason thereof she waived the full performance by plaintiff of the contracts until such time as plaintiff could obtain employment and arrange for a housekeeper to care for decedent during the hours plaintiff was working; plaintiff found employment, and had made arrangements about May 6, 1953 (two days before decedent's death), for a housekeeper to look after decedent; decedent and Mr. Acosta purchased the property with community funds; Mr. Acosta was present when the oral contracts were made; he orally agreed to the terms of the contracts and agreed that if plaintiff would perform the contracts the survivor of them (Mr. and Mrs. Acosta) would make a will devising the property to plaintiff; decedent's estate was solvent; a considerable portion of the property would remain for distribution after payment of debts and the costs of administration; plaintiff had performed the agreements and changed her position in detrimental reliance upon the promises of decedent; plaintiff performed services of exceptional and extraordinary character and rendered comfort and solace to the decedent in an amount which could not be estimated in money; plaintiff had no adequate remedy at law for breach of the agreement, and defendants are estopped to assert the invalidity of the agreement, as such an assertion would be a fraud upon the plaintiff; by reason of the premises herein, Mrs. Acosta held the property in trust for plaintiff; decedent left no husband, children or issue of children surviving her; defendant Morales is the next of kin of decedent, and except for said contract he would be entitled to the estate; the claim of Morales is subsequent to the claim of plaintiff under the contract.

The prayer of the amended complaint was for a decree establishing the original and supplementary contract between plaintiff and Mrs. Acosta as alleged by plaintiff; and decreeing that plaintiff is entitled to specific performance of the contracts; and decreeing that defendant Morales is constructive trustee of "the proceeds of the contract and the supplemental contract" for the benefit of plaintiff.

Defendant Morales demurred to the amended complaint upon the grounds that it failed to state a cause of action in that the alleged cause of action appeared to be barred under the provisions of section 1973, subdivision 6, of the Code of Civil Procedure and section 1624, subdivision 6, of the Civil Code. The demurrer was overruled.

The second amended answer set forth as an affirmative defense that the agreement alleged was not in writing and was by its terms not to be performed during the lifetime of Mrs. Acosta; that plaintiff had an adequate remedy at law; that on October 13, 1953, plaintiff filed a claim against the estate of Mrs. Acosta, and a copy of the claim was attached to said answer; that plaintiff was notified in writing of the rejection of her claim. The claim of plaintiff (as shown by the copy attached to the answer) was for $4,200 for services as "Maid, housekeeper, laundress and practical nurse for Maria M. Acosta at $100.00 per month" from June 10, 1949, to December 13, 1952. The copy of the claim shows that the claim was rejected on October 15, 1953.

It was stipulated that Mrs. Acosta died intestate; plaintiff had filed a claim against her estate; the claim was disallowed; the property known as 207 South Centre Street and 311 West Second Street was the entire estate of Mrs. Acosta and it was appraised at $6,000.

When plaintiff was called as a witness, defendant objected to any testimony on the grounds that the complaint failed to state a cause of action; plaintiff had an adequate remedy at law; plaintiff had exercised that remedy by filing a claim against the estate and the claim was disallowed. The objection was overruled.

Plaintiff testified that in 1934, when plaintiff was 17 years of age, she went to live with her aunt, Mrs. Acosta, and she stayed there until 1941, when she (plaintiff) moved to Mexico; she married in Mexico; she conducted an English-Spanish academy in Mexico and taught English and Spanish; her net income from the academy was from 900 to 1,100 pesos a month (from $185 to $225 a month); she continued to work there until she returned to the United States in 1949; she received letters in

Mexico from Mrs. Acosta and from her (Mrs. Acosta's) neighbors; plaintiff lost the letters; Mrs. Acosta stated in every letter that she was ill, she needed plaintiff, wanted plaintiff to come and be with her, she did not want anyone else to take care of her for the reason plaintiff used to live with them (Mr. and Mrs. Acosta) and she knew them very well and they loved her as their own daughter. Plaintiff testified further that she returned to San Pedro in March, 1949, intending to make a short visit with Mr. and Mrs. Acosta and then return to Mexico; she had a conversation with her aunt that caused her to remain here; she did not remember the exact words of the conversation but that her aunt wanted her to remain—her aunt felt that she was getting older and sicker and she did not feel that she had long to live, and that she wanted plaintiff to remain here and see her through her last days; her aunt was 61 years of age at that time; Mr. Acosta was always present when she had conversations with Mrs. Acosta, and his statements were the same as Mrs. Acosta's statements—he always wanted plaintiff to stay; Mr. and Mrs. Acosta promised plaintiff that if she would stay that everything they had would be given to her, because they could not afford to pay plaintiff and that was their way of showing their appreciation of her; Mr. and Mrs. Acosta then lived at 311 West Second Street in San Pedro; subsequent to that promise plaintiff agreed to the terms of the promise and took care of Mrs. Acosta; plaintiff brought her husband from Mexico in May, 1949, and then they went to live with Mr. and Mrs. Acosta; in October, 1949, there was a subsequent promise in respect to leaving property to plaintiff on death; plaintiff had expressed a wish to return to Mexico; Mr. and Mrs. Acosta begged her not to go; they stated that she should heed what they asked her to do, they wanted her here, they had no one else to turn to, they loved her as their own daughter, they felt that it was her duty and she should not leave; in consideration of that promise, she remained and took care of them.

Plaintiff testified further that in October, 1949, Mr. and Mrs. Acosta purchased the property located at 311 West Second Street and 207 South Centre Street; thereafter there were other conversations as to what would happen on the death of Mr. and Mrs. Acosta; the conversations were "in this line" that "if I [plaintiff] kept my promise to them, that if they should ever pass away I [plaintiff] was to have the corner house—that is, 207 South Centre"; Mr. and Mrs. Acosta "stated always they would write up a paper which to them was a will," leaving 207 South Centre Street to plaintiff; the reason Mrs. Acosta did not make a will was that she was supertitious and believed that if she wrote a will she would die the next day; Mrs. Acosta stated many times that she would write a will later—that she was "not going to die now, anyway."

Plaintiff testified further that she lived in the same house with Mrs. Acosta from May, 1949, until October, 1951; during that time plaintiff took care of Mrs. Acosta, took her to the doctor and the hospital, and kept house, cooked, washed and ironed for her; after an operation for goiter was performed on Mrs. Acosta in 1951, she was not able to do much; plaintiff fed her, helped her bathe, dress, and move about; plaintiff's husband separated from plaintiff by reason of the constant care and attention plaintiff gave Mrs. Acosta; subsequently they were divorced; in October, 1951, plaintiff moved to another house; she went to Mrs. Acosta's home every day and took care of her and did the housework; in February, 1952, at the request of Mrs. Acosta, plaintiff moved to the house at 207 South Centre Street; plaintiff plastered the bedroom and painted the house; in 1952 Mr. Acosta was afflicted with cancer, was bedridden for the last two months he lived, and required constant care; plaintiff took care of him every day during his illness; Mr. Acosta died in March, 1952; thereafter Mrs. Acosta lived at plaintiff's home until September 1, 1952, when Mrs. Acosta moved back to the house at 311 West Second Street; she remained there until the middle of December, 1952, when she went to the home of her brother, defendant Morales; after the death of Mr. Acosta and until Mrs. Acosta went to the home of her brother, plaintiff took care of Mrs. Acosta and cooked, washed and ironed for her; before Mrs. Acosta went to the home of her brother, plaintiff's mother was ill and Mrs. Acosta said that she would go to the home of her brother until plaintiff's mother recovered; plaintiff went to the brother's home almost every day after Mrs. Acosta was there and ran errands for Mrs. Acosta; after plaintiff's mother recovered, arrangements were made for Mrs. Acosta to return on May 30, 1953, to live with plaintiff; Mrs. Acosta died at the home of her brother on May 8, 1953; Mrs. Acosta had sclerosis of the heart and dropsy during the time plaintiff took care of her.

Plaintiff testified further that Mrs. Acosta wanted plaintiff to be with her constantly; plaintiff discontinued many activities in order to take care of Mrs. Acosta; some of the activities which she discontinued were: attending church, attending picture shows, visiting and entertaining friends, bowling, and dancing; plaintiff was not paid for any of the services she performed for Mr. or Mrs. Acosta.

On cross-examination, plaintiff testified Mrs. Acosta was her second cousin, but plaintiff always called her "Aunt Maria"; plaintiff never asked Mrs. Acosta to make a will or deed giving the property to plaintiff; she had Mrs. Acosta's word and that was enough.

Mrs. Aranda, called as a witness by plaintiff, testified that she and Mrs. Acosta were neighbors for 20 years; in 1948 she wrote two letters for Mrs. Acosta to plaintiff who was in Mexico; she did not make copies of the letters; Mrs. Acosta requested her to tell plaintiff to come home because Mrs. Acosta was very sick; Mrs. Acosta wanted plaintiff to stay with her until she died; Mrs. Acosta said that the reason she wanted her to write the letters was that Mrs. Acosta loved plaintiff like a daughter and Mrs. Acosta was always like a mother to plaintiff; Mrs. Acosta told Mrs. Aranda on two or three occasions that the house on the corner (207 South Centre Street) was for plaintiff when Mrs. Acosta died; she (witness) heard Mr. Acosta state that he was going to give the house (207 South Centre Street) to plaintiff.

Mrs. Pereria, called as a witness by plaintiff, testified that she lived in the house located at 207 South Centre Street for five years; in February, 1952, Mrs. Acosta requested her to move; Mrs. Acosta stated that the reasons she wanted Mrs. Pereria to move were that Mrs. Acosta was sick and she wanted her niece (plaintiff) to move there so that plaintiff could take care of Mrs. Acosta, and Mrs. Acosta wanted plaintiff to have the house when Mrs. Acosta died.

It was stipulated that if Dr. Lehman were called as a witness he would testify that he attended Mrs. Acosta for two and one-half years; during that time he saw her two or three times a week; plaintiff brought Mrs. Acosta to his office each time she required treatment; plaintiff was present each time he called on Mrs. Acosta; plaintiff did all the work that a nurse would do; plaintiff attended to the needs of Mr. and Mrs. Acosta.

At the close of plaintiff's case, defendants made a motion to dismiss the action on the ground that plaintiff had failed to show that she did not have an adequate remedy at law. The motion was denied.

Defendant Morales testified that he lived approximately 12 blocks from Mrs. Acosta's home; Mrs. Acosta was not well in 1949; he saw plaintiff at Mrs. Acosta's home from 1949 until the time Mrs. Acosta came to his home; plaintiff was not at Mrs. Acosta's home from 7 a. m. until evening, from 1949 until Mrs. Acosta came to live with him; for two or three months in 1951 or 1952 he took care of Mr. and Mrs. Acosta at night; Mrs. Acosta was not very sick; plaintiff, and friends who came with her, took care of Mrs. Acosta in the daytime during those two or three months; plaintiff came to his house three or four times to see Mrs. Acosta; he heard conversations between plaintiff and Mrs. Acosta on those occasions; one of the conversations pertained to a check that plaintiff brought to Mrs. Acosta; Mrs. Acosta gave plaintiff $20; he also heard a conversation between Mrs. Acosta and plaintiff two days before Mrs. Acosta died, and plaintiff wanted Mrs. Acosta to make a will; Mrs. Acosta told plaintiff "that she was not making any, that she was to leave things as they were."

It was stipulated that if Josefina Morales (wife of Augustin) were called to testify her testimony would be substantially the same as that of Mr. Morales regarding Mrs. Acosta's condition and the conversations in the home of Mr. and Mrs. Morales.

Findings of fact and conclusions of law were waived.

Judgment was that the oral contract of May 1, 1950, whereby Maria M. Acosta agreed to make a will devising to plaintiff the property known as 207 South Centre Street (also legal description) was established and was in full force and effect; that the contract be specifically enforced; that defendant, as administrator of the estate of decedent and as sole beneficiary of the estate, holds said property in trust for plaintiff; and that said property be conveyed to plaintiff by said trustee.

Section 1624 of the Civil Code (statute of frauds) provides: "The following contracts are invalid, unless the same, or some note or memorandum thereof, is in writing and subscribed by the party to be charged or by his agent: * * * 6. * * * an agreement to devise or bequeath any property, or to make any provision for any person by will: 7. * * *" A similar provision is in section 1973, subdivision 6, of the Code of Civil Procedure.

[1,2] A question in the present case is whether the plaintiff has pleaded and proved facts sufficient to take the oral contracts out of the statute of frauds. The rule, and the reason for the rule, that under some circumstances principles of equity will remove a contract from the operation of those sections, statute of frauds, are stated in Walker v. Calloway, 99 Cal.App.2d 675, 222 P.2d 455. On page 678 of 99 Cal.App.2d, at page 457 of 222 P.2d of that case it is stated: "[T]he mere rendition of services is not usually such a part performance of a verbal agreement as will relieve the contract from the operation of the statute, but 'if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, and if the plaintiff, after the performance of the services, could not be restored to the situation in which he was before the rendition of the services, it is such a part performance of the verbal agreement as will remove the contract from the rule, and equity, where other objections are not present, will decree specific performance. But in such cases the reason for the interposition of equity is quite obvious. Plaintiff has rendered services of extraordinary and exceptional character such service as, in contemplation of the parties, was not to be compensated for in money, and, as in contemplation of law, cannot be compensated for in money. Therefore, by no action at law could a plaintiff be restored to his original position. It would be in the nature of a fraud upon him to deny him any relief, and, the law failing by reason of its universality, equity, to promote justice, makes good its imperfections. [Citations.]'" The amended complaint in the present case stated a cause of action. It is not an example to be followed, however, in preparing a complaint.

[3] As above stated, findings were waived. All intendments are in favor of the judgment.

There was evidence that, prior to making the contract, plaintiff had lived with Mr. and Mrs. Acosta in their home, about 7 years (from 1934 to 1941 when plaintiff moved to Mexico), and Mrs. Acosta was like a mother to plaintiff and loved plaintiff as if plaintiff were her daughter; that Mrs. Acosta did not want anyone else to take care of her for the reason plaintiff had lived with her and knew her very well, and Mr. and Mrs. Acosta loved her as if she were their own daughter. There was evidence that Mrs. Acosta wrote letters to plaintiff in Mexico, stating that she was sick and needed plaintiff, and asking plaintiff to come from Mexico to be with her and take care of her; after plaintiff had come from Mexico on a visit, Mr. and Mrs. Acosta begged her not to return to Mexico, stating that she should heed them, they had no one else to turn to, and it was her duty and she should not leave. It thus appears, from letters and statements of Mrs. Acosta, that a relationship similar to a close family relationship existed between Mrs. Acosta and plaintiff, and that Mrs. Acosta needed and wanted the services, companionship, love and affection of plaintiff only. The trial judge could have inferred from the evidence just referred to that Mrs. Acosta contemplated that the services rendered by plaintiff were exceptional and could not be rendered by any other person. Also, the judge could have inferred that the services rendered by plaintiff were of such exceptional, extraordinary, and peculiar character that they could not be, and in contemplation of the parties were not to be, compensated for in money. Plaintiff was not paid for her services. In Monarco v. Lo Greco, 35 Cal.2d 621 at page 626, 220 P.2d 737, 741, it was said: "It is settled that neither the remedy of an action at law for damages for breach of contract, nor the quasi-contractual remedy for the value of services rendered is adequate for the breach of contract to leave property by will in exchange for services of a peculiar nature involving the assumption or continuation of a *close family relationship.*" (Italics added.)

There was evidence that plaintiff changed her position very materially by reason of the contract. She did not return to Mexico where she had resided about 8 years, where she had an established English-Spanish academy, and where her husband was residing. She discontinued her academy and teaching in Mexico, and she made her home with Mrs. Acosta. She brought her husband from Mexico. She gave up many of her activities such as attending church and shows, and visiting and entertaining friends. She performed difficult and confining duties, pursuant to the contract, for approximately 3½ years. The judge could have inferred that she could not be restored to the situation she was in before the contract was made.

[4] The evidence was sufficient to support the judgment.

[5] Appellants contend further that the action is barred by provisions of section 714 of the Probate Code. That section states the time within which an action upon a creditor's claim must be commenced. The present action is not upon a creditor's claim. It is an action for equitable relief. Said section is not applicable herein.

[6] Appellants contend further that the court erred in permitting plaintiff to testify as to conversations she had with decedent. They argue that such testimony was not admissible under section 1880 of the Code of Civil Procedure. That section provides: "The following persons cannot be witnesses: * * * 3. Parties * * * to an action * * * against an executor or administrator upon a claim, or demand against the estate of a deceased person, as to any matter or fact occurring before the death of such deceased person." This is not an action upon a claim or demand against the estate. Said section is not applicable herein.

Appellants contend in effect that allegations in the original complaint that plaintiff had filed a claim against the estate for $4,200 as the reasonable value of plaintiff's services, and that the claim was disallowed, were destructive of "the cause of action"; that the plaintiff could not cure the defect by omitting such allegations from the amended complaint without explanation.

The original complaint stated, in the caption, that it was for specific performance of an agreement to leave property to plaintiff by will in exchange for services. The allegations therein with reference to making and performing the oral contracts were substantially the same as the allegations in the amended complaint. It was also alleged in the original complaint that plaintiff acted as housekeeper and practical nurse for decedent, and looked after her comfort and general welfare; $4,200 was the reasonable value of her services; plaintiff had filed a claim against the estate for $4,200 for services; and the claim had been disallowed. The original complaint did not contain allegations with reference to: the relationship between plaintiff and decedent; love and affection; changing of plaintiff's position to her detriment; and exceptional character of her services. The prayer of the original complaint was for "distribution" of $4,200 to plaintiff.

[7, 8] Appellants argue that the original complaint alleged a cause of action for the reasonable value of plaintiff's services; that the plaintiff attempted therein to disguise the nature of her action by using language that suggested an equitable cause of action for specific performance; that, in the amended complaint, plaintiff omitted her former allegations regarding her claim and the reasonable value of her services, and alleged therein additional facts in an attempt to state a cause of action for specific performance; and that plaintiff is bound by her former allegations regarding the value of her services. It seems to be appellants' contention that plaintiff's former allegation stating the money value of her services was a conclusive refutation of her subsequent allegation that the value could not be estimated in money. Plaintiff was not precluded by her former allegation from alleging that the services were of exceptional character and could not be estimated in money. The inconsistency of the allegations could be considered in determining the fact as to whether the services were of exceptional character, but the first allegation was not conclusive. Whether or not the services were of exceptional character and could not be estimated in money was a question of fact for the trial judge.

By reason of the above conclusions, it is not necessary to determine other contentions on appeal.

The judgment is affirmed. The purported appeal from the order denying the motion for a new trial is dismissed.

VALLÉE, J., concurs.

SHINN, P. J., concurs in the judgment.

146 Cal.App.2d 752

PACIFIC GAS AND ELECTRIC COMPANY, a corporation, and Southern Pacific Company, a corporation, on behalf of themselves and all other Taxpayers of the Shasta Dam Area Public Utility District, County of Shasta, Plaintiffs and Appellants,

v.

SHASTA DAM AREA PUBLIC UTILITY DISTRICT, a public corporation, W. S. Price, Jonathan C. Tibbits, Matt Rumboltz, Hal Craig, Bruno W. Kloss, members of the Board of Directors of said District, Matt Rumboltz, Treasurer, and Jonathan C. Tibbits, Clerk of said District, Defendants and Respondents.

PACIFIC GAS AND ELECTRIC COMPANY, a corporation, on behalf of itself and all other Taxpayers of the Shasta Dam Area Public Utility District, County of Shasta, Plaintiff and Appellant,

v.

SHASTA DAM AREA PUBLIC UTILITY DISTRICT, a public corporation, W. S. Price, Jonathan C. Tibbits, Matt Rumboltz, Hal Craig, Bruno W. Kloss, members of the Board of Directors of said District, and Jonathan C. Tibbits, Clerk of said District, Defendants and Respondents.

Civ. 9167, 9168.

District Court of Appeal, Third District,
California.

Dec. 13, 1956.

Rehearing Denied Jan. 8, 1957.

Hearing Denied Feb. 6, 1957.

Actions brought to enjoin defendants from purchasing electrical energy from bureau of reclamation and to enjoin sale of bonds to finance distribution of electric power to be received under contract with bureau of reclamation. The Superior Court, Shasta County, Albert F. Ross, J., denied the relief sought, and plaintiffs appealed. The District Court of Appeal, Schottky, J., held that when taxpayer commenced prior action, attacking validity of bonds voted by public utility district, it had been its duty to allege all of grounds upon which it relied and to litigate them in that action, and that an issue withdrawn by taxpayer over objection of district could not now be litigated in this new action between the parties.

Affirmed.

1. Judgment ⚷729

When taxpayer commenced action, attacking validity of bonds voted by public utility district, it was its duty to allege all of grounds upon which it relied and to litigate them in such action; and issue withdrawn by taxpayer over objection of district could not thereafter be litigated in a new action between the parties.

2. Judgment ⚷725(1)

A judgment in a prior action between the same parties on the identical cause of action is a bar to second suit thereon, and conclusive not only as to issues actually determined therein, but also as to issues necessarily involved.

3. Judgment ⚷713(2)

Even though causes of action be different, prior determination of issue is conclusive in subsequent suit between same parties as to that issue and every matter which might have been urged to sustain or defeat determination.

4. Judgment ⚷540

A former judgment operates as a bar against second action upon same cause.

5. Judgment ⚷720

In a later action upon a different claim or cause of action, a former judgment operates as an estoppel or conclusive adjudication as to such issues in second action as were actually litigated and determined in first action.

6. Action ⚷53(1)

The law abhors a multiplicity of actions, and a party cannot by negligence or design withhold issues and litigate them in successive actions.

7. Action ⚷12, 53(1)
Trial ⚷3

A party may not split his demands or defenses or submit his case in piecemeal fashion.

William S. Love and William T. Bagley, San Francisco, for appellant Pacific Gas & Elec. Co.

Robert L. Pierce, San Francisco, for appellant Southern Pac. Co.

Daniel S. Carlton, Redding, for respondent.

SCHOTTKY, Justice.

Respondents in each of the above entitled actions filed a motion to dismiss the appeal in each case upon the ground that the appeal in each case is sham, frivolous and without merit, and taken for the purpose of delay. Upon the hearing of the motions it was stipulated by the parties that the motions and the merits of the appeal be submitted together and that additional points and authorities be filed by respective counsel.

The action involved in case No. 9168 is one to enjoin defendants from purchasing electric energy from the Bureau of Reclamation.

The action involved in case No. 9167 is one to enjoin the sale of bonds, the proceeds of which are to be used for the distribution of electric power to be received under a contract with the Bureau of Reclamation.

The gravamen of appellants' cause of action in each case is that respondent District is without power or authority to purchase electric energy from the Bureau of Reclamation and that therefore the purpose for which the bonds are to be sold is illegal.

Respondents in each case pleaded a prior action between the same parties in which the issuance of the bonds was authorized, and in which action the judgment was affirmed by this court. 135 Cal.App.2d 463, 287 P.2d 841. In the prior action appellants sought unsuccessfully to enjoin the issuance of the bonds here involved.

The trial court found in the action involved on the appeal in 3 Civil No. 9167:

> "* * * that thereupon the plaintiff Pacific Gas and Electric Company, for and on behalf of itself and all other taxpayers in said District, commenced an action in the above entitled Superior Court numbered 19529 therein, and wherein it alleged that said District had no power to contract with the United States Government or any branch or agency thereof for the purchase of a supply of electrical energy with which to energize its proposed electrical distribution system; that said plaintiff alleged that by reason of the lack of legal authority of said defendants to purchase electrical power from the United States Government that said District had no power to issue the said bonds above mentioned and that if they were issued they would be null and void and not a lien or charge upon the taxable property situate within said District.
>
> "That thereafter the defendant District answered the complaint in said action and the cause was tried and determined; that during the trial thereof the said plaintiff voluntarily abandoned its contention that the said District was without authority to purchase electrical energy from the United States Government.
>
> "That in said action the said court, by its judgment, decreed that the said plaintiff take nothing by its action and that the electrical bonds hereinabove referred to will be, when sold, valid and legal obligations of said district, and that the defendants herein had the right, power, and jurisdiction to issue and sell said electrical bonds.
>
> "That thereafter the said plaintiff appealed from said judgment, and said judgment was affirmed on appeal and the same is now final."

The court made substantially the same finding in the action involved on the appeal in 3 Civil No. 9168.

The court then concluded that appellants were estopped by the judgment in the prior action and that the judgment in the prior action was res adjudicata. The court found further that the respondent district did have authority to purchase electric energy from the Bureau of Reclamation. Appellants have appealed from the judgment in each action denying an injunction and decreeing that respondent District had the legal right and authority to enter into the proposed contract.

We have concluded that the court correctly determined that appellants were estopped by the judgment in the prior action and that the judgment in said prior action was res adjudicata.

The record shows that in the prior action numbered 19529, filed in the Superior Court, appellant Pacific Gas and Electric Company, for and on behalf of itself and other taxpayers, alleged in its complaint that respondent District had no power to contract with the United States Government or any agency thereof for the purchase of electric energy and that by reason of said lack of legal authority to so contract said District had no power to issue the bonds, and if they were issued they would be illegal. There were, of course, other allegations that the issuance of $150,000 in bonds would exceed the authorized debt limit and that the District failed to obtain an estimate of the cost of acquiring the existing distribution system of appellant company.

[1] It is the contention of appellants that in the prior action the trial court would not consider the question of whether respondent District should be enjoined from contracting with the United States for electric power and that the court, over the objection of respondent, allowed appellant

Pacific Gas and Electric Company to withdraw that issue from the case. Appellants argue in effect that having withdrawn the issue in the prior action, the judgment establishing the validity of the bonds did not foreclose the raising of the issue of respondent District's right to contract with the United States Government for the purchase of electric energy in a subsequent action.

Respondents in reply contend that the voluntary withdrawal of the said issue by appellant over the objection of respondent constituted a voluntary abandonment of the issue, and that the judgment in the action barred appellants from raising any issue as to the validity of the bonds which was available to appellants at the time the prior action was commenced.

It is clear that in the complaint in the prior action appellants did make the same allegations as to the lack of power of respondent District to contract with the United States Government and asserted that by reason of such lack of legal authority the District had no power to issue the bonds and that if issued they would be null and void. Appellants state that the court would not consider these issues and that they withdrew them. As hereinbefore pointed out, the court in the action involved in this appeal found that appellant voluntarily abandoned the contention that respondent District was without power to purchase electric energy from the United States Government. While it may be that appellant believed that the court was precluding it from having said issue heard in the prior action, it is also true that appellant had commenced an action attacking the validity of the bonds and seeking to enjoin their issuance, and it had alleged these issues, among others. If the grounds alleged in the complaints in the instant actions are good grounds in these actions they were likewise good grounds which appellants had the right to have considered in the prior action. When, therefore, appellants were, as they contend, confronted with a situation in which they believed the trial court would not consider said issues, it was their duty to insist that said issues remain in the case unless they were willing to withdraw them from the case. They were not entitled to reserve them for future litigation and thus subject respondent District to endless delay in proceeding with its project. It is to be noted that respondent District did not consent to the withdrawal of said issues from the case and it is to be noted, also, that in its appeal from the judgment in the prior action appellant did not urge in this court, as a ground of appeal, that the court improperly refused to consider the grounds that it urges in the instant actions.

[2, 3] When appellant Pacific Gas and Electric Company commenced an action attacking the validity of the bonds voted by respondent District it was their duty to allege all the grounds upon which they relied and to litigate them in the action. The law would indeed be lame if appellant, after making the allegations that it made in the prior actions, by withdrawing some of the issues raised by said allegations voluntarily, and even with the permission of the court, but over the objection of respondent, could thereafter in a new action litigate said issues.

As stated in Krier v. Krier, 28 Cal.2d 841, at page 843, 172 P.2d 681, at page 682:

> "* * * It is settled, however, that a judgment in a prior action between the same parties on the identical cause of action is res judicata, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved. * * * And even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties *as to that issue and every matter which might have been urged to sustain or defeat its determination.*" (Emphasis added.)

[4, 5] And as stated in Todhunter v. Smith, 219 Cal. 690, at page 695, 28 P.2d 916, at page 918:

> "* * * The doctrine of res judicata has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action."

In Price v. Sixth District Agricultural Association, 201 Cal. 502, at page 511, 258 P. 387, at page 390, the court said:

> "Appellants, however, apparently have a misconception of this rule. They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same is foreclosed, not only as to matters heard but also as to matters that could have been heard in support of or in opposition thereto."

[6, 7] And as stated in Flickinger v. Swedlow Engineering Co., 45 Cal.2d 388, at page 393, 289 P.2d 214, at page 217:

> "The law abhors a multiplicity of actions * * *. Thus, a party cannot by negligence or design withhold issues and litigate them in successive actions; he may not split his demands or defenses; he may not submit his case in piecemeal fashion. * * * If by an attempt at artful pleading, a party could assert his cause in one form in one action and, after an adverse decision on the merits, reassert it in another form in a subsequent action, there would be no end to litigation."

Authorities in addition to the above cases could be multiplied but we deem it unnecessary to do so upon a proposition so well settled. For the rule has often been reiterated that the doctrine of res judicata is that an existing final judgment on the merits of a cause rendered by a court of competent jurisdiction is, in all subsequent actions, conclusive of the rights of the parties thereto and of their privies on all material issues which were or might have been determined. French v. Rishell, 40 Cal.2d 477, 479, 254 P.2d 26; Dillard v. McKnight, 34 Cal.2d 209, 213, 209 P.2d 387, 11 A.L.R.2d 835; Bliss v. Security-First National Bank, 81 Cal.App.2d 50, 58, 183 P.2d 312.

We therefore conclude that the court correctly determined that appellants were estopped by the judgment in the prior action and that the judgment in the prior action was res adjudicata as to the issues in each of actions involved in this appeal. Our conclusion upon this point makes it unnecessary to discuss the remaining contentions of appellant.

In view of the fact that the appeals have been submitted upon the merits, the motions to dismiss the appeals are dismissed.

The judgments are affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

Hearing denied; SCHAUER and SPENCE, JJ., dissenting.

147 Cal.App.2d 168

Theodore RUPLEY, Plaintiff and Appellant,
v.
Jack R. WINKLER, Defendant and Respondent.
Civ. 8913.

District Court of Appeal, Third District, California.

Dec. 21, 1956.

Hearing Denied Feb. 13, 1957.

Action against person who had been appointed to fill unexpired term of previous district attorney, to enjoin prosecution of certain misdemeanor actions against plaintiff on grounds that defendant was not legally the district attorney and, hence, could not prosecute the misdemeanor actions and that such misdemeanor actions were based on unconstitutional statutes. The Superior Court, El Dorado County, Ralph McGee, J., denied application and sustained defendant's general demurrer without leave to amend, and plaintiff appealed. The District Court of Appeal, Peek, J., held that, under the Government Code, person appointed to fill vacancy for unexpired term of a former district attorney was under legislative mandate to continue to discharge the duties of the office until his successor had qualified, and, therefore, plaintiff could not attack such appointment and that, the statutes were constitutional.

Order affirmed.

1. Criminal Law ⚷639(1)

Under the Government Code, person appointed to fill vacancy for unexpired term of district attorney was under legislative mandate to continue to discharge the duties of his office until his successor had qualified, and therefore, defendant in criminal proceeding brought by such person could not attack such appointment and such person could prosecute the misdemeanor actions. West's Ann.Gov.Code, § 1302.

2. Automobiles ⚷316
Constitutional Law ⚷250

Vehicle Code provision which makes it unlawful for owner, or any other person, employing or otherwise directing driver of any vehicles to require the operation of such vehicle upon a highway in manner contrary to law is constitutional. West's Ann.Vehicle Code, § 731, subd. (a).

3. Automobiles ⚷316
Constitutional Law ⚷250

Vehicle Code provision which makes it a misdemeanor for any one to drive or move or for owner to cause or knowingly permit to be driven or moved on any highway any vehicle of the size or weight or with load exceeding or otherwise failing to comply with certain limitations or requirements is constitutional. West's Ann.Vehicle Code, § 690.

H. D. Jerrett, Sacramento, for appellant.

Jack R. Winkler, Dist. Atty., in pro. per., Placerville, for respondent.

PEEK, Justice.

This is an appeal from an order of the trial court denying plaintiff's application for an injunction dissolving a temporary restraining order and sustaining defendant's general demurrer without leave to amend.

The complaint, although not set forth in counts, makes two separate charges: (1) That defendant is not legally the district attorney of El Dorado County and hence cannot prosecute the misdemeanor actions which (2) plaintiff contends are based on unconstitutional statutes.

The facts which are not in dispute show that on December 27, 1954, the defendant Winkler was appointed by the board of supervisors of El Dorado County to the office of district attorney for the unexpired term of Robert E. Roberts "ending the 3rd day of January, 1955." Roberts had previously been appointed judge of the superior court for said county. Winkler qualified that same day and on January 3 Roberts appeared before the board of supervisors and filed a formal written resignation as district attorney for the term beginning January 3, 1955. On that same day the board appointed Winkler district attorney for the unexpired term ending on the first Monday after January 1, 1959. Winkler took his oath of office on January 4 and since that date has exercised the powers and duties of district attorney of that county.

On March 3, 1955, plaintiff herein filed a petition for a writ of prohibition in the superior court of El Dorado County by which he sought to prohibit the trial of certain misdemeanor actions which form the basis of the case now before this court. On May 6 the superior court filed its order denying said petition, and on May 13 plaintiff filed his complaint in the present case seeking an injunction on the grounds previously noted. On June 7 the court filed its order denying the same, and the present appeal followed. Thereafter, on June 30, 1955, Winkler prosecuted the criminal cases. Following a jury verdict of guilty, the fines assessed in each case were paid and an appeal was taken to the superior court of El Dorado County, which matter is presently pending in that court.

[1] We find no merit in plaintiff's first contention. As the trial court noted, even assuming the January 3, 1955, appointment of Winkler as district attorney was invalid, and if we further assume that this is a proper proceeding to test defendant's title to public office, such facts could be of no aid to plaintiff. The appointment of Winkler on December 27, 1954, to fill the vacancy for the unexpired term is not attacked by plaintiff, nor could it be. Under the provisions of section 1302 of the Government Code, Winkler was under legislative mandate to "* * * continue to discharge the duties of his office until his successor [had] qualified." It follows that any official acts taken by him were pursuant to and by virtue of such legislative provision.

[2, 3] Plaintiff's second contention is equally without merit. Assuming that one may enjoin a criminal proceeding based on the enforcement of an unconstitutional statute, and that plaintiff's complaint sets forth sufficient material allegations to come within this rule, said rule can be of no aid to plaintiff since there can be no question but that the statutes here in issue, sections 690 and 731 of the Vehicle Code, are constitutional.

Plaintiff's argument concerning said sections appears to be that they violate the equal protection clauses of the state and federal constitutions because of unreasonable classification, discriminating against owners of vehicles, and that criminal penalties are imposed against owners of vehicles for acts done without criminal intent. Specifically section 731 provides in subsection (a) that,

> "It is unlawful for the owner, or any other person, employing or otherwise directing the driver of any vehicle to require the operation of such vehicle upon a highway in any manner contrary to law."

The second section in question, 690, provides in part:

> "It is a misdemeanor for any person to drive or move, or for the owner to cause or knowingly permit to be driven or moved, on any highway any vehicle or vehicles of a size, or weight, or with a load, exceeding or otherwise failing to comply with the limitations or requirements stated in this division."

In section 731 the act made criminal is the "requiring" by the owner of the illegal operation of his vehicle on the highway. The object to be accomplished is to prevent the owners from requiring such illegal operation of vehicles. That such object is legitimate is not questioned by plaintiff and would appear to be a valid object on which to exercise the police powers of the State. It is obvious that drivers are not in the class bearing a substantial relation to the object to be accomplished, namely the requiring of the illegal operation of vehicles on the highways. Owners and other persons "employing or otherwise directing the driver" are the only persons falling in the class having a substantial relation to the legitimate object to be accomplished. Plaintiff has cited no authority wherein the validity of the sections in question has been considered, nor are the authorities in point which are cited by him in this regard. By analogy, however, it would appear that the offense of solicitation to commit a felony, Penal Code, section 653f, would be directly in point. That section makes it a separate crime for one person to solicit another to commit a crime in the same way that section 731 makes it a crime for the owner to require the driver to commit a particular offense.

Plaintiff's further argument directed at this section, that it imposes criminal liability on the owner of a vehicle for an act not requiring criminal intent, is equally without merit. The offense is not the requiring of the operation of the vehicle on the highway alone, but the requiring of the operation of the vehicle on the highway "in any manner contrary to law." Thus if the owner requires the driver to operate his vehicle on the highway in a manner contrary to law, he obviously knows that the vehicle will be operated illegally if his directions are carried out. It is the intentional doing of the prohibited act, regardless of good motive or ignorance of its criminal character, which supplies the criminal intent necessary to commit the offense. People v. McCalla, 63 Cal.App. 783, 220 P. 436; People v. Standley, 126 Cal.App. 739, 15 P.2d 180.

What we have held in regard to section 731 is likewise controlling of plaintiff's arguments concerning section 690 of the code. This section, as noted, makes no classification as between owners and drivers, but by its terms, applies equally to both. Thus there can be no question of classification nor can it be arbitrary or discriminatory.

The order sustaining defendant's demurrer without leave to amend is not an appealable order, Cole v. Rush, 40 Cal.2d 178, 252 P.2d 1, and hence plaintiff's purported appeal from the same is dismissed.

The order denying plaintiff's application for an injunction dissolving a temporary restraining order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

146 Cal.App.2d Supp. 910

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Stanley LIEBER, Defendant and Appellant.
Cr. A. 3512.

Appellate Department, Superior Court,
Los Angeles County, California.
Nov. 29, 1956.

Defendant was convicted of dispensing narcotics without making records of transactions. The Municipal Court of the South Bay Judicial District, Otto B. Willett, J., suspended sentence and granted defendant probation, and he appealed. The Superior Court, Patrosso, J., held that instruction in which trial court read to jury section of Health and Safety Code providing that in prosecution under "this division," including section defining offense charged, proof that defendant possessed lesser amount of narcotics than is accounted for by any record required by law is prima facie evidence of his guilt, was error requiring reversal of conviction, as jury could only understand therefrom that proof of shortage in narcotics account of pharmacy corporation, of which defendant was a stockholder, officer and employee, constituted prima facie evidence of his guilt of crime charged.

Order appealed from reversed.

Swain, J., dissented.

1. Criminal Law ⚿808½, 1172(2)

In prosecution for dispensing narcotics without making records of transactions, instruction, in which trial court read to jury section of Health and Safety Code providing that in prosecution under "this division," including section defining offense charged, proof of defendant's possession of lesser amount of narcotics than is accounted for by any record required by law is prima facie evidence of his guilt, was error requiring reversal of conviction, as jury could only understand from such instruction that proof of shortage in narcotics account of pharmacy corporation, of which defendant was a stockholder, officer and employee, constituted prima facie evidence of his guilt of crime charged. West's Ann.Health & Safety Code, §§ 11225, 11227.

2. Corporations ⚷369

The presumption declared by statute providing that in prosecution for dispensing narcotics without making records of transactions, proof that defendant had possession of lesser amount of narcotics than is accounted for by any record required by law is prima facie evidence of his guilt, is unreasonable and unconstitutional, if applied against a corporation's officer or employee on hypothesis that corporation's possession of narcotics is his possession thereof, at least in absence of proof that he alone had access thereto or that shortage in corporation's narcotics account was occasioned by some act of his. West's Ann. Health & Safety Code, §§ 11225, 11227.

3. Constitutional Law ⚷55

A statute making an act prima facie evidence of necessary criminative fact against one accused of crime should not be upheld as against an accused who had no control over or connection with such act.

4. Corporations ⚷369

An officer of corporation is not criminally answerable for any act of corporation in which he did not personally participate.

5. Poisons ⚷9

In prosecution of one who was a stockholder and president of corporation operating pharmacy for dispensing narcotics without making records of transactions, evidence that certain quantity of narcotics purchased and received by corporation from wholesale drug concern was missing or unaccounted for by prescriptions on file in its store did not prove that defendant dispensed or disposed of such narcotics, as required to sustain conviction, in view of evidence that cabinet in which corporation's narcotics were kept and key thereto were readily accessible to other employees of corporation and other persons in store. West's Ann.Health & Safety Code, § 11225.

6. Criminal Law ⚷404(4)

In prosecution for dispensing narcotics without making records of transactions, two empty card-board boxes and two empty vials, bearing "Demerol" labels and identified by peace officer as found by him on premises where he discovered body of dead woman, were erroneously admitted in evidence, in absence of proof that any of such articles were ever in possession of pharmacy operated by corporation of which defendant was president and stockholder, except that cost code word of such pharmacy was written on one of boxes, or proof that defendant dispensed or furnished narcotics to such woman. West's Ann.Health & Safety Code, § 11225.

7. Poisons ⚷9

Evidence was insufficient to sustain conviction of dispensing narcotics on two occasions without making records of transactions. West's Ann.Health & Safety Code, § 11225.

◆

Arthur M. Reilly, Los Angeles, for appellant.

S. Ernest Roll, Dist. Atty., Jere J. Sullivan, Deputy Dist. Atty., Los Angeles, for respondent.

PATROSSO, Judge.

Defendant was convicted upon two counts of violating H. & S. Code, § 11225, in that, upon two different occasions, he dispensed a narcotic, demerol, without making a record of that transaction as required by the section. Imposition of sentence was suspended and defendant placed upon probation. Defendant challenges the sufficiency of the evidence to sustain the conviction, and also assigns numerous errors in the trial court's rulings on evidence and in the instructions to the jury.

We find it unnecessary, however, to consider in detail all of the numerous errors assigned, many of which appear to have been well taken, for the reason that we have concluded not only that the trial court committed a fatal error in the instructions to the jury, but that, if the word "dispenses" as used in section 11225, comprehends one who sells or furnishes a narcotic to another without a prescription as required by section 11500, H. & S. Code,[1] there is no competent evidence that the defendant failed to make a record of any narcotic sold or furnished by him, with or without a prescription. If the evidence discloses that the defendant was guilty of any crime, it was not that of violating the section of which he was charged.

The evidence discloses that Eric Pharmacy, Inc. is a corporation operating a pharmacy, of which corporation defendant is a stockholder and president; the other stockholders and officers being his wife and mother-in-law. Defendant is the only permanent pharmacist employed by the corporation and its other employees consist of a relief pharmacist, a drug and cosmetic clerk and a stock boy.

During the period of March 21, 1955 (at which time it had no demerol in stock) to January 1, 1956, the corporation purchased and received from a wholesale drug concern 43 vials (30 cc) of demerol, and when its records were checked by narcotics inspectors on February 8, 1956, it was found that there were on hand 8 vials and only 26 prescriptions therefor, which indicated a shortage of 9 vials, for which there were no prescriptions on file. All of this evidence with respect to the quantity of demerol purchased, the amount remaining on hand, and the number of prescriptions, was received over the persistent objections of the defendant. There is no evidence, however, that defendant either dispensed, sold, or gave away any of the missing demerol, except as hereinafter stated.

[1–3] We pause here to point out that the trial judge throughout the trial took the position and so stated in effect, on numerous occasions in the presence of the jury that the corporation and the defendant were one and the same; that a corporation can act only through its agents; that "the store was in his possession, he [defendant] works for it." Moreover, in its instructions to the jury the trial court read to it the provisions of section 11227 of the H. &

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1. We mention this because the trial court instructed the jury that the word "dispenses" as used in section 11225 had the meaning set forth in B. & P. Code section 4214, formerly H. & S. Code section 29003.6 found in division 22 thereof, namely: "'Dispense' as used in this division shall mean the furnishing of the medicines referred to in this act *upon the legal prescription from a physician* * * *." The section which defendant is charged with violating, 11225, is not found in the B. & P. Code nor was it in division 22 of the H. & S. Code, but in division 10 thereof, and hence without application to a charge laid under section 11225. However, if the trial court was correct in so defining the word "dispenses" as used in section 11225, a reversal would be required for there is not a scintilla of evidence that defendant dispensed, sold or furnished a narcotic *upon a legal prescription* of which he did not make a record. By the foregoing, we do not desire to be understood as deciding that the definition of "dispense" as used in B. & P. Code section 4214 as given by the trial court was erroneous. That it is there used in this restricted sense finds some support in the fact that the furnishing, sale or gift of a narcotic except upon a legal prescription is made an independent crime by section 11500 of H. & S. Code without regard to whether the one who furnishes, sells or donates the same makes a record thereof. As indicated above, however, we shall assume, for the purposes of this opinion, that the word "dispenses" as used in section 11225 is sufficiently comprehensive to include every act by which a narcotic is transferred from the possession of one person to another.

S. Code which reads as follows: "In a prosecution under this division proof that a defendant received or has had in his possession at any time a greater amount of narcotics than is accounted for by any record required by law or that the amount of narcotics possessed by a defendant is a lesser amount than is accounted for by any record required by law is prima facie evidence of guilt."

It should be noted that the "division" referred to in the preceding section is division 10 which includes numerous sections defining a great variety of different offenses other than that specified in section 11225.

The jury could only understand from this instruction that proof of a shortage in the narcotics' account of the corporation of which defendant was a stockholder, officer and employee operated to establish prima facie evidence of defendant's guilt of the crime charged, namely that he (defendant) dispensed a narcotic without making the prescribed record thereof. However proper the presumption declared by section 11227 may be as applied to one who in his individual capacity possesses narcotics, it is unreasonable and indeed unconstitutional if applied against a corporate officer or employee of a corporation upon the hypothesis that the corporation's possession of the narcotics is his possession, at least in the absence of proof that he and he alone had access thereto, or that the shortage was occasioned by some act of his, and of this there is no evidence here as will later appear. As said in Mayes v. State, 1942, 145 Tex.Cr.R. 295, 167 S.W.2d 745, 746: "[C]ertainly a law should not be upheld which would make an act prima facie evidence of a necessary criminative fact against one accused of crime when such party had no control over nor connection with the act in question." And we cannot believe that the legislature so intended to provide.

[4] If the law were as the court told the jury, it would mean that every employee of a drug store, however numerous they might be, could be convicted of violating section 11225 without any evidence that any of them had ever dispensed a narcotic by the simple device of proving that the amount of narcotics possessed by their corporate employer was "a lesser amount than is accounted for by any record required by law." This, of course, is not the law. " 'An officer of a corporation is not criminally answerable for any act of a corporation in which he is not personally a participant.' " People v. International Steel Corp., 1951, 102 Cal.App.2d Supp. 935, 943, 226 P.2d 587, 592, and cases there cited.

[5] The evidence here is to the effect that the corporation's narcotics were kept in a cabinet which was locked but the key to which was kept on top of the cabinet, and that this cabinet as well as the key thereto were readily accessible not only to the other employees but to other persons who might be in the store from time to time. Therefore, the fact that a certain quantity of narcotics was missing or unaccounted for by prescriptions on file would in and of itself no more serve to prove that defendant had dispensed or disposed of the same than it would tend to establish that they were dispensed by some other employee.

While the error necessarily requires a reversal, in view of the possibility of a new trial, we shall briefly examine the other evidence adduced to establish the specific charge contained in each of the two counts of the complaint.

[6, 7] The first count relates to the so-called Petrosini matter. The People adduced evidence to the effect that on January 22, 1956, a peace officer was called to a given address relative to an "unnatural death" where he discovered the body of a dead woman identified as Mary Petrosini. The witness then identified an empty cardboard box with the label "Demerol" thereon (Ex. 2); a similar empty box and empty vial similarly labeled "Demerol" (Ex. 3) and another similar empty vial labeled the same (Ex. 4) as having been found by him upon the premises above referred to. No

proof was adduced that any of these items had ever been in the possession of the Eric Pharmacy except that the box identified as Exhibit 3 contained thereon in handwriting the notation "POM" which was admittedly the cost code word of the Eric Pharmacy. Each of these exhibits was admitted over the objection of the defendant, not only without any proof that, except as to Exhibit 3, they were ever in the possession of the Eric Pharmacy, but with no proof whatever that defendant had dispensed or furnished the same to Mary Petrosini.

The court therefore erred in admitting the same in evidence, and in refusing to grant defendant's motion made before the close of the trial to strike the same. And the foregoing is all of the evidence to be found in the record adduced to prove the first count that defendant dispensed demerol except the fact that Mrs. Petrosini was a nurse and was frequently in the Eric Pharmacy, and that when the narcotic inspectors called upon the defendant, he according to their testimony, said "I suppose you want to see me in connection with the Petrosini matter." This, however, is wholly insufficient to sustain a conviction of the crime charged. There is testimony that Petrosini had stolen demerol from other drug stores in the vicinity and defendant may well have been concerned, as he stated, that some of the missing demerol of the Eric Pharmacy may have been accounted for by thefts by Petrosini.

Count II of the complaint relates to the so-called Wadleigh matter, the evidence concerning which is highly conflicting, but we shall state the same in the light most favorable to the People.

Mrs. Wadleigh is a nurse employed by a Dr. Rich who maintains his office in the vicinity of the Eric Pharmacy. According to her testimony, about the middle of January she took a prescription written by Dr. Rich for a bottle of demerol to the defendant, which she said Dr. Rich had received the night before, and at the same time stated to defendant that Dr. Rich had not yet received the "state application blanks" for demerol in the office, and requested a bottle so they might have it for the office, telling defendant it would be covered by a prescription "as soon as the blanks arrived." Thereupon, defendant delivered a bottle to her without a prescription, but there is no evidence that he did not make a record of this.

Sometime later, defendant called Mrs. Wadleigh inquiring as to why he had not received the "prescription" and she replied they had not received their "state forms" and defendant then asked that she return the bottle which she promised to do. Later, she returned a bottle of demerol to defendant stating it was the one previously delivered to her. However, unknown to the defendant, the bottle returned was not the one she had received from defendant, but one which she had received from another pharmacy upon a prescription to which she had forged Dr. Rich's name, from which she had removed the label applied to the outside of the bottle by the pharmacist from whom she had obtained it and put it in the box which had contained the bottle obtained from defendant.

The foregoing testimony may have supported a conviction of defendant for selling, furnishing, or giving away a narcotic without a legal written prescription in violation of H. & S. Code, § 11500 (assuming, without deciding, that this section applies to a sale to a physician, as to which see section 11570) but defendant was not charged with a violation of section 11500, although a reading of the transcript suggests that both the trial judge and counsel for the People seemingly entertained the erroneous view that this was the case.

The order appealed from is reversed.

BISHOP, P. J., concurs.

SWAIN, Judge.

I dissent. The presumptions in H. & S. 11227 apply here because there is evidence that the defendant received and has had in his possession a greater amount of narcotics than is accounted for by any record required by law. There is no merit to the claim that the corporation, not the defendant, received the demerol. He testified that he ordered it and that he received it. Furthermore he was the president, one of three stockholders (the other two being his wife and her mother), and the only permanent pharmacist of the corporation. It is clear that he was also managing agent. The law is well settled that one who is a stockholder, director and superintendent of operations of a corporation *had such possession* of personal property being purchased by the corporation under a lease contract as to bring him within the provisions of Penal Code 504a. People v. Brock, 1937, 21 Cal.App.2d 601, 612, 70 P.2d 210.

Inasmuch as the defendant had sufficient "possession" of the demerol to make the presumptions of H. & S. 11227 applicable, it devolved on him to explain the shortage. This he did not do and under this section the jury was entitled to conclude that all elements of the crime were proved and that the defendant personally was guilty.

I do not agree that the order from which the appeal is taken should be reversed because the court defined "dispense" in the language of H. & S. Code 29003.6. (Note: In 1955 H. & S. Code 29003.6 was repealed and substantially reenacted as B. & P. Code 4214.) "Dispense" as defined by the court was limited to narcotics dispensed under a prescription. This narrowing, if an error, was favorable to the defendant and therefore not reversible. However, under H. & S. 11227, if a prescription was a prerequisite to guilt, the jury was entitled to presume there were prescriptions for the missing demerol.

I would affirm the order from which the appeal is taken.

47 Cal.2d 483

Herbert H. DOWELL, Petitioner,

v.

The SUPERIOR COURT of the State of California, IN AND FOR The CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Southern Pacific Company, Real Party in Interest.

S. F. 19553.

Supreme Court of California.
In Bank.
Dec. 14, 1956.

Mandamus proceeding was brought in the Supreme Court to compel Superior Court to set aside order denying application for inspection pursuant to the Code of Civil Procedure. The Supreme Court, Shenk, J., held that where claim adjuster of railroad, within 24 hours after accident in which individual was injured as result of alleged negligence of railroad, took a written statement in hospital from individual concerning the circumstances of the accident, and did not give individual a copy of the statement, and he could not recollect what the statement contained, it was an abuse of discretion on part of Superior Court to deny application of individual under the Code of Civil Procedure to inspect the statement.

Writ issued.

Schauer and McComb, JJ., dissented.

Opinion, 296 P.2d 97, vacated.

1. Appeal and Error 🔑104
Mandamus 🔑4(3)

Order of Superior Court denying application for inspection pursuant to the Code of Civil Procedure was not an "appealable order," and there was no plain, speedy, or adequate remedy in the ordinary course of law, and therefore mandamus was the appropriate remedy to obtain the relief sought. West's Ann.Code Civ.Proc., § 1000.

See publication Words and Phrases, for other judicial constructions and definitions of "Appealable Order".

2. Mandamus 🔑1

"Mandamus," though it is an extraordinary legal remedy, is in the nature of an equitable interference supplementing the deficiencies of the common law.

See publication Words and Phrases, for other judicial constructions and definitions of "Mandamus".

3. Mandamus 🔑3(1)

Mandamus will ordinarily be issued where a legal duty is established, and no other sufficient means exist for enforcing it.

4. Mandamus 🔑7

Issuance of mandamus is not necessarily a matter of right, and lies rather in the discretion of the court, but where one has a substantial right to enforce, and that may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, he is entitled, as a matter of right, to the writ, or, perhaps more correctly, in other words, it is an abuse of discretion to refuse it.

5. Mandamus 🔑1

Though mandamus is generally classed as a legal remedy, question whether it should be applied is largely controlled by equitable considerations.

6. Discovery 🔑88

Where claim adjuster of railroad, within 24 hours after accident in which individual was injured as result of alleged negligence of railroad, took a written statement in hospital from individual concerning the circumstances of the accident, and did not give individual a copy of the statement, and he could not recollect what the statement contained, it was an abuse of discretion on part of Superior Court to deny application of individual under the Code of Civil Procedure to inspect the statement. West's Ann.Code Civ.Proc., § 1000.

Barbagelata, Zief & Carmazzi, and Rinaldo A. Carmazzi, San Francisco, for petitioner.

No appearance for respondent.

A. B. Dunne, G. Blandin Colburn, Jr., and Dunne, Dunne & Phelps, San Francisco, for real party in interest.

SHENK, Justice.

This is an application for a writ of mandate to compel the respondent Superior Court to set aside its order denying an application for inspection pursuant to section 1000 of the Code of Civil Procedure. That section provides: "Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. * * *"

In September, 1955, the petitioner Herbert Dowell suffered personal injuries resulting from the alleged negligence of the Southern Pacific Company, the real party in interest and hereinafter called the company. Shortly thereafter the petitioner was taken to a hospital. On the following day a claims investigator of the company called upon him in the hospital and took his written statement concerning the circumstances of the accident. This took place during an interview lasting approximately one hour. The petitioner signed the statement but was not given a copy.

In November, 1955, the petitioner commenced an action against the company in the respondent court, seeking the recovery of damages for his injuries. Thereafter he presented to the court a motion under section 1000 for an order directing the company to permit him or his attorneys to inspect and copy the statement he had given the claims investigator. This and a subsequent motion for inspection of the same document were denied. These motions were supported by affidavits of the plaintiff and one of his attorneys. In his affidavit the plaintiff averred that he did not remember just what he had said in the statement he had made to the investigator; that neither he nor his attorneys had seen the statement which was in the possession of the defendant; and that the evidence contained in the statement was material to the issues of liability of the defendant and the contributory negligence, if any, of the plaintiff; and that the statement would be admissible at the time of trial.

The company opposed these motions but at no time filed any counter-affidavits. On the occasion of the second motion, counsel for the company offered to permit the plaintiff to inspect and copy the statement but only on the condition that he execute an affidavit that he did not remember the facts and circumstances of the accident and that an inspection was necessary to refresh his memory. The plaintiff did not accept this offer although as noted he averred that he did not recollect what he had said in the statement.

The petitioner relies mainly on the case of Holm v. Superior Court, 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722, and urges that the trial court abused its discretion in refusing an order of inspection. The company asserts in reply that the Holm case has no application. There are several points of similarity in the two cases which are of compelling significance. The Holm case emphasizes the importance of the requirement of materiality in the document sought to be inspected. It was there said in 42 Cal.2d at page 505, 267 P.2d at page 1028, "Where the use of the statutory bill of discovery is denied by our courts it usually is because the information sought to be obtained is not relevant or material to any of the issues in the case." In that proceeding the materiality of the statement sought to be produced appeared in the affidavits in support of the motion to inspect. Here the materiality of the statement was established by the uncontradicted affidavits of the plaintiff in the pending action. There as here the defendant had refused to furnish a copy of the statement to the plaintiff. There as here there was no attorney-client relationship and the parties were in adversary positions. There is a dissimilarity in that the Holm case was a prohibition proceeding and this is a mandamus proceedings. It was held in the Holm case that the condition of materiality had been met and that it was within the power of the trial court to entertain and determine the motion. The application for the writ of prohibition was accordingly denied. Whatever action the court might take in granting or denying the motion would of course be subject to the right of a plaintiff to test the discretionary power of the court with reference thereto. Whether such a motion should be granted or denied is within the trial court's sound discretion and whatever order the court might make will not be disturbed in the absence of an abuse of discretion. Shell Oil Co. v. Superior Court, 109 Cal.App. 75, 292 P. 531; Construction Products Corp. v. Superior Court, 103 Cal.App.2d 403, 229 P.2d 399.

[1] Here the court has acted and denied the motions for inspection. As the order is not appealable there is no plain, speedy or adequate remedy in the ordinary course of law and mandamus is the appropriate remedy to obtain the relief sought. McClatchy Newspapers v. Superior Court, 26 Cal.2d 386, 159 P.2d 944; Proctor & Gamble Mfg. Co. v. Superior Court, 124 Cal.App.2d 157, 268 P.2d 199.

In approaching the problem it is noted that the "trend of judicial decisions is to relax the rules which relate to the taking of evidence by ancillary proceedings, of which the inspection of documents is one method * * *." Union Trust Co. v. Superior Court, 11 Cal.2d 449, 462, 81 P.2d 150, 157, 118 A.L.R. 259; 18 C.J., Discovery, § 116 and cases cited; 27 C.J.S., Discovery, § 77.

[2–5] It is also observed that the principles of equity enter into the determination of an application for discovery and also in a mandamus proceeding to compel appropriate action. It was well said in Potomac Oil Co. v. Dye, 10 Cal.App. 534, at page 537, 102 P. 677, 678: "*Mandamus,* although it is an extraordinary legal remedy, is in the nature of an equitable interference supplementing the deficiencies of the common law. It will ordinarily be issued where a legal duty is established, and no other sufficient means exist for enforcing it. * * * Its issuance is not necessarily a matter of right, but lies rather in the discretion of the court, but where one has a substantial right to protect or enforce, and this may be accomplished by such a writ, and there is no other plain, speedy, and adequate remedy in the ordinary course of law, he is entitled, as a matter of right, to the writ, or, perhaps more correctly, in other words, it would be an abuse of discretion to refuse it." It has also been said that although generally classed as a legal remedy, the question of whether it should be applied is largely controlled by equitable considerations. Hutchison v. Reclamation Dist. No. 1619, 81 Cal.App. 427, 433, 254 P. 606, and cases cited.

In the light of the foregoing principles it appears beyond question that the petitioner has shown a substantial right in his application. It is authorized by statute and should be enforced when the necessary prima facie showing has been made and there is no adequate showing to the contrary.

It sufficiently appears that the motions of the petitioner presented a prima facie case in favor of the relief sought. They disclosed the situation of the parties at the time the statement was made and the document signed. It is to be assumed that the claims investigator was skillful in his undertaking. It may also be assumed that it would be to the advantage of the company to obtain from a possible claimant an account from his standpoint of the facts surrounding the accident and to obtain it as soon as possible after it occurred. Certainly it may not be denied that one of the purposes of an interview with a possible claimant as soon as possible after an accident is to obtain information to be used in resisting an unjust or exorbitant claim or in aid of adjustment thereof. But in obtaining and using such information against an adverse party the conduct of the possible defendant in an action on the claim should be attended with fairness and without overreaching.

It may also fairly be assumed that a patient in a hospital, taken there immediately after an accident for observation or treatment, would then be in a condition of nervous shock and remain so for some time thereafter. Here as noted, the statement was obtained within 24 hours after the accident. If mentally distraught in any way, he might not during that period be in such a normal condition as would enable him to recollect just what had happened at the time of the accident or to appreciate the necessity of safeguarding his rights under such circumstances. He was without the aid of counsel and may not have realized that he had the right to refuse to make any statement at that time or that he had the right to demand a copy of his statement as a condition to making it. It was requested by the company and voluntarily given by the petitioner under circumstances which should give the court concern to see that no unfair advantage was taken of the party who thus voluntarily acceded to the request.

To encompass further the probabilities it may be that a person undergoing examination under the circumstances here shown would then be possessed of a clearer recollection of what had taken place than he would have thereafter. In this respect the statement might have reciprocal advantages. In such a case the advantage to the person making it would be as an aid in refreshing his recollection. In this connection the company asserts that if a copy of the statement be given to the petitioner he will be able to reconcile his testimony at the trial with what he had said in the statement, resulting in a denial to the company of the benefit of cross-examination and to its prejudice in the presentation of its defense. The company would thus seek to obtain an advantage over the petitioner on the trial of the case by not permitting an inspection. At the same time it would deprive the petitioner of any advantage he might gain from an inspection. In taking this attitude the company is assuming such an obvious inequitable position toward the petitioner as to require the intervention of a court to prevent what may rightly be called a failure of justice.

The State of New York has taken legislative cognizance of abuses which might arise in a situation such as is here presented. By section 270–b of the Penal Law, McK.Consol.Laws, c. 40 of that state it was made a misdemeanor for any person to enter a hospital, for the purpose of obtaining a general release or a statement written or oral from any person confined in the hospital with reference to personal injuries, within 15 days after the injuries were sustained, unless the person injured has signified his willingness, in writing and at least five days prior to making the statement, that he is willing to make it. In Bearor v. Kapple, Sup., 24 N.Y.S.2d 655, 657, the court granted an application for inspection even though the injured person was not in a hospital at the time the statement was made but was in his own home. The application was granted pursuant to a section of the Civil Practice Act, and "in the interest of substantial justice."

[6] Under the circumstances here disclosed we conclude that the company has advanced no valid reason why a copy of the statement should not be furnished to the petitioner and that it was an abuse of discretion on the part of the trial court to deny the relief sought. The offer of the company to furnish a copy to the petitioner on condition that he execute an affidavit that he did not remember the facts and circumstances of the accident and that an inspection of the statement was necessary to refresh his memory was not within the bounds of reason or justice.

Let a peremptory writ issue requiring the respondent court to set aside its order denying the petitioner an inspection of the document in question and to issue an appropriate order of inspection with the right to take a copy as prayed.

GIBSON, C. J., and CARTER, TRAYNOR and SPENCE, JJ., concur.

SCHAUER, Justice (dissenting).

It is my view that petitioner has not shown that the trial court abused its discretion in refusing the inspection, and that the writ should be denied.

From the record it appears that in September, 1955, petitioner (sometimes herein called plaintiff) suffered personal injuries resulting from alleged negligence of Southern Pacific Company, the real party in interest herein. The following day a claims investigator of Southern Pacific (sometimes herein called defendant) visited petitioner in the hospital and took his written statement "about how the accident occurred and about the injuries sustained by Petitioner." Petitioner signed the statement, but has received no copy thereof. In November, 1955, he filed an action against Southern Pacific in respondent court, seeking recovery for his injuries, and at the same time moved under section 1000[1] of the Code of Civil Procedure for an order directing Southern Pacific to permit plaintiff or his attorneys to inspect and copy the statement he had given the claims investigator. The motion was supported by affidavits of plaintiff and one of his attorneys, but no counter affidavits were filed. The motion was denied, and upon being later twice renewed by plaintiff was both times again denied. Plaintiff then filed this petition for mandate, stating that "the question to be decided * * * is whether, on the showing made, Respondent Court had jurisdiction to deny the * * * motion for inspection * * * That * * * Respondent erroneously refused to grant your Petitioner an inspection of this statement and therefore divested itself of jurisdiction."

The petition for mandate and plaintiff's affidavits allege that among the issues in plaintiff's action are defendant's negligence and plaintiff's contributory negligence; that plaintiff's statement secured by the claims investigator "is to be used by the defendant at the time of trial" of the action; that plaintiff does not remember what he said in the statement; that the evidence contained therein is material to the issue of defendant's liability and of plaintiff's contributory negligence; that the statement would be admissible in the trial of the action.

No claim of unfairness, fraud, inducement, coercion or overreaching in respect to the statement is made.

Defendant, in answer to the petition for mandate, avers that it has filed an answer to plaintiff's complaint in the basic action, alleging that plaintiff was guilty of contributory negligence; that its claims adjuster took the signed statement from plaintiff but that it "has not yet determined whether or when said statement will be used in said pending action"; that at the second hearing on plaintiff's motion defendant's counsel offered to permit plaintiff to inspect and copy the statement upon the condition that plaintiff would execute an affidavit that he did not remember the facts and circumstances of the alleged accident and that inspection of the statement was necessary to refresh his memory; that such offer of counsel was not accepted.

Petitioner, in reliance upon Holm v. Superior Court (1954), 42 Cal.2d 500, 267 P.2d 1025, 268 P.2d 722, urges that the trial court had no discretion but to order the inspection he sought. In that personal injury case, contrary to the present situation, the trial court, rather than refusing to order the inspection, granted plaintiff's motion to inspect a statement obtained from plaintiff by defendant's claims investigator. Defendants then petitioned for prohibition to restrain the court from enforcing its inspection order. This court held, adversely to defendants' contentions, that the statement was not within the confidential attorney-client relationship and that it could properly be reached under section 1000 of the Code of Civil Procedure (at pages 505–508 of 42 Cal.2d at pages 1027–1029 of 267 P.2d), and denied the writ as to the statement.

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[1] Section 1000: "Any court in which an action is pending, or a judge thereof may, upon notice, order either party to give to the other, within a specified time, an inspection and copy or permission to take a copy, of entries of accounts in any book, or of any document or paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defense therein. * * *"

The Holm case does not, however, hold that the trial court would have no jurisdiction in any case to deny a motion for inspection nor is it authority for the proposition that it is an abuse of discretion for the trial court to deny inspection of such a statement regardless of the circumstances of the particular case. The true rule is that the trial court's action with respect to an inspection sought under section 1000 is discretionary within the field of reason and justice, that all intendments are in favor of the validity of the court's order, and that the order will not be interfered with unless a clear abuse of discretion is shown. (See Union Trust Co. v. Superior Court (1938), 11 Cal.2d 449, 464, 81 P.2d 150, 118 A.L.R. 259; Construction Products Corp. v. Superior Court (1951), 103 Cal.App.2d 403, 404, 229 P.2d 399; Milton Kauffman, Inc., v. Superior Court (1949), 94 Cal.App.2d 8, 16, 210 P.2d 88; Shell Oil Co. v. Superior Court (1930), 109 Cal.App. 75, 79–80, 292 P. 531; Maclay Rancho Realty Co. v. Superior Court (1927), 81 Cal.App. 471, 475, 254 P. 287; see also Union Oil Co. v. Reconstruction Oil Co. (1935), 4 Cal.2d 541, 545, 51 P.2d 81.)

As a foundation for the making of an order of inspection, one of the indispensable requirements that must be made to appear by an affirmative and substantial showing is that the document that is sought to be inspected contains evidence that is material to an issue which is involved in the action or proceeding with respect to which the order of inspection is sought. Union Trust Co. v. Superior Court (1938), supra, 11 Cal.2d 449, 454, 81 P.2d 150; Austin v. Turrentine (1939), 30 Cal.App.2d 750, 761, 87 P.2d 72, 88 P.2d 178; Shell Oil Co. v. Superior Court (1930), supra, 109 Cal.App. 75, 80, 292 P. 531. Thus, the affidavit in support of the demand for inspection must clearly show that the desired document contains competent and admissible evidence which is material to the issues to be tried, and in so showing the affiant cannot rely merely upon the legal conclusion, stated in general terms, that the desired documentary evidence is relevant and material. (McClatchy Newspapers v. Superior Court (1945), 26 Cal.2d 386, 396–397, 159 P.2d 944; Proctor & Gamble Co. v. Superior Court (1954), 124 Cal.App.2d 157, 161, 268 P.2d 199; Los Angeles Transit Lines v. Superior Court (1953), 119 Cal.App.2d 465, 467–468, 259 P.2d 1004; Shell Oil Co. v. Superior Court (1930), supra, 109 Cal.App. 75, 80–87, 292 P. 531.) And in the exercise of its discretion in passing upon a motion for an inspection order, the court is not required to accept the averments of the affidavits in support of the motion as final, but may conclude from other matters before it that in some respects the facts are otherwise. (See Maclay Rancho Realty Co. v. Superior Court (1927), supra, 81 Cal.App. 471, 475, 254 P. 287.) As also commented in the Maclay decision (at page 475 of 81 Cal.App., at page 288 of 254 P.), even though the facts in a particular case might warrant the making of the inspection order, "it is elementary that where the action is discretionary with the trial court, the writ [mandate] here asked will not issue unless the refusal of the trial court * * * amounts to an abuse of discretion."

Further, the statute (section 1000 of the Code of Civil Procedure) was designed to aid in the administration of justice and to assist a party to an action to obtain the necessary disclosure of material facts even though the writings evidencing such facts are in the possession of the adverse party. (Union Trust Co. v. Superior Court (1938), supra, 11 Cal.2d 449, 456, 459, 462–463, 81 P.2d 150; Union Oil Co. v. Reconstruction Oil Co. (1935), supra, 4 Cal.2d 541, 545, 51 P.2d 81; Milton Kauffman, Inc., v. Superior Court (1949), supra, 94 Cal.App.2d 8, 15, 210 P.2d 88.)

Applying these several rules to the present case, it appears to me that petitioner, upon whom the burden of proof rests, has not shown himself entitled to the writ he seeks. In the first place, the affidavits in support of his motion to inspect allege only the legal conclusion that the evidence contained in the statement is material to the issues to be tried, and, further, he has not accepted defendant's offer to produce the statement if plaintiff would execute his affidavit stating that he did not remember the facts of the alleged accident upon which his action against defendant is based. (If he does not need the statement to refresh his recollection as to *the facts,* then for what reason does he need it?) In addition, the complaint and the motion for inspection were filed only two months after the alleged accident, and at a time when plaintiff's memory of the occurrence was presumably relatively fresh. As pointed out by defendant, there were thus ample grounds for the trial court, in the exercise of its discretion, to decide that plaintiff had not made an adequate showing of materiality or necessity for inspection in the interest of justice and that, to the contrary of petitioner's claim, production of the statement would tend to suppress the truth and thwart the administration of justice rather than aid therein. If he did not remember the facts of the accident, and in truth needed the memorandum to refresh his memory, then upon his affidavit to that effect the statement would have been produced by defendant. If he did remember such facts and had told the truth in the statement, then he already knew the contents of the statement and there was no reason for him to see it in preparing a truthful case for presentation at trial. It will be remembered that petitioner makes no claim of unfairness, coercion or overreaching in respect to the statement. The only reason for him to see it under the circumstances presented to the trial court would seem to be, as defendant comments, that plaintiff would then know what kind of a story he could tell in court without being impeached by his own statement. When faced by a similar problem the court pointed out in Crisafulli v. Public Service Coordinated Transport (1950), 7 N.J.Super. 521, 72 A.2d 429, 430, that "All that is claimed is that such statement may perchance be contradictory of the case plaintiff is now preparing to prove. If her claim is honest, she need have no fear. If otherwise, her fears should be permitted to continue, in order that truth may prevail." (See also Safeway Stores v. Reynolds (1949), 85 U.S.App.D.C. 194, 176 F.2d 476, 477; McCoy v. District Court (1952), 126 Colo. 32, 246 P.2d 619, 622; La Maida v. Miledna Realty Corp. (1944), 182 Misc. 690, 49 N.Y.S.2d 650, 651.) Ascertainment of the truth is an important part of the trial court's function; it is all too often a difficult task. I am firmly convinced that this reviewing court should not, by what appears to me to be a straining of the law, curtail the means available to the trier of facts to discover the truth.

Since the record before us indicates that plaintiff has failed to show either the materiality of the desired document, or that its production will serve the cause of justice, the alternative writ should be discharged and the peremptory writ sought should be denied.

McCOMB, J., concurs.

47 Cal.2d 494

The BOARD OF EDUCATION OF the SAN FRANCISCO UNIFIED SCHOOL DISTRICT et al., Plaintiffs-Respondents,

v.

John W. MASS, Defendant-Appellant.

S. F. 19433.

Supreme Court of California.
In Bank.
Dec. 21, 1956.

Proceeding by city school district board of education for permission to dismiss a state college teacher as an employee of the district. From a judgment of Superior Court, City and County of San Francisco, Milton D. Sapiro, J., for the plaintiffs, defendant appealed. The Supreme Court, Gibson, C. J., held that where scope of inquiry on a hearing was limited to a determination of whether teacher refused to answer questions put to him by Congressional Committee respecting communism, such hearing did not meet the requirements of statute and a new hearing must be had.

Reversed and remanded for further proceedings.

Spence, Shenk and McComb, JJ., dissented.

Opinion 288 P.2d 874, vacated.

1. Schools and School Districts ⚷127

The state has power to require teachers in public schools, as a condition to continued employment, to give evidence with respect to matters bearing upon their fitness to teach. West's Ann.Education Code, §§ 12600, 12604; West's Ann.Gov.Code, § 1027.5; Internal Security Act of 1950, § 2, 50 U.S.C.A. § 781; Communist Control Act of 1954, § 2, 50 U.S.C.A. § 841.

2. Schools and School Districts ⚷127

A teacher may properly be required to disclose information relative to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though disclosure under some circumstances may amount to self-incrimination.

3. Constitutional Law ⚷48

A construction that would require the court to hold a statute unconstitutional should be avoided if possible.

4. Schools and School Districts ⚷141(5)

Where school district sought dismissal of a state college teacher for refusal at a hearing before Board of Education to affirm or deny charge when summoned before a Congressional Committee that he told truth in his prior affidavit that he was no longer connected with Communist Party and never heard of any group therein advocating overthrow of Government, but no consideration was given to teacher's reasons for invoking his constitutional right and inquiry was limited to determining whether teacher refused to answer questions put by committee, such hearing did not meet requirements contemplated by statute and a new hearing must be had at which any matter germane to the charges filed against the teacher would be open to inquiry. West's Ann.Education Code, §§ 12600–12607, 12604(a–f); U.S.C.A.Const. Amend. 5.

Lawrence Speiser, San Francisco, for appellant.

Dion R. Holm, City Atty., and Irving G. Breyer, San Francisco, for respondents.

GIBSON, Chief Justice.

This case involves the constitutionality of section 12604 of the Education Code which provides that any employee of a school district who fails or refuses on any ground whatsoever to answer questions put to him by a legislative committee relating to specified matters, including past or present knowing membership in the Communist Party, shall be guilty of insubordination and of violating the section and shall be dismissed from his employment in the manner provided by law.[1]

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[1] Section 12604 of the Education Code, as it was enacted in 1953, read: "It shall be the duty of any employee of any school district who may be subpenaed by a United States Congressional Un-American Activities Committee or a subcommittee thereof or a California Legislative Un-American Activities Committee or a subcommittee thereof or any other committee or subcommittee of the United States Congress or the California Legislature or of either house of either thereof to appear before said committee or subcommittee and specifically to answer under oath a question or questions propounded by any member or counsel of the committee or subcommittee relating to:

"(a) Present personal advocacy by the employee of the forceful or violent overthrow of the Government of the United

In 1950 defendant, an instructor at the City College of San Francisco, signed a loyalty oath required of school employees in which he stated that he "had been a member of the Communist Party from the fall of 1947 to the fall of 1949" but that he was no longer connected with it.[2]

On December 2, 1953, pursuant to subpoena, defendant appeared as a witness before a subcommittee of the House of Representatives Committee on Un-American Activities. He refused to answer a number of questions put to him by the committee, basing his refusal on the ground of privilege against self-incrimination under the Fifth Amendment to the federal Constitution. In particular he declined to state whether he had been a member of the Communist Party since he signed the loyalty oath, whether he was presently a member of the Communist Party, and whether his statement in the loyalty oath was true when he made it.

The superintendent of schools filed with the Board of Education a verified statement charging defendant with unprofessional conduct, unfitness for service, insubordination and disobedience of the school laws of the state because of his refusal to answer the questions propounded to him by the committee. A transcript of the hearing before the committee was attached to and made a part of the charges.

At a meeting of the board held on December 8, 1953, to consider what action should be taken, defendant offered to answer under oath any questions the board wished to ask him with respect to whether he had been a member of the Communist Party since 1950, whether he told the truth when he signed the loyalty oath, and whether to his knowledge any employee of the San Francisco School District was a mem-

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States or of any state or political subdivision.

"(b) Present knowing membership in any organization which, to the knowledge of such employee, advocates the forceful or violent overthrow of the Government of the United States or of any state or political subdivision.

"(c) Past knowing membership at any time since September 10, 1948, in any organization which, to the knowledge of such employee, during the time of the employee's membership advocated the forceful or violent overthrow of the Government of the United States or of any state or political subdivision.

"(d) Past knowing membership of such employee in the Communist Party at any time since September 10, 1948.

"(e) Present knowing membership of such employee in the Communist Party.

"Any employee who fails or refuses to answer under oath on any ground whatsoever any such question propounded by any member or counsel of any such committee or subcommittee shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law."

(Sections 12600–12607, commonly known as the Dilworth Act, were added to the Education Code in 1953. In 1955 section 12604 was amended by changing the dates from September 10, 1948, to October 3, 1945, and a new subdivision (f), which is not involved here, was also added.)

[2] The oath required by chapter 8 of the Government Code in 1950 was set forth in section 3103 of that code and was the same in all material respects as the one which, since 1953, has been required by chapter 8 in the form appearing in section 3 of article XX of the California Constitution. On the printed form of oath, in the place reserved for exceptions to the statement that during the preceding five years defendant had not been a member of any organization that advocated the overthrow of the government by force or violence, he wrote: "To the best of my knowledge and belief, no exceptions (Over)." On the back of the form he wrote: "Since it has been alleged by certain persons that the Communist Party and the California Labor School fall in the category described in the oath I am now taking, I feel compelled to state that I had been a member of the Communist Party from the fall of 1947 to the fall of 1949 and of the California Labor School from the fall of 1946 to the summer of 1950. However, I am definitely no longer connected with either of the above groups. Finally, at no time was I aware of nor did I hear of any person or group within these two organizations advocating either the overthrow of the government by force or any other activity described in the oath."

ber of the Communist Party. The offer was refused. Defendant's attorney stated that defendant's conduct before the committee was based upon the attorney's opinion that, if defendant answered a question regarding his affiliation with the Communist Party, he would waive any right to claim the privilege against self-incrimination with respect to questions concerning membership of other persons in the Communist Party. The board's refusal to accept the testimony offered by defendant or to consider the reasons for his conduct apparently resulted from its belief that under section 12604 of the Education Code, it was compelled to dismiss him and had no discretion in the matter.

Defendant was suspended and notified of the board's intention to dismiss him. He demanded a hearing, and the board elected to file this action in the superior court pursuant to section 13529 of the Education Code which provides that the board shall have the option either to rescind its action or file a complaint in the superior court, setting forth the charges against the employee.[3]

A copy of the superintendent's charges, including a transcript of defendant's testimony before the committee, was designated "Exhibit A" and attached to and made a part of the complaint. Defendant in his answer admitted that he had been asked the questions by the committee and that he had refused to answer them "on the basis of the Fifth Amendment." The evidence at the trial consisted of a transcript of the proceedings at the board meeting held on December 8, 1953. The court found that the charges were true and concluded that they constituted grounds for dismissal. On this appeal from the ensuing judgment, defendant's principal contention is that section 12604 of the Education Code is unconstitutional.

[1, 2] The state of California has the power to require teachers in our public schools, as a condition to continued employment, to give evidence with respect to matters bearing upon their fitness to teach. See Adler v. Board of Education, 342 U.S. 485, 493, 72 S.Ct. 380, 96 L.Ed. 517; Steinmetz v. California State Board of Education, 44 Cal.2d 816, 824, 285 P.2d 617; Pockman v. Leonard, 39 Cal.2d 676, 687, 249 P.2d 267. It has been established by legislative findings and judicial decisions that the Communist Party is a continuing conspiracy against our government. Ed. Code, § 12600, added by Stats.1953, ch. 1632, § 1; Gov.Code, § 1027.5, added by Stats. 1953, ch. 1646, § 1; Internal Security Act of 1950, 64 Stats. 987, 50 U.S.C.A. § 781; Communist Control Act of 1954, 68 Stats. 775, 50 U.S.C.A. § 841; Black v. Cutter Laboratories, 43 Cal.2d 788, 800–806, 278 P.2d 905; Daniman v. Board of Educ. of City of N. Y., 306 N.Y. 532, 540, 119 N.E. 2d 373. Loyalty on the part of public employees is essential to orderly and dependable government and is therefore relevant to fitness for such employment. A teacher may properly be required to disclose information relative to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure under some circumstances may amount to self-incrimination. See Steinmetz v. California State Board of Education, 44 Cal.2d 816, 824, 285 P.2d 617; Pockman v. Leonard, 39 Cal.2d 676, 687, 249 P.2d 267; Christal v. Police Comm., 33 Cal.App.2d 564, 567 et seq., 92 P.2d 416.

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[3] Section 13529 of the Education Code provides:

"When any employee who has been served with notice of the governing board's intention to dismiss him demands a hearing, the governing board shall have the option either (a) to rescind its action, or (b) to file a complaint in the superior court of the county in which the school district or the major part thereof is located, setting forth the charges against the employee and asking that the court inquire into the charges and determine whether or not the charges are true, and if true, whether or not they constitute sufficient grounds for the dismissal of the employee, under the provisions of this code, and for judgment pursuant to its findings."

In determining whether section 12604 of the Education Code is constitutional, we must consider the effect of the recent decision of the United States Supreme Court in Slochower v. Board of Higher Education, 1956, 350 U.S. 551, 76 S.Ct. 637. In that case a teacher was summarily dismissed from his position in accordance with a section of the city charter which provided that the term of employment of any city employee should terminate if, when called before any legislative committee, he refused to answer a question regarding his official conduct on the ground his answer would tend to incriminate him. The court held that the summary dismissal violated the constitutional requirement of due process, pointing out that the charter provision "operates to discharge every city employee who invoked the Fifth Amendment. * * * No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive." 350 U.S. at page 558, 76 S.Ct. at page 641.

We understand the holding of the Slochower case to be that a public employee may be dismissed for invoking the privilege against self-incrimination only if, after a full hearing in which he is afforded an opportunity to explain his reasons for claiming the privilege, it is determined that his refusal to answer is sufficient under the circumstances to warrant dismissal. The judgment involved here was rendered before the Slochower case was decided by the United States Supreme Court, and it is clear from the record that the parties and the trial court construed section 12604 of the Education Code as requiring the dismissal of an employee who refused to answer a question on the ground his answer might incriminate him, regardless of his reasons for claiming the privilege allowed by the Fifth Amendment.

[3] Any construction which would require us to hold that section 12604 is unconstitutional should be avoided if possible, Bodinson Mfg. Co. v. California E. Comm., 17 Cal.2d 321, 326–327, 109 P.2d 935, and we are of the opinion that the statute may be reasonably interpreted in a manner consistent with due process. Section 12604, as we have seen, provides for the dismissal of an employee "in the manner provided by law," and we construe these words to mean that, before an employee may be found guilty of insubordination or dismissed for refusing to answer under the claim of privilege against self-incrimination, there must be a full hearing and a determination that his reasons for invoking the privilege are not sufficient. Factors of the type mentioned in the portion of the Slochower decision quoted above should, of course, govern the determination as to the sufficiency of the employee's reasons.

[4] It is apparent that no consideration was given to defendant's reasons for invoking his constitutional right. The scope of inquiry was limited to a determination of whether he refused to answer the questions which were put to him by the committee. Such a hearing did not meet the requirements laid down in the Slochower case and contemplated by section 12604 of the Education Code, when properly construed, and a new trial must be had. We do not, of course, mean to suggest that, on retrial, the sufficiency of defendant's reasons for invoking the privilege is the only question which may be considered in determining whether his dismissal is warranted. Any matter germane to the charges filed against him would be open to inquiry.

The judgment is reversed and the cause remanded for further proceedings in accordance with this opinion.

TRAYNOR and SCHAUER, JJ., concur.

CARTER, Justice (concurring).

I concur in the judgment of reversal but I do not agree with the holding in the opinion prepared by the Chief Justice that the provisions of the so-called Dilworth Act here involved are constitutional. In Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 641, the Supreme Court of the United States squarely held that a law is unconstitutional which makes mandatory the dismissal of a government employee solely for relying on the privilege against self-incrimination before a congressional committee, and that a discharge based on such a law violates the due process clause of the Fourteenth Amendment. The law involved in that case was section 903 of the New York City Charter. Such a law is involved here, Educ.Code, § 12604. In that case the court said: "As interpreted and applied by the state courts, it [Section 903] operates to discharge every city employe who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. * * * The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of Wieman v. Updegraff [344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216]."

While it is true that in Steinmetz v. California State Board of Education, 44 Cal.2d 816, 285 P.2d 617, this court upheld the provisions of this act which require discharge of an employee who refuses to answer certain questions propounded to him by the board which employs him, there is a clear distinction between such provisions and those here involved. This distinction was pointed out by the court in the Slochower case [350 U.S. 551, 76 S.Ct. 641] in the following language: "It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.' In this respect the present case differs materially from Garner [Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317], where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

In this case, likewise, the Board of Education had the information about Appellant's Communist Party membership in prior years. However, this case presents even a stronger factual situation than that presented in the Slochower case, because here the appellant had offered to answer the questions of the Board of Education with regard to his past Communist Party membership at the meeting of December 8, 1953 after appellant's appearance before the House Un-American Activities Committee. It can be said here, just as the United States Supreme Court said in the Slochower case: "On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

The statute involved here, Educ.Code, § 12604 has even greater constitutional defects than the charter provision of the city of New York involved in the Slochower case (New York City Charter, § 903), because, under the Dilworth Act involved here, the employee must be discharged for refusing to answer any question relating to communism "on any ground whatsoever," whereas, the New York charter provision involved in the Slochower case was restricted to cases only where the employee relied on the privilege against self-incrimination. It should be apparent that even though our Education Code provides for the filing of charges, notice thereof and a hearing before the discharge becomes effective, such a hearing is a mere farce, since the end result is the foregone conclusion that the employee must be discharged because the statute here involved eliminates any defense whatsoever. Even though there is a hearing, there is nothing to be heard except whether the teacher did or did not refuse to answer a question for any reason whatsoever. No matter what his reason for refusing to answer may have been, the employee must be discharged under the Dilworth Act. The mere fact that in the Slochower case there was a summary dismissal, but here some procedural steps are required to be taken before the discharge is ordered, is a mere distinction without a difference.

With regard to the purpose of the Senate committee which the Supreme Court refers to in the Slochower case, the case at bar is also even a stronger one for the employee, as the court there stated [350 U.S. 551, 76 S.Ct. 638]: "The investigation, conducted on a national scale, related to subversive influences in the American educational system."

Here, there was no reference made by the House Un-American Activities Committee that it was interested in education at all. At the beginning of the hearing in San Francisco on December 1, 1953, at which appellant was interrogated, the chairman of the committee stated: "* * * It is the purpose of this investigation to ascertain the nature, extent, character, and objects of Communist infiltration in the Bay area where there is a great concentration of defense industry and where the headquarters of District No. 13 of the Communist Party are maintained. This investigation, unlike those conducted in the Territory of Hawaii and southern California, is not concentrated upon a single industry or enterprise. For the time being the work of the committee will be of a more general character." (Hearing Before the Committee on Un-American Activities of the House of Representatives, 83rd Cong., 1st Sess., pt. 1, at 3056 [1953].)

The only other factual distinction between the two cases is the fact that Professor Slochower denied that he was presently a member of the Communist Party but refused to answer questions about his activities in 1940 and 1941; whereas, in the instant case, the appellant relied on the privilege against self-incrimination with respect to all questions relating to Communist Party membership irrespective of the date. However, this is completely immaterial in the light of the holding in the Slochower case, where the court said: "* * * the privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in Ullmann, [Ullman v. U. S., 350 U.S. 422, 76 S.Ct. 497], a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances. See Griswold, The Fifth Amendment Today (1955)."

The constitutional privilege against self-incrimination has been the subject of many recent decisions by the Supreme Court of the United States. In the recent case of Quinn v. United States, 349 U.S. 155, 75 S. Ct. 668, at page 673, 99 L.Ed. 964, Mr. Chief Justice Warren speaking for the court declared: "The privilege against self-incrimination is a right that was hard earned by our forefathers. The reasons for its inclusion in the Constitution—and the necessities for its preservation—are to be found in the lessons of history. * * * To apply the privilege narrowly or begrudgingly—to treat it as an historical relic, at most merely to be tolerated—is to ignore its development and purpose." And in Ullmann v. United States, 350 U.S. 422, 428, 429, 76 S.Ct. 497, 501, Mr. Justice Frankfurter painted a somewhat graphic picture of the origin and objectives of this salutary constitutional provision: "No doubt the constitutional privilege may, on occasion, save a guilty man from his just deserts. It was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality. Prevention of the greater evil was deemed of more importance than occurrence of the lesser evil. Having had much experience with a tendency in human nature to abuse power, the Founders sought to close the doors against like future abuses by law-enforcing agencies.

"As no constitutional guarantee enjoys preference so none should suffer subordination or deletion. It is appropriate to read the conviction expressed in a memorable address by Senator Albert J. Beveridge to the American Bar Association in 1920, a time when there was also manifested impatience with some of the restrictions of the Constitution in the presumed interest of security. His appeal was to the Constitution—to the whole Constitution, not to a mutilating selection of those parts only which for the moment find favor. [Footnote 3:] 'If liberty is worth keeping and free representative government worth saving, we must stand for *all* American fundamentals—not some, but all. All are woven into the great fabric of our national well-being. We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient. If one American fundamental is prostrated, others in the end will surely fall. The success or failure of the American theory of society and government, depends upon our fidelity to every one of those interdependent parts of that immortal charter of orderly freedom, the Constitution of the United States.' Beveridge, The Assault upon American Fundamentals, 45 Reports of American Bar Assn., 188, 216 (1920). To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution."

While the foregoing sufficiently disposes of this case on constitutional grounds, I want to again assert that I adhere to the views expressed in my dissenting opinion in Steinmetz v. California State Board of Education, 44 Cal.2d 816, 825, 285 P.2d 617, and in the views expressed by Mr. Justice Black and Mr. Justice Douglas in their dissents in Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; Garner v. Los Angeles Board, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317, and in their concurrences in Wieman v. Updegraff, 344 U. S. 183, 73 S.Ct. 215, 97 L.Ed. 216.

While it is my view that a school board should be given broad powers to investigate the moral as well as the intellectual and educational backgrounds of those whom they employ to teach in our public schools, I do not believe that mere membership in a so-called proscribed organization should be a sufficient ground to justify the discharge of a teacher whose conduct during his period of employment has been exemplary.

I have no sympathy whatsoever with the philosophy which establishes guilt by association. Neither would I determine innocence on the same basis. Holy Writ tells us that a man known as Jesus of Nazareth was ostracized and condemned by religious and social leaders of His own race because He associated with "publicans and sinners" (Matthew 9:11 11:19, Luke 5:30 15:2 19:7), yet half the world will unite this month in commemoration of the date of His birth and bow in reverence to His name. I am sufficiently naive to believe that there may be those who "can talk with crowds and keep their virtue, or walk with kings nor lose the common touch." It has been aptly said that, "It is not by deed alone can any eye the whole soul's measure scan—the whole round life from the cradle to the grave must be the test of man." About twenty years ago liberal minded people in this country were shocked by the disclosure that a man who had just been appointed an Associate Justice of the Supreme Court of the United States had, in his youth, been a member of the Ku Klux Klan, yet that man by an unbroken line of judicial opinions has indelibly written into the decisional law of this country a most liberal philosophy of civil liberties and racial and religious tolerance. Many other similar examples may be mentioned, all of which serve to demonstrate that mere membership in an organization or group does not necessarily classify anyone as an adherent of its teachings. Of course, such membership or association may be, and often is, used in political campaigns to discredit candidates for public office when such organizations are in popular disfavor and super patriots use them as whipping boys.

In the case at bar there is no suggestion that Professor Mass ever engaged in any subversive activities or disloyal conduct of any nature or character whatsoever or that his conduct as a teacher has not been at all times commensurate with the highest standards of the teaching profession. The sole and only charge against Professor Mass is that when interrogated by the Un-American Activities Committee of the House of Representatives with respect to membership in the Communist Party, he refused to answer on the grounds that his answers might incriminate him and he took refuge under the Fifth Amendment to the Constitution of the United States, which, in my opinion he had both a moral and legal right to do.

While it is my opinion that the act here involved is unconstitutional and that no charge against the appellant can be sustained thereunder, I join in the judgment of reversal, which will set the case at large in the trial court for such disposition as that court may determine to be in accordance with the law.

SPENCE, Justice (dissenting).

I dissent.

Upon the authority of our own decisions, as well as those of the United States Supreme Court, this court recently declared: "Moreover, a person may properly be required to disclose information relevant to fitness and loyalty as a reasonable condition for obtaining or retaining public employment, even though the disclosure, under some circumstances, may amount to self-incrimination. Pockman v. Leonard, 39 Cal.2d 676, 687, 249 P.2d 267; Christal v. Police Comm., 33 Cal.App.2d 564, 567 et seq. 92 P.2d 416; cf. Garner v. Board of Public Works, 341 U.S. 716, 719–720, 71 S.Ct. 909, 95 L.Ed. 1317; Adler v. Board of Education, 342 U.S. 485, 492–493, 72 S.Ct. 380, 96 L.Ed. 517 [27 A.L.R.2d 472]. A public employee, of course, cannot be forced to give an answer which may tend to incriminate him, but he may be required to choose between disclosing information and losing his employment." Steinmetz v. California State Board of Education, 44 Cal.2d 816, 824–825, 285 P.2d 617, 621.

This was precisely the choice which defendant was required to make, and which he did make, when he appeared before the House of Representatives Committee on Un-American Activities in 1953. He there admittedly refused to answer a series of relevant questions on subjects specifically covered by section 12604 of the Education Code. Charges were filed by the superintendent, and defendant appeared at a meeting of the Board of Education in connection with those charges. Thereafter he was suspended and notified of the board's intention to dismiss him. He then demanded a hearing, and the board filed the present action pursuant to section 13529 of the Education Code.

In the present action, a copy of the charges, together with a transcript of defendant's testimony before the committee, were made a part of the complaint. Defendant admitted in his answer that he had been asked the questions by the committee and had refused to answer them. He offered no reasons for his refusal other than the claim that he was privileged to refuse to answer. Following trial, the court found that the charges were true and that they constituted grounds for dismissal. In my opinion, this judgment should be affirmed.

The majority opinion, which reverses the judgment, is based upon the majority's construction of the recent decision of the United States Supreme Court in Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637. I do not believe that the decision in the Slochower case requires a reversal here. It was decided by a sharply divided court, and the decision in that case should not be extended by this court to cover a wholly distinguishable situation.

In the Slochower case [350 U.S. 551, 76 S.Ct. 638], the broad and vague charter provision is set forth in a footnote therein. It applied to any employee who refused "to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, * * *." No provision was made for a hearing of any kind. On the contrary, the automatic effect of any such refusal was that "his term or tenure of office or employment shall terminate and such office or employment shall be vacant, * * *." As stated by the court, "Dismissal under this provision is therefore automatic and there is no right to charges, notice, hearing, or opportunity to explain." 350 U.S. 554, 76 S.Ct. 639. It is therefore understandable that there could have been a difference of opinion among the members of the court on the question of due process. The majority in the Slochower case concluded that "the summary dismissal of appellant in the circumstances of this case violates due process of law." 350 U.S. 555, 76 S.Ct. 639. It is further understandable, in view of the almost unlimited field which might be covered by questions purportedly relating to the numerous subjects covered by the charter, that the majority should have said: "No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for the exercise of the privilege." 350 U.S. 558, 76 S.Ct. 641.

Turning to the present case, an entirely different situation is presented. Section 12604 of the Education Code is narrowly drawn both with respect to subject matter and time. It covers only the refusal to answer questions relating to (1) "*present personal advocacy*" of the forceful overthrow of government, or "*present knowing membership* in any organization which, to the knowledge of such employee, advocates" such forceful overthrow, or "*present knowing membership* of such employee in the Communist Party" or (2) "*past knowing membership at any time since September 10, 1948*" in such organizations. Thus the field of the questions which the employee was required to answer was strictly confined to the specific area which the Legislature reasonably deemed relevant to the question of such public employee's loyalty to the government and his lack of subversive purposes. Furthermore, the field of the questions was limited in point of time to "any time since September 10, 1948." Again said section 12604 did not provide for automatic dismissal but only for dismissal "in the manner provided by law." This provision obviously contemplated a judicial hearing as provided by section 13529 of the Education Code, which judicial hearing was accorded to defendant. At that hearing he admitted his violation of the section and raised only the issue of the constitutionality of the section.

In my opinion, section 12604 is constitutional in all respects, and such constitutionality is not affected by the mandatory language thereof. The section provides that in the event of the employee's refusal to answer questions relating to the limited field covered by the statute, he "shall be guilty of insubordination and guilty of violating this section and shall be suspended and dismissed from his employment in the manner provided by law." Thus the only issue to be determined in such cases upon judicial review under section 13529 is whether the defendant refused to answer relevant questions in the limited field covered by section 12604 when he was subpoenaed before, and questioned by, a legislative committee of the type therein described. The duty to answer such relevant questions is not an unreasonable requirement, as the harm is done when the teacher refuses to answer such questions in a public hearing before such a committee. Such refusal not only constitutes a violation of duty on the part of one holding a public position of honor and trust, but it tends to bring the employee under a cloud of suspicion concerning his loyalty to the very government to which he owes his appointment and to which he looks for his compensation. Such refusal likewise tends to destroy the confidence of the general public in our whole system of public education.

The majority opinion, however, does not meet squarely the issue of the constitutionality of section 12604. It is conceded therein that defendant has refused to answer relevant questions as required by that section, and that he has had a judicial review under section 13529. Nevertheless, it reverses the judgment of the trial court and remands the cause for "a determination of the sufficiency of his reasons for invoking the privilege." The majority appears to reach this result upon the assumption that the decision in the Slochower case compels it, but I believe this to be an erroneous assumption. That case did not declare that a teacher could not constitutionally be "required to choose between disclosing information and losing his employment," as we have heretofore held. Steinmetz v. California State Board of Education, supra, 44 Cal.2d 816, 824–825, 285 P.2d 617. It merely held that the charter there under consideration, which provided for "summary dismissal" without any hearing, violated due process.

The equivocal declaration of the majority on the issue of constitutionality and the resulting remand for a further judicial hearing significantly furnish no guide to the trial court for the purpose of determining the "sufficiency" of any reasons which may be urged on a retrial for defendant's refusal to answer the questions. If the section is constitutional, then under the admitted facts defendant was required to make his choice, which he did; and his reasons for making that choice would appear to be wholly immaterial. In other words, he was compelled to choose between complying with a reasonable duty imposed upon him by virtue of his position and, on the other hand, exercising his privilege and losing his position. See Steinmetz v. California State Board of Education, supra, 44 Cal.2d 816, 285 P.2d 617, and authorities cited therein. Thus the remand for a further hearing constitutes an idle act, for it launches the trial court upon an uncharted course to determine the "sufficiency" of reasons for defendant's refusal, which reasons cannot be sufficient under the admitted facts.

In my opinion, the issue of the constitutionality should be met squarely, the statute should be held to be constitutional, and the judgment of the trial court should be affirmed.

SHENK and McCOMB, JJ., concur.

146 Cal.App.2d 787

S. A. TURNEY, James E. Lundgren and Ruth R. Lundgren, Plaintiffs, Cross-Defendants and Respondents,

v.

Victor SOUSA, First Doe and Second Doe, Defendants, Cross-Complainants and Appellants.

Victor SOUSA, Administrator of the Estate of Euphrasia Felix, Deceased, Plaintiff and Appellant,

v.

S. A. TURNEY, James E. Lundgren and Ruth R. Lundgren, Defendants and Respondents.

Civ. 16787.

District Court of Appeal, First District, Division 2, California.

Dec. 14, 1956.

Action by record owner to quiet title wherein the adverse claimant filed cross-complaint. The action was consolidated with a quiet title action instituted by adverse claimant as administrator of his great-grandmother's estate. The Superior Court, Marin County, Thomas F. Keating, J., entered judgment for record owner and adverse claimant appealed. The District Court of Appeal held that oral declarations of adverse claimant's great-grandmother made to him did not come under exception to the hearsay rule and were not admissible to prove claimant's adverse possession.

Judgment affirmed.

1. Evidence ⚷236(4), 276

Testimony of adverse claimant, who claimed under deceased great-grandmother, as to oral statements made by her to him in 1914 when he was eleven and she was ninety-seven tending to explain character of her occupancy, was not admissible to prove possession prior to 1878, where statements were not made in presence of opposing party, since statements were not declarations against interest or admissions. West's Ann.Code Civ.Proc., § 325.

2. Evidence ⚷236(4)

Testimony of adverse claimant, who claimed under great-grandmother, regarding oral statements made by her while she was in possession of the property, that she came to disputed property from San Francisco, and that she had lived in San Francisco when there was only one building there, tending to explain the character of occupation was admissible as evidence of "verbal act" but was not admissible as proof of actual possession. West's Ann. Code Civ.Proc., §§ 325, 1845.

3. Evidence ⚷297

Testimony by adverse claimant, who claimed land under his great-grandmother, regarding oral statements made by her relative to her possession of disputed land was not admissible under pedigree exceptions to hearsay rule. West's Ann.Code Civ. Proc., §§ 325, 1852, 1870, subds. 4, 11.

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W. O. Weissich, San Rafael, for appellant.

Freitas, Allen, McCarthy & Bettini, San Rafael, for respondents.

PER CURIAM.

These are two quiet title actions concerning the same property consolidated in the court below and decided by one judgment. Action No. 23,693 was instituted by the record owners of the "K Ranch" on Tomales Bay in Marin County against Victor Sousa, a Digger Indian, hereinafter called Sousa, who occupied a portion of said ranch fronting on Tomales Bay known as Parker's Landing. Sousa filed a cross-complaint to quiet title to the portion of the ranch occupied by him, claiming title by adverse possession, which was denied by the record owners. As it appeared that Sousa and his relatives who had been in possession before him had never paid any taxes on the property, a requirement for the establishing of adverse possession under section 325 of the Code of Civil Procedure, Sousa had himself appointed administrator of the Estate of Euphrasia Felix, his great-grandmother, hereinafter called Euphrasia, and in that capacity instituted against the record owners of the ranch action 24,814 to quiet title to the property in said Euphrasia, deceased. It was the position of the administrator that Euphrasia had obtained title by adverse possession prior to the year 1878, the year in which an amendment to section 325, supra, made the payment of taxes an element of adverse possession. If that were so the requirement of payment of taxes would have no application. Lucas v. Provines, 130 Cal. 270, 272, 62 P. 509.

At the trial the only evidence offered of the actual possession of Euphrasia during five years prior to 1878 was testimony of Sousa that his great-grandmother told him around 1914, when he was eleven and she ninety-seven years old, that she came to Parker's Landing from San Francisco and that she lived in San Francisco when there was only one building there, and testimony by deposition of Mary Pensotti, a woman then probably 79 years old, that she knew Euphrasia at Parker's Landing when she was 12 or 14 years old and that Euphrasia told her that San Francisco, when she moved away from there, was forest and just a log house; that from San Francisco she first moved to Camp Murray and that thereafter, how long the witness did not know, she moved to Parker's Landing. The record owners objected to all this testimony as self-serving hearsay. The court admitted the testimony of Sousa subject to the objection and to being stricken if found inadmissible and subsequently ordered it stricken. The above parts of the deposition of Mary Pensotti were not admitted into evidence. The direct evidence of witnesses who had seen Euphrasia at Parker's Landing did not go back further than the late 1880's. Title was quieted in the record owners and Sousa appeals both as administrator and individually.

Appellant assigns as only error the exclusion of testimony as to statements of Euphrasia offered as proof of the alleged adverse possession. It is contended that from the stated testimony the time of the beginning of Euphrasia's possession could be inferred. There was also stricken testimony of Sousa of statements of Euphrasia to him about fencing, improvement and cultivation of the property, which could be relevant to the adverse character of the possession but which becomes immaterial if, as we have concluded, the evidence as to the time of possession was correctly excluded.

[1] The evidence excluded was testimony as to facts not within the own knowledge of the witness, but resting on the veracity of Euphrasia and therefore not admissible under Code of Civil Procedure section 1845 unless it came under an express exception. As the statements of Euphrasia were offered in support of the position of Sousa, who claims under Euphrasia, and were not made in the presence of the opposing party, they were not admissible as declarations against interest or admissions.

[2] Appellant urges correctly that declarations made by Euphrasia when she was in possession of the property, tending to explain the character of the occupation were admissible as "verbal acts". Wigmore on Evidence, Vol. VI, § 1778; Stockton Savings Bank v. Staples, 98 Cal. 189, 193, 32 P. 936; Garbarino v. Noce, 181 Cal. 125, 130, 183 P. 532, 6 A.L.R. 1433. These authorities, however, show only that such verbal acts are competent to prove the *character* of possession otherwise proved or admitted. Wigmore at p. 206 expressly states that they cannot be offered, "except *as coloring the occupation,*" and in 2 C.J.S., Adverse Possession, § 221, p. 827, it is stated that declarations of the adverse claimant are inadmissible to prove his possession. Although Sousa's testimony as to the statements of Euphrasia may have been admissible in part to prove the adverse character of the occupation, the exclusion was not prejudicial because the total failure of proof of actual possession prior to the year 1878 was at any rate fatal to appellant's position.

Appellant relies on the statement in 20 Am.Jur., Evid. § 464 that "hearsay evidence of ancient possession is admissible on the ground of necessity where it is impossible to produce other testimony relevant thereto," and on Casey's Lessee v. Inloes, 1 Gill, Md., 430, 39 Am.Dec. 658, the only authority cited in American Jurisprudence in support of the rule quoted. Although there is language in that case (1 Gill at page 492, 39 Am.Dec. at page 669) to the effect that in general with respect to any fact of great antiquity, resting wholly in parol, of which no written evidence can be presumed to exist, hearsay evidence is competent, the decision itself concededly relates to written hearsay concerning possession, to wit recitals in ancient deeds and ancient surveys. See annotations under these titles at the end of the case, 39 Am.Dec. at page 686. The opinion expressly notes (1 Gill at page 492, 39 Am.Dec. at page 669) that the recitals relied on are all made by persons wholly uninterested in the truth or falsehood of the facts recited. We do not believe that the case is good authority for the general admissibility of all hearsay, irrespective of whether it is contained in ancient documents or transmitted orally and irrespective of any indication of trustworthiness, as to facts which because of their remoteness in time cannot be proved in any other way. Neither is it good authority for such rule restricted to the proof of adverse possession. Admissibility of evidence as to adverse possession follows the general rules applicable to civil cases. 2 C.J.S., Adverse Possession, § 221, p. 826. Two general considerations form the key to the specific exceptions recognized to the hearsay rule and are both essential: Necessity for the evidence and Circumstantial Probability of Trustworthiness as substitute for cross-examination (Wigmore, supra, Vol. V, §§ 1420–1422, especially p. 202–203). Evidently, there is an immense difference in trustworthiness between recitals in ancient documents drawn up by disinterested persons and oral statements of the interested person in possession made many years before and preserved during all those years only by the fallible memory of the witness, who even may have an interest to color his recollection. Nothing can in such case be considered a substitute for the impossibility of cross-examination of the original declarant. A rule making recitals in ancient deeds competent evidence is recognized in this state in Garbarino v. Noce, supra, 181 Cal. 125, 130, 183 P. 532, 6 A.L.R. 1433. No such exception to the hearsay rule for oral testimony concerning ancient possession is known to us and certainly it is in this state not one of "those few express cases" of admissibility of hearsay referred to in Code of Civil Procedure, section 1845, supra.

[3] Finally, appellant contends that the testimony as to the statements of Euphrasia relative to her possession were admissible under the pedigree (family history) exception of Code of Civil Procedure, §§ 1852, 1870(4) and 1870(11), which according to appellant does not relate only to matters of relationship, birth, marriage and death, but also to place and date of residence, citing In re Estate of Strong, 54 Cal.App.2d 604, 608, 129 P.2d 493. The case cited by appellant clearly refutes his contention. The court, 54 Cal.App.2d at page 609, 129 P.2d at page 496, quotes as the true rule, that declarations as to place come equally under the exception as those touching other family matters, " 'where the inquiry is strictly one of pedigree, and the declarations as to place are not relied on as giving any right by reason of the place, but proof as to place is made merely by way of identification of the person or family.' " Here the declaration is solely offered as showing a right against third parties by adverse possession.

The evidence of the declarations of Euphrasia offered for the purpose of showing time of actual possession were hearsay not coming under any exception and were correctly excluded. We therefore do not need to decide whether if it had been admissible, adverse possession could as a matter of law be proved by such weak inferential evidence. There was concededly no other evidence of actual possession prior to the year 1878.

The judgment is affirmed.

147 Cal.App.2d 43

Thomas P. DOWNIE, Plaintiff and Appellant,
v.
William BRUNTON et al., Defendants and Respondents.
Civ. 5295.

District Court of Appeal, Fourth District California.

Dec. 18, 1956.

Rehearing Denied Jan. 8, 1957.

Hearing Denied Feb. 13, 1957.

Action by discharged employee against union official and union for damages because of official's alleged inducement of employer to fire employee. The Superior Court of San Bernardino County, A. D. Mitchell, J., after jury verdict for employee, granted a new trial to union official and union, and employee appealed. The District Court of Appeal, Griffin, J., held that there was no abuse of discretion by trial court in granting new trial on the basis of insufficiency of evidence.

Affirmed.

1. New Trial ⚷**70**

Even though the only evidence was testimony of plaintiff's own witnesses and those called by plaintiff as adverse witnesses under the statute, where trial judge was of the opinion that a nonsuit might be allowable, he could decide question of sufficiency of evidence on defendants' motion for new trial, as against contention that in absence of conflict, evidence must be judged as though ruling on motion for nonsuit. West's Ann.Code Civ.Proc., § 2055.

2. New Trial ⚷**72**

It is not only the right, but the duty of the trial judge to grant a new trial when, in his opinion, he believes the weight of the evidence to be contrary to the finding of the jury.

3. New Trial ⚷**70**

In the action by discharged employee against union official and union for damages because of official's alleged inducement of employer to fire employee, after jury verdict for employee, there was no abuse of discretion by trial court in granting a new trial on the basis of insufficiency of evidence. West's Ann.Code Civ.Proc., § 2055.

* * *

Charles H. Carter, Corona, for appellant.

Algerdas N. Cheleden and Ernest A. Kessler, Los Angeles, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant was employed by Kaiser Steel Company (hereinafter referred to as Kaiser) in the early part of April, 1952, and was then a member of defendants and respondents United Steel Workers of America, Local 2869 and United Steel Workers of America. He was discharged by Kaiser on April 19, 1952. Defendant Brunton was an agent of the other defendants, had office space, and, as such, maintained a grievance room at Kaiser's plant. Plaintiff was on a so-called "probationary status" to him.

Plaintiff's complaint is in three counts, (1) in tort alleging that defendants wrongfully procured his discharge; (2) in contract, alleging the constitution and by-laws of defendants constituted a contract between them and defendants violated it in procuring his discharge; and (3) in contract, alleging breach of an oral agreement between plaintiff and the defendants by inducing Kaiser to discharge plaintiff. Damages are sought for claimed loss of seniority in defendants' Union, loss of benefit of membership, companionship, loss of convenience, for mental anguish and humiliation, and for exemplary damages.

The matter was heard before a jury. Plaintiff called several witnesses under section 2055 of the Code of Civil Procedure in support of his claim, and as to the general set-up in the Union in relation to the hearing of grievances of the employees. This evidence brought out that Kaiser had advised its employees that it was against the rules of the company for the employees to pass out any literature regarding union elections on its premises, and plaintiff was passing out some of it and engaging in union electioneering on the premises. It appears that about April 19, 1952, plaintiff's employment card at the plant was "pulled" and he was advised to see defendant Brunton before he went to work again. It also appears that Downie filed charges against Kaiser with the National Labor Relations Board for wrongful discharge and there was a compromise or settlement of this claim. According to the testimony, plaintiff came to Kaiser "with an unsavory record" and Brunton was assigned to be responsible for him before Kaiser would hire him. Plaintiff knew of these arrangements and accepted them. Plaintiff refers to the agreement between the Union and Kaiser providing that no employee shall be peremptorily discharged without first being suspended. He claims this procedure was not followed in that he was not first suspended. The method usually adopted in suspending a worker is for the foreman to verbally suspend him by sending the man home or giving him a written slip so indicating. The evidence shows that plaintiff telephoned a member of the Union that he had been suspended and that the foreman would not permit him to go to work and would not issue him a time card. Plaintiff was advised to go to the grievance committee. It was not indicated that plaintiff made any effort to initiate proceedings for such a hearing. Defendant Brunton, testifying under section 2055 of the Code of Civil Procedure, stated he was first advised by one Petty, Director of Labor Relations between Kaiser and the Union, that plaintiff's job was in jeopardy about ten days prior to his being suspended, and that he sent word to plaintiff to come and see him about his grievance but plaintiff never contacted him; that Petty called plaintiff and indicated that unless he straightened out his problems, the Kaiser Company did not intend to let him go back to work; that under the contract with Kaiser or the Constitution and By-laws of the Union, any dispute that arises under them should first be initiated by the employee claiming the grievance and he never did file a complaint under the contract or under the Constitution; and that he never said or did anything to have plaintiff suspended or discharged by Kaiser.

Plaintiff testified he had no "unsavory record" in the East, was not on so-called probation to Brunton; that he had been secretary in one of the largest steel workers' unions in Pittsburgh; that Brunton got him a job at Kaisers and that plaintiff paid his Union dues and was a member in good standing; that on April 19, he came to work as usual and after working 20 minutes the foreman removed him from the job and told him he would have to be cleared through the Union before he could go to work; that he went to the Union hall and, being Saturday, it was closed; that he called to see defendant Brunton at his home and he was not there; that he saw Petty and he advised him to call one Dayton, a member of the grievance committee; that he told him his troubles and asked for a clearance; that he was told he had to see defendant Brunton before he could return to work but a clearance was given for that day; that on April 22, he returned to work and his time card had been "pulled"; that on May 2, 1952, he received a letter from Kaiser containing a termination notice; that Dayton told plaintiff to see defendant Brunton and he might get his job back; that he has never been informed as to why he was fired; that he quit paying dues to the Union and is now working for Rohr Aircraft Company and that he has been humiliated and suffered loss of seniority and was damaged by the actions of defendants. On cross-examination he was shown a copy of a letter he wrote on September 29, 1952, to one Murray, District Director in Pittsburgh, telling him of his arrival in California. He stated therein that through the sub-district director in California, he was unable to obtain a job here himself because he was considered "a definite trouble maker * * * on account of my Union activities in Pittsburgh" and claimed it was through Brunton that he was able to obtain this employment. He admitted passing out Union election literature on the company property and campaigning among the men in the plant for his friend who he said had reputedly been wrongfully accused of being kicked out of the Union back East for Communistic activities. He then testified that he had been accused of making a statement that he was going to run Brunton out of town; that he did not know of anything done directly by Brunton to have him discharged; that he knew the grievance procedure and did register an oral grievance with the company foreman; that he filed no charges against Brunton or the Union according to the procedure prescribed because he felt that it would be futile since Brunton ran the Union.

Plaintiff produced the witness for whom he was campaigning. He testified he talked to defendant Brunton about plaintiff and that Brunton said Downie was going around saying he was going to run Brunton out of town, and as soon as Downie didn't show up in his office when he sent for him he was going to have his card "pulled" and he would not be able to go to work until he saw Brunton. He then testified that he did not know Brunton actually induced Kaiser to fire plaintiff. It appears that this witness was also fired from Kaiser for unauthorized absence from work while attending the International Convention, and he took his appeal through all the steps provided by the Union and lost his case.

Defendants produced no witnesses except those testifying under section 2055 of the Code of Civil Procedure. Motions for nonsuit and a directed verdict for defendants were denied. In the absence of the jury, the judge stated that if the jury decides the case in favor of the plaintiff he would grant a new trial on the evidence produced. The jury returned a verdict against defendants for $15,000 and on a motion for a new trial the court granted it upon all statutory grounds, including insufficiency of the evidence. The appeal is from this order and the principal claim is that the court abused its discretion in so doing.

[1] As we view it, plaintiff contends that since all the evidence produced by plaintiff was testimony of his own witnesses and those called under section 2055 of the Code of Civil Procedure, there was no conflict in the testimony, that there was no evidence that would support a verdict in defendants' favor, and accordingly, the evidence should be judged as though ruling on a motion for nonsuit, citing Weck v. Los Angeles County Flood Control District, 80 Cal.App.2d 182, 191, 181 P.2d 935; and de la Falaise v. Gaumont-British Picture Corp., 39 Cal.App.2d 461, 103 P.2d 447. We see no merit to this contention. It is apparent from the record that the trial judge, after hearing all the evidence produced, was of the opinion that a nonsuit might be allowable, but that he preferred to decide the question of the sufficiency of the evidence on a motion for new trial, where the law allows a much wider discretion.

[2] In Otten v. Spreckels, 24 Cal.App. 251, 141 P. 224, it was held that the plaintiff in a civil action must establish his case by a preponderance of proof, but although many witnesses may testify directly in favor of his position, and no adverse testimony may be directly adduced, it is still with the jury, in the first instance, and finally with the trial court where a new trial is asked on the ground of the insufficiency of the evidence to support the verdict, to say whether such testimony, when subjected to the legal tests whereby the probative value of evidence is to be judged, measures up to the requirement of the law as to the degree of proof essential to the support of an issue of fact. See also Perry v. Fowler, 102 Cal.App.2d 808, 811, 229 P.2d 46; Witkin on California Procedure, pp. 2060–2061. Other late cases emphasize the fact that it is not only the right, but the duty of the trial judge to grant a new trial when, in his opinion, he believes the weight of the evidence to be contrary to the finding of the jury, and that the trial judges are to be commended, rather than condemned, for their actions in granting new trials under those circumstances. Tice v. Kaiser Co., 102 Cal.App.2d 44, 46, 226 P.2d 624.

[3] Here, the trial court had the right to disbelieve certain testimony and reasonably conclude that the evidence was insufficient to support a finding that defendants wrongfully and unlawfully procured the discharge of plaintiff from Kaiser. It further affirmatively appears, even from plaintiff's testimony, that he failed and refused to first pursue the remedy provided by the Constitution and By-laws of the Union in reference to his grievance, before resorting to the courts for redress. Zepeda v. International Hodcarriers, etc., 143 Cal.App.2d 609, 300 P.2d 251. A review of the entire testimony produced fully justifies the action of the trial court.

Order granting a new trial affirmed.

BARNARD, P. J., and MUSSELL, J., concur.

147 Cal.App.2d 40

The PEOPLE of the State of California, Plaintiff and Respondent,

v.

Millard ACKLES, Defendant and Appellant.

Cr. 2705.

District Court of Appeal, Third District, California.

Dec. 18, 1956.

Prosecution resulting in a conviction of defendant for being addicted to the unlawful use of narcotics in Lassen County. The Superior Court, Lassen County, Ben V. Curler, J., entered judgment of conviction, and denied motion for new trial and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that although there was no evidence that defendant had used any narcotics in Lassen County, the testimony of two doctors as to defendant's addiction to drugs therein established venue in Lassen County.

Judgment and order affirmed.

1. Poisons ⚷9

In prosecution resulting in a conviction of defendant for being addicted to the unlawful use of narcotics, defendant's general appearance, nervousness, numerous puncture wounds, and fact that doctors' examinations failed to reveal the kidney ailment from which defendant claimed to be suffering, was a sufficient basis for doctors' opinions that defendant was a drug addict. West's Ann.Health & Safety Code, § 11721.

2. Criminal Law ⚷564(1)

Although there was no evidence that defendant had used any narcotics in Lassen County, the testimony of two doctors as to defendant's addiction to drugs therein established venue in Lassen County, in prosecution for being addicted to unlawful use of narcotics in Lassen County. West's Ann.Health & Safety Code, § 11721.

3. Criminal Law ⚷1144(14)

Where trial court's instructions to the jury were not included in the record on an appeal from a conviction, District Court of Appeal must assume jury was properly instructed.

4. Criminal Law ⚷1170(1)

Where evidence was sufficient to sustain a finding that defendant was addicted to the illegal use of narcotics at the time of his arrest, as charged, fact that six months thereafter defendant might not have been so addicted was immaterial and defendant was not prejudiced by the exclusion of evidence which might have so shown. West's Ann.Health & Safety Code, § 11721.

◆

Harold L. Abbott, Susanville, for appellant.

Edmund G. Brown, Atty. Gen., by Gail A. Strader, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from the judgment entered upon the jury's verdict which found appellant guilty of being addicted to the unlawful use of narcotics in Lassen County, in violation of Section 11721 of the Health and Safety Code, and from the order denying a motion for a new trial.

[1] Appellant travels as a booking agent for circuses. His wife frequently accompanies him. They testified that on November 19, 1955 they were driving from Redding to Las Vegas when appellant was stricken with severe pain which he attributed to a kidney ailment from which he had suffered for several years. Therefore, they stopped near Chester in Plumas County in order that appellant might relieve himself. He took a small amount of dolophine and induced urination by use of a hypodermic syringe which he carried for that purpose. Then appellant and his wife resumed their journey. However, appellant's pain persisted, so his wife prevailed upon him to stop in Susanville. He there consulted Dr. Priest to whom he complained of pain and passing blood upon urination. Appellant stated he needed depropanex and dolophine which had been prescribed by physicians

who had treated him in the past. Dr. Priest testified that generally those drugs are not given for such a condition nor for self-administration and, further, that from his examination and observation of appellant, he concluded that appellant did not have a polyp nor any bladder or kidney obstruction but was feigning such ailment in order to obtain narcotics to which he was addicted. Therefore, he did not give appellant a prescription for dolophine, but told him to go to the drugstore and that he would telephone ahead. The police were advised and awaited appellant's arrival at the drugstore. When appellant appeared he was placed under arrest. At that time he had upon his person an eye dropper, a hypodermic, syringe, two needles, and a box marked "dolophine hydrochloride" which contained an empty bottle bearing a label which indicated that it had been filled in Idaho on August 28, 1955 upon a doctor's prescription. Appellant admitted to the Chief of Police that he had been a drug addict in the past, but denied having taken any narcotics in the five years immediately preceding his arrest except those prescribed for him for medicinal purposes. Appellant was held in custody for eight days before being released on bail. During that time he was examined by Dr. Priest and Dr. Henriques, each of whom testified that appellant was very nervous and was perspiring and that some of the many puncture wounds on his arms appeared to be fresh. The two doctors testified that they believed that appellant was in some stage of withdrawal from narcotics although he never manifested such acute symptoms as yawning, running eyes, excess saliva, vomiting, or diarrhea. However, an explanation for the absence of acute symptoms may be found in the fact that, upon Dr. Henriques' orders, appellant was given thorazine which is a sedative which tends to reduce or eliminate withdrawal symptoms. Both Dr. Henriques and Dr. Priest testified that they believed appellant to be a drug addict because of his general appearance, nervousness, numerous puncture wounds, and the fact that their examinations failed to reveal the kidney ailment from which appellant claimed to be suffering. Such reasons furnished a sufficient basis for the doctors' opinions. Appellant's contention to the contrary cannot be sustained.

[2–4] Likewise unsupportable is appellant's contention that the venue of the charged offense was not established. It may be conceded that there was no evidence that appellant had used any narcotics in Lassen County where he was tried and convicted. People v. Garcia, 122 Cal.App.2d Supp. 962, 964, 266 P.2d 233. However, venue in that county was established by the doctors' testimony as to his addiction therein. We are not here confronted with the situation presented in People v. Thompson, 144 Cal.App.2d Supp. 854, 301 P.2d 313, where, under the instructions given, the jury could have convicted the defendant upon a finding that he illegally used narcotics not within, but without, the county. The instructions in the instant case have not been included in the record on appeal. We must assume that the jury was properly instructed and that they found that appellant committed the charged offense in Lassen County. The evidence was sufficient to sustain a finding that appellant was addicted to the illegal use of narcotics at the time of his arrest. The fact that six months thereafter he may not have been so addicted is immaterial. Therefore, appellant was not prejudiced by the exclusion of evidence which might have so shown.

We have considered appellant's assignments of prejudicial misconduct upon the part of the district attorney and found them to be untenable. We think they do not require detailed discussion.

The judgment and the order are affirmed.

SCHOTTKY and PEEK, JJ., concur.

147 Cal.App.2d 314

Agnes SMITH, Plaintiff and Respondent,
v.
David KILE and Mrs. David Kile, Defendants and Appellants.
Civ. 21636.

District Court of Appeal, Second District, Division 3, California.
Dec. 28, 1956.

Action against landlords for death of tenant as alleged result of asphyxiation caused by unvented gas heater. The Superior Court of Los Angeles County, Joe Raycraft, J., rendered judgment for plaintiff, and defendants appealed. The District Court of Appeal, Parker Wood, J., held that instruction, that violation of ordinance making it unlawful to install, sell or use any open-flame heating appliance constituted negligence per se, applied to both landlord and tenant, and held that it had not been error to refuse requested instruction limiting application of ordinance to tenant, whose death by asphyxiation was basis for action against landlord.

Affirmed.

1. Trial 🔑219

In action for wrongful death allegedly caused by an unvented gas heater, it was not error to give instruction with regard to ordinance making installation or use of open-flame heating appliance unlawful and to incorporate therein dictionary definition of word "use", notwithstanding defendants' contention that words contained in ordinance required no judicial interpretation.

2. Appeal and Error 🔑882(12)

A party cannot complain of instruction given at his own request or of an error in an instruction given at instance of his adversary, when he requests a substantially similar one.

3. Landlord and Tenant 🔑169(10)

Instruction, that violation of ordinance making it unlawful to install, sell or use any open-flame heating appliance constituted negligence per se, applied to both landlord and tenant, and it was not error to refuse requested instruction limiting application of ordinance to tenant, whose death by asphyxiation was basis for action against landlord.

4. Trial 🔑295(7)

In action against landlords for death of tenant as alleged result of asphyxiation caused by unvented gas heater, instructions, considered as a whole, properly presented issue of assumption of risk.

King & Mussell and John Lewis King, San Bernardino, for appellants.

Ball, Hunt & Hart and Clarence S. Hunt, Long Beach, for respondent.

PARKER WOOD, Justice.

Action for damages for wrongful death caused by an unvented gas heater. Plaintiff is decedent's mother. Defendants are the owners of the building in Lynwood where the death occurred. Judgment upon a verdict was for plaintiff. Defendants appeal from the judgment.

Appellants contend that the court erred in instructing the jury.

About January 1, 1954, defendants rented a room to Robert Lee Smith, 19 years of age. An open flame gas heater, which was in the room, had a cracked mantle, was unvented, and was attached to a gas outlet by a flexible rubber hose. Defendants had obtained and installed the heater in December, 1953. They did not obtain a permit from the City of Lynwood to install the heater, and did not request an inspection of the installation. On Friday, April 2, 1954, Mr. Smith left his room about 6 o'clock in the evening, and returned sometime after 2:30 o'clock Saturday morning. It was a cold morning. About 3:30 o'clock Saturday afternoon two friends of Smith went to the door of his room. There was no response to a knock on the door. The door and the windows of the room were locked. One of the friends broke a window, reached inside and unlocked the door, and entered the room. Mr. Smith was lying on his bed and was fully clothed. There was no flame in the heater. The gas was turned on, the room was hot and filled with gas. A doctor, who arrived shortly thereafter, determined that Mr. Smith was dead. The cause of death was carbon monoxide poisoning due to burning illuminating gas.

There was conflicting evidence as to whether or not the heater was located in its usual place in the room at the time the body was found.

Mr. Chaney, called as a witness by plaintiff, testified that he was a chemical engineer; he had examined the heater; it had a carbon monoxide output in excess of 1 per cent; the standard for a heater of that type was .02 per cent; the heater when operated at full capacity in a room such as the one involved here would produce enough carbon monoxide gas to be invariably fatal in less than an hour; if one window were open in the room, the heater would produce enough carbon monoxide gas to be dangerous to human life; the heater had a vent opening which could be connected to a chimney or vent; if the vent opening had been connected to a pipe leading to the open air, approximately 75 per cent of the gas would have been carried off.

Section 9 of Ordinance No. 560 of the City of Lynwood was introduced in evidence. That section provides, in part, as follows: "It shall be unlawful to install, sell or use any open flame heating appliance in the City of Lynwood, * * *"

[1] Appellants contend that the court erred in giving the following instruction: "You are instructed that with reference to Section 9 of Ordinance No. 560 of the City of Lynwood, wherein it is declared that 'it shall be unlawful to install, sell or use any open flame heating appliance in the City of Lynwood', 'install' means to set up or place in a position for use or service, and 'use' means that enjoyment of property which consists in its employment, occupation, exercise or practice."

Appellants argue that the words "install" and "use" as contained in the ordinance required no judicial interpretation; that the interpretation of those words in the instruction was confusing, unintelligible, and prejudicial to appellants; that the definition of the word "use," in the instruction, was not correct; that the instruction had the effect of limiting or applying the provisions of the ordinance to appellants only. It seems to be their argument that according to the definitions in the instruction the appellants (owners) were the installers and users of the heater, and that the renter was not a user. The definition of the word "use," in the instruction, is a definition stated in Webster's International Dictionary, 1951 Edition. It was not error to give the instruction.

[2] Appellants contend that the court erred in giving the following instruction: "Conduct which is in violation of Section 9 Ordinance No. 560 of the City of Lynwood or sections 16900 or 16905 Health & Safety Code just read to you constitutes negligence per se. This means that if the evidence supports a finding, and you do find, that a person did so conduct himself, it requires a presumption that he [or] [she] was negligent. However, such presumption is not conclusive. It may be overcome by other evidence showing that under all the circumstances surrounding the event, the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him without moral fault, to do otherwise." This instruction will be referred to hereinafter as Instruction No. 2. The record shows that this instruction was given at the request of appellants and respondent. "A party cannot complain of an instruction given at his own request, or of an error in an instruction given at the instance of his adversary, when he requests a substantially similar

one." Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772, 774.

[3] Appellants contend that the court erred in refusing to give the following instruction: "If you should find from the evidence that plaintiff's decedent violated Section 9 of Ordinance No. 560, of the City of Lynwood, just read to you, a presumption arises that he was guilty of contributory negligence. This presumption is not a conclusive one. It may be overcome by other evidence showing that under all the circumstances surrounding the event the conduct in question was excusable, justifiable and such as might reasonably have been expected from a person of ordinary prudence. In this connection, you may assume that a person of ordinary prudence will reasonably endeavor to obey the law and will do so unless causes, not of his own intended making, induce him, without moral fault, to do otherwise. To prove that a violation of a statute (ordinance), such as that charged in this case, was excusable and justifiable, so as to overcome the presumption of negligence, the evidence must support a finding that the violation resulted from causes or things beyond the control of the person charged with the violation."

Appellants argue that section 9 of the ordinance referred to in that instruction attempts to "outlaw" the type of heater, described in the ordinance, in such a manner that such a heater cannot be sold or installed or used by anyone; that the doing of any of those acts constitutes a violation of law; that under the common understanding of the word "use," decedent used the heater. The record shows that respondent requested a similar instruction in regard to a violation of the ordinance by appellants. Appellants' requested instruction (just quoted) would have limited the application of the provisions of the ordinance to decedent. Respondent's requested (similar) instruction would have limited the application of the ordinance to appellants. The court properly refused to give either instruction, but did give said Instruction No. 2, quoted above, which was requested by appellants and respondent and which was applicable to appellants and decedent.

[4] Appellants contend that the court erred in giving an instruction, requested by respondent, wherein the court stated the issues that were to be determined. The instruction commenced with the words, "The issues to be determined by you in this case are these:" The issues stated therein pertained to negligence, proximate cause, contributory negligence and amount of damages. Appellants argue that the instruction was erroneous for the reason it did not include assumption of risk as an issue. In a separate instruction, requested by appellants, the jury was properly instructed as to assumption of risk. Also, at the request of appellants, the court gave a proper instruction as to the distinction between assumption of risk and contributory negligence. Furthermore, at the beginning of the trial, the court stated, in effect, that assumption of risk was an issue. The court further instructed the jury that it was not to single out any certain sentence or instruction, and ignore the others, but was to consider all the instructions as a whole, and to regard each in the light of all others. The instructions, when considered together, stated the issues. It is not reasonable to conclude that the jury believed that assumption of risk was not an issue.

The judgment is affirmed. The purported appeal from the order denying the motion for a new trial is dismissed.

SHINN, P. J., and VALLÉE, J., concur.

In the Matter of the Estate of Merland Jose WOLFE, etc., deceased.

Leanore L. WOLFE, Petitioner and Appellant,
v.
Troi C. WOLFE, Contestant and Respondent.*

Civ. 21816.

District Court of Appeal, Second District, Division 3, California.

Dec. 27, 1956.

Hearing Granted Feb. 19, 1957.

Proceeding to determine heirship. From a decree of the Superior Court of Los Angeles County, Newcomb Condee, J., decedent's sister appealed. The District Court of Appeal, Shinn, P. J., held that evidence supported finding that will reciting that testator intended to dispose of all property over which he had power of testamentary disposition, indicated, under circumstances, that testator intended to dispose of all property and not only his undivided one-half interest in community property, and widow would be required to elect to take either under the will or at law.

Reversed.

1. Husband and Wife 🔑279(3)

A reconciliation and resumption of marital relations does not, as a matter of law, effect a rescission of property settlement agreement.

2. Husband and Wife 🔑279(3)

Whether a property settlement agreement continues in force after the reconciliation and resumption of marital relations is a question of fact and depends upon the mutual intentions and understandings of the parties.

3. Husband and Wife 🔑279(3)

Although reconciliation itself is material evidence of spouses' intention to abandon property settlement agreement after reconciliation and resumption of marital relations, it is not conclusive.

4. Husband and Wife 🔑279(3)

In estate proceeding to determine heirship, evidence supported finding that property settlement agreement, executed by parties at time they were contemplating divorce, which was later dismissed after parties became reconciled and resumed marital relations, was abandoned by the parties.

5. Wills 🔑782(3)

A testator is presumed to know that his power of testamentary disposition extends only to his undivided one half interest in community property, but where it is manifest from the language of the will that he intended to dispose of his entire estate, including the wife's community interest, the wife will be put to an election to take either under the will, or under the law, if her assertion of both claims would be inconsistent with his plainly expressed testamentary scheme.

6. Wills 🔑789

In estate proceeding to determine heirship, evidence supported finding that will reciting that testator intended to dispose of all his property over which he had power of testamentary disposition, indicated, under circumstances, that testator intended to dispose of his entire estate including his wife's community interest, and she would be required to elect to take either under the will or at law.

Church, Howard & Stevens, Los Angeles, for appellant.

Paul R. Hutchinson, Los Angeles, for respondent.

SHINN, Presiding Justice.

Merland J. Wolfe died testate on November 24, 1952 and his will was admitted to probate. This is an appeal from a decree determining heirship in the matter of his estate. Appellant Leanore L. Wolfe is the sister of decedent; respondent Troi C. Wolfe is his widow.

Appellant filed a petition for determination of heirship by which she sought a declaration that all the property in the estate of decedent was his separate property, or, in the alternative, that if there were any community property, that decedent's will put respondent to an election to take under the will or to assert her community rights. She alleged that Mr. and Mrs. Wolfe entered into a property settlement agreement in March 1940 whereby the community property of the parties was converted into separate property and that the agreement was still in full force and effect at the time of decedent's death. Respondent filed a statement of interest in which she admitted the execution of the agreement but alleged that it was never given effect and was wholly disregarded and abandoned by mutual consent. She further alleged that all the property inventoried in decedent's estate was purchased with community funds.

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* Opinion vacated 311 P.2d 476.

Trial was to the court. The court made findings and decreed that all the property in which decedent had an interest at the time of his death was community property, that respondent was not put to an election by reason of decedent's will and that distribution should be made to respondent of her community interest and to both parties the interests that remained, in accordance with the will. We are of the opinion that the court did not err in determining that the property in decedent's estate was community property, but we are persuaded that its determination that respondent was not put to an election was erroneous.

The will was executed on October 10, 1951. Its pertinent provisions are as follows: "*Third*: All property in which at this date I have an interest is my separate property, pursuant to the provisions of a certain property settlement agreement heretofore entered into between my said wife and me. It is my intention to dispose of all property over which I have the power of testamentary disposition."

Paragraph Fourth contains specific bequests of "* * * my Cadillac automobile, jewelry, silver, books, pictures, paintings, works of art, household furniture and furnishings, clothing, and other personal effects * * *" to respondent.

"*Fifth:* I give and bequeath the sum of Two Thousand Dollars ($2,000.00) to Angel Corona, in appreciation of his long and faithful service in my employ. It is my desire that my Executor and/or Trustee employ said Angel Corona to manage my ranch property in Northridge, California, so long as it shall remain and be a part of my probate estate or the trust estate hereinafter described."

By paragraph Sixth, decedent gave, devised and bequeathed "* * * all the residue of my estate, real and personal, wherever situated, including all failed and lapsed gifts * * *" to the Bank of America in trust for the benefit of Leanore L. Wolfe and Troi C. Wolfe, or the survivor of them, said trust to terminate at the death of the survivor and the remainder of the trust estate to be distributed for certain charitable purposes. Under the provisions of the trust, the trustee is to distribute one-half of the net income to Leanore L. Wolfe and one-half to Troi C. Wolfe in convenient installments, the whole of the net income to be distributed to the survivor of them during her life. In the event the net income payable to respondent is less than $3,600 in any one year, the trustee is empowered to make up the difference from the principal of the trust estate. There is an identical provision as to appellant. The trustee is further empowered to invade the principal if the income is insufficient, in its discretion, to provide for the reasonable support, care and comfort of the two beneficiaries.

"*Seventh:* During such time as my ranch property in Northridge, California, shall remain and be a part of my probate estate or the trust estate, I direct that my wife, Troi C. Wolfe, shall, during her life, have the right to the use and occupancy of the residence located on said ranch property * * *" and the necessary surrounding area as determined by the trustee.

"*Ninth:* Any gift, devise, or bequest to my wife, Troi C. Wolfe, pursuant to the provisions of this Will, other than as set forth in Article Fourth hereof, shall be considered to be a gift, devise, or bequest to my said wife so long as she shall remain unmarried, and in the event she shall remarry, the provisions of this Will, other than as set forth in Article Fourth hereof, shall thereafter be carried out as though my wife had not survived the date of such remarriage. * * *"

Decedent's estate was inventoried at $118,384. Of this amount, $95,000 was represented by real property in Northridge, California, referred to in decedent's will as "my ranch property."

There was evidence of the following facts. Mr. and Mrs. Wolfe were married in June 1935. It was the second marriage for both parties and apparently was an unhappy one, for respondent filed an action for divorce against decedent in October 1937. This action never came to trial but was not dismissed until after respondent filed a second action for divorce against decedent on March 8, 1940. Mrs. Wolfe was awarded an interlocutory decree on April 30, 1940 and left for New York on a trip. She testified that she returned three weeks later and that she and decedent agreed to a reconciliation; that she lived with her husband throughout the seventeen years of their marriage with the exception of the three weeks she spent in New York. No final decree was entered in the second divorce action and the same was dismissed in 1943.

Respondent testified that at the time of the marriage, decedent was engaged in operating a service station in Los Angeles. He did not own the station and had no lease. He had some equipment which he sold for a few hundred dollars. She sold some property which she had acquired prior to the marriage and loaned some of the proceeds to decedent, which he used in establishing a garage business. The loan was never repaid in full. One garage was operated by decedent until 1939 or 1940 and a corporation was formed in 1936 to conduct the operation of another garage. During the existence of the corporation (it was dissolved in 1942) stock was held from time to time by decedent, respondent, and respondent's son by her former marriage.

On March 11, 1940, during the pendency of the second divorce action, Mr. and Mrs. Wolfe executed a property settlement agreement which purported to adjust their respective property rights and to divide the community property. It contained the usual releases of after acquired property and it transferred to respondent certain furniture and furnishings as her separate property. Decedent also waived all his right, title and interest to four shares of stock in the corporation, which were then in the name of respondent. A second agreement was executed on May 1, 1940, whereby respondent agreed to sell her stock to decedent for $3,500 to be paid in installments. This agreement antedated the reconciliation and respondent testified that decedent did not pay any of the installments. The corporation was dissolved in 1942, by which time the stock had been transferred to decedent. The assets of the corporation were distributed to him. Thereafter decedent operated the garage business as sole proprietor until his death. Respondent assisted him without compensation until about 1948, doing bookkeeping, making collections and answering the telephone. She testified that the property settlement agreement was never discussed with her husband after the reconciliation.

Real property was purchased in 1941 and title was taken in the name of "Merland J. Wolfe, a married man." Respondent testified that it was purchased out of the earnings of the garage business. This property was sold in 1944 and decedent took back a trust deed as his separate property. The proceeds of the sale were used in the purchase of the real property in Northridge which is the main asset in the estate. Title to this property was taken in the name of "M. J. Wolfe, a married man." A trust deed on this property was executed by decedent and respondent and payments on the purchase price and the taxes were made out of the earnings of the garage business. The spouses lived on the ranch property from 1950 until decedent's death.

In 1951, three months before the execution of the will, decedent brought an action for declaratory relief against respondent in which he alleged that the Northridge real property was his separate property. Respondent contested the action. She testified that it was dismissed in 1952 by mutual consent.

The first assignment of error to be considered is that the court erred in determining that the estate of decedent was the community property of decedent and respondent. In this connection appellant relies heavily upon the execution of the property settlement agreement of March 1940 which purported to divide the community property. Respondent contends that the agreement was terminated by consent, evidenced by the reconciliation and resumption of marital relations between the spouses, whereas appellant argues that the agreement was not abandoned, but remained in full force and effect until decedent's death. We believe appellant's position to be untenable.

Whether the spouses intended to abandon the agreement and treated it as a nullity was a question of fact and the subject of reasonable inferences to be drawn from the evidence. The question of intention was one for which the answer was to be found in the agreement, construed in the light of the situation of the parties and the surrounding circumstances from which inferences could be drawn. The following were material facts to be considered. The agreement was executed during the pendency of the divorce action. It recited that the spouses had already separated, but respondent testified that this was not so and that they were not living in separate abodes. Although it contained the usual disclaimer that it was not an agreement for a divorce, it was reasonable to assume that the parties intended to adjust their property relations so as to remove the property question from the divorce proceedings. It was a reasonable inference that the intention of the parties to sever the marital relation was the primary, if not the sole reason for the agreement. Respondent testified that there was a reconciliation soon after she obtained her interlocutory decree and it was undisputed that she lived with decedent until his death twelve years later. Although Mr. Wolfe had agreed to pay respondent $3,500 for her stock in the corporation he paid no part of it and there was no evidence that Mrs. Wolfe ever demanded payment. And although he was to obtain the stock only upon payment of the agreed sum it was in his name at the time of the dissolution of the corporation. Respondent contributed valuable services to the garage business without compensation. Two parcels of real property were purchased after the reconciliation and title was taken in the name of decedent as a married man. Other circumstances were that when one of these parcels was sold in 1943 the trust deed was made payable to decedent as his separate property; also commencement of the declaratory relief action. There was no direct evidence as to the source of the funds that went into liquidation of the purchase money trust deed on the ranch property. While the evidence as to the cost of the property is not too clear, it appears that the price was $10,240 of which only $2,560 was paid down. The trust deed payments were evidently made from the earnings of the garage business.

[1–3] A reconciliation and the resumption of marital relations do not, as a matter of law, effect a rescission of a property settlement agreement, Crossley v. Crossley, 97 Cal.App.2d 627, 218 P.2d 132, although it has been held that they may be sufficient to cancel the executory provisions of the agreement. Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal.App.2d 416, 95 P.2d 966; Lloyd Corp., Ltd. v. Industrial Acc. Comm., 61 Cal.App.2d 275, 142 P.2d 754; Harrold v. Harrold, 100 Cal.App.2d 601, 224 P.2d 66. Whether the agreement continues in force after the reconciliation and resumption of marital relations is a question of fact and depends upon the mutual intentions and understanding of the spouses. Morgan v. Morgan, 106 Cal.App.2d 189, 234 P.2d 782; Margolis v. Margolis, 115 Cal.App.2d 131, 251 P.2d 396. Although the reconciliation itself is material evidence of their intention, it is not conclusive. DeVault v. DeVault, 90 Cal.App.2d 15, 202 P.2d 375. Where rescission or abandonment of a property settlement agreement is asserted there can be no formula for ascertaining the intentions of the parties from their conduct. No two cases are alike. All the circumstances must be weighed before it can be known whether they preponderate for or against abandonment of rights under the agreement.

[4] Mr. and Mrs. Wolfe did not agree to release each other from the agreement. They did not even discuss it. Since they did not orally express their intentions it was necessary to determine from their conduct whether they considered themselves bound by their agreement or released from it. The circumstances indicated the latter. We shall not reiterate them. Prominent among them is the fact that under the agreement Mrs. Wolfe was to own the stock which represented ownership of the garage business; Mr. Wolfe was to buy it from her for $3,500. He acquired the stock without paying anything for it and when the corporation was liquidated he, and not Mrs. Wolfe, was distributee of the assets. The ranch property was paid for out of the earnings of the business which, having come from the joint efforts of the parties, would properly be considered as community property. This, without mention of the other circumstances, was sufficient to justify an inference that the agreement and all rights thereunder were abandoned and waived. The evidence supports the finding of the community character of the property.

The remaining question is whether the court committed error in adjudging that respondent was not put to an election under the will. We have concluded that the court did commit error.

[5] A testator is presumed to know that his power of testamentary disposition extends only to his undivided half interest in the community property. But where it is manifest from the language of the will that he intended to dispose of his entire estate, including his wife's community interest, she will be put to an election to take either under the will, or under the law, if her assertion of both claims would be inconsistent with his plainly expressed testamentary scheme. In re Estate of Moore, 62 Cal.App. 265, 216 P. 981; In re Estate of Emerson, 82 Cal.App.2d 510, 189 P.2d 734; In re Estate of Vogt, 154 Cal. 508, 98 P. 265.

[6] From a reading of the will and a consideration of the surrounding circumstances we are convinced that the testator intended to dispose of the entire property in disregard of respondent's community interest therein.

Respondent relies heavily on decedent's declaration that he intended to dispose only of the property over which he had the power of testamentary disposition. She argues that since the court found the estate to be community property, decedent must be deemed to have intended only to will his undivided half interest. The argument is unconvincing. Of far greater weight than the recital stressed by respondent is the statement in the will that all property in which decedent had an interest was his separate property. It was not an unfounded statement, even if erroneous, since it was doubtless based upon a belief that the property settlement was still operative. We think it is clear that decedent believed the entire estate to be his separate property and that he had absolute testamentary power over it. That was the crucial fact which was indicative of his intention. Even where a testator is mistaken as to the character of his property and erroneously believes it to be his separate property, the controlling factor is his intention to will the entire estate and not the soundness of the belief upon which his intention is based. In re Estate of Moore, supra, 62 Cal.App. 265, 216 P. 981.

Respondent's assertion of her right to half of the community property, to the specific bequests under the will, and to participate in the trust, would defeat the main purpose of the will, which was to establish a testamentary trust for the benefit of respondent and decedent's sister, with gifts over to charity after the death of the survivor. The estate was inventoried at $118,000. Respondent and appellant are each to receive $3,600 annual income from the trust estate. Were respondent's community interest of approximately $59,000 excluded from the trust estate, the remaining $59,000 would have to produce $7,200 in annual income, a return of better than 12%. This computation does not take into account any diminution of the estate due to the payment of the specific bequests, taxes, commissions and attorneys' fees. We would judge from the description of the property we find in the record that the so-called ranch property consisted of about 20 acres in the San Fernando Valley. There was a house on it and it was the home of the parties. It is obvious that its value increased greatly between the time of its purchase and the death of Mr. Wolfe. The trustee was not authorized to sell the entire property; Mrs. Wolfe had the right to remain in the home. There was no evidence as to the income from any ranching operations nor of expected income from any source that would enable the trustee to meet the directions of the will without a sale of the trust assets. It seems certain that at the time he executed the will Mr. Wolfe intended that the entire residue of his estate would go into the trust. The circumstances indicate that he believed he had a right to dispose of the entire property and that he did not contemplate that his surviving wife would take half of it under the law as community property; his will so declared and it contained numerous references to the home property as "my ranch." It is clear to us that Mr. Wolfe would not have executed the will in question if he had believed that his wife had a community interest in the property. But his belief and intentions at the time it was executed are controlling. It follows from the views we have expressed that the judgment should be reversed and a new judgment entered which will require Mrs. Wolfe to make an election in accordance with the foregoing opinion.

The judgment is reversed.

PARKER WOOD and VALLÉE, JJ., concur.

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